



DISCUSSING THE LEGAL BASIS FOR ENTRY INTO FORCE OF A TRADE FACILITATION AGREEMENT

SYNOPSIS

A Trade Facilitation Agreement (TFA) has been proposed as an outcome from the Bali WTO Ministerial Conference. The TFA's provisions create new rights and obligations for WTO Members; they alter the rights and obligations that WTO Members currently have under the WTO Agreement and its annexes. Accordingly, the TFA should be incorporated into WTO law by listing it as one of the covered agreements under Annex 1A of the WTO Agreement.

Consequently, the following note argues that:

- The TFA will only enter into force upon the fulfillment of requirements under Article X of the WTO Agreement (i.e. the article addressing amendments).
- The Ministerial Conference cannot take a decision that overrides the requirements of Article X of the WTO Agreement.
- Members can also argue for pegging the entry into force of the WTO to the conclusion of the Doha Mandate Single Undertaking, basing that on the current content of paragraph 47 of the Doha Declaration.

Anything outside this framework carries a significant threat to the rules-based nature of the WTO, undermines the Marrakesh agreement, sets a problematic precedent, and calls into question the legitimacy of the outcome.

November 2013
Geneva, Switzerland

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I. HOW WOULD A TFA BE BROUGHT UNDER THE BODY OF WTO LAW?

1. Giving legal effect to the Trade Facilitation Agreement (TFA) will establish a precedent for bringing in new agreements under the umbrella of WTO law and the coverage of the Dispute Settlement Understanding (DSU). Accordingly, Members are advised to closely consider the legal basis based on which the TFA will be added to the WTO, and guard against mal-interpretation of the procedural requirements established under the WTO Agreement.
2. **The TFA's provisions in Sections I and II thereof create new rights and obligations for WTO Members. As such, they alter the rights and obligations that WTO Members currently have under the WTO Agreement and its annexes.**
3. **It is, therefore, in both legal nature and effect, a new WTO agreement of a nature that alters the rights and obligations of the Members. As such, it has to be considered as an amendment to the WTO Agreement and, therefore, its entry into force must be in accordance with Article X of the WTO Agreement (the provision which governs amendments to the WTO Agreement and its annexes).**
4. Given that the TFA pertains to trade in goods, as it substantively affects and alters Members' rights and obligations in relation to GATT 1994's provisions (particularly Article V, VIII, and X of GATT 1994), the TFA should be incorporated into WTO law by listing it as one of the covered agreements under Annex 1A of the WTO Agreement. In order to amend the listing in Annex 1A of the WTO Agreement, Article X.3 of the WTO Agreement will have to be complied with.
5. Accordingly, the TFA cannot enter into force and become a covered agreement under WTO law except only if the requirements of Article X.3 of the WTO Agreement have been fulfilled.
6. Listing the TFA in Annex 1A of the WTO Agreement through an amendment to Annex 1A would then automatically bring the TFA into the ambit of the DSU. The DSU applies to agreements that are included in Appendix 1 to the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (See Article 1 of the DSU on Coverage and Scope¹). This would be the case with a TFA after the Annex 1 A of the WTO agreement is amended and the TFA is added to the Annex.
7. **Members are also advised to peg the entry into force of the TFA to the conclusion of the Doha Round Single Undertaking mandate.** This would be in accordance with paragraph 47 of the Doha Declaration, which establishes that "*the conduct, conclusion*

¹ Article 1 of the DSU provides that: "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement".



and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking" (Full text of para. 47 provided in the Annex). This should be the case given the need to counterbalance an extremely weak solution in Food Security resulting from the Bali Ministerial Conference, and ensure negotiation leverage on the way forward post-Bali. Such a position would give developing countries the assurance that they have something to bargain with when they are negotiating a permanent solution in Food Security, and that the other development issues are fully dealt with in the Doha Round.

8. **Anything outside this framework carries a significant threat to the rules-based nature of the WTO, undermines the WTO Agreement, and would call into question the legitimacy of the outcome. This is why Members are advised to collectively guard against setting a precedent based on unlawful approach to WTO law.**

Accordingly, the articles that establish the clear legal basis for the entry into force of the TFA are:

- Article X of the WTO Agreement on 'Amendments'
- Para. 47 of the Doha Ministerial Declaration (*Please see more comments on Para. 47 in the following sections*)

→ Based on these provisions, a TF Agreement should only enter into force at the conclusion of the Doha Round Single Undertaking and subject to Article X of the WTO Agreement.

The following language can be added to the TF Agreement (Section I):

'Article __: Acceptance, Entry into Force and Deposit

1. **This Agreement shall be open for acceptance by ratification by Members of the WTO.**
2. **Subject to Article X, paragraph 3, of the Agreement to Establish the World Trade Organization and after the conclusion of the single undertaking in the Doha Work Programme, this Agreement shall take effect for Members that have accepted it upon acceptance of two thirds of the Members and thereafter for each other Member upon acceptance by it.**
3. **The Agreement shall, upon its entry into force, be deposited with the Director General of the WTO.'**



II. REQUIREMENTS AND PROCEDURES STIPULATED UNDER ARTICLE X OF THE WTO AGREEMENT

9. Article X of the WTO Agreement provides two core steps of relevance to the process of entry into force of a TFA:
10. **FIRST STEP: Article X.1** establishes that: *“Any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1 the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus. Unless the provisions of paragraphs 2, 5 or 6 apply, that decision shall specify whether the provisions of paragraphs 3 or 4 shall apply. If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. If consensus is not reached at a meeting of the Ministerial Conference within the established period, the Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority of the Members that the provisions of paragraph 4 shall apply”* (emphasis added).
11. **According to Article X.1**, ‘any Member of the WTO may initiate a proposal to amend the provisions of this Agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference’. Accordingly, any WTO Member can table at the Ministerial Conference in Bali a proposal on amending Annex 1 to give legal effect to the TFA under WTO law.
12. Upon such a step, Members will have two possibilities available for them:
 1. Agree by consensus at the Ministerial Conference, or at the General Council (within 90 days after the proposal has been tabled formally at the Ministerial Conference) to submit the TFA for acceptance by Members through a protocol.
 2. If Members do not reach consensus, Members can decide based on a two-third majority – at a Ministerial or General Council meeting- to submit the TFA for acceptance.
13. **SECOND STEP: Article X.3** establishes that: *“Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it. The Ministerial Conference may decide by a three-fourths majority of the*



Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference” (emphasis added).

14. Accordingly, a potential TF agreement will take effect only after two-third of the WTO membership has accepted it (i.e. 106 out of the 159 members of the WTO have ratified it). Even then, it will only be effective for Members that accepted it. The members that accept the agreement will also accept applying the ‘most-favored nation’ rules to their commitments, thus extending accepted preferential treatment to WTO Members that have not accepted the agreement².
15. It is important to consider the implications of the second part of Article X.3 referred to above, stipulating that “*The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference*”. Such stipulation could allow, after the agreement have passed the two-third majority acceptance, for three-fourth majority of members to set a date by which all the rest of the WTO members shall accept the agreement or else case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.

PROPOSED TEXT FOR A PROTOCOL ON SUBMITTING THE TFA FOR ACCEPTANCE

Members of the World Trade Organization;

Referring to the proposed Agreement on Trade Facilitation annexed to this protocol;

Having regard to the proposal submitted to the Ministerial Conference in Bali in document XXXX;

Hereby agree as follows:

1. Annex 1A to the WTO Agreement shall be amended by the introduction of the Agreement on Trade Facilitation, as annexed to this Protocol, into the list of agreements thereunder.
2. The amendment to Annex 1A of the WTO Agreement and the Agreement on Trade Facilitation shall be submitted for acceptance and ratification by WTO Members at the same time, and shall enter into force after the conclusion of the Single Undertaking in the Doha Work Programme, in accordance with Article X.3 of the WTO Agreement.

² See ACWL paper (2006) “Giving Legal Effect to the Results of the Doha Development Round: An Analysis of the Methods of Changing WTO Law”.



III. THE IMPLICATIONS OF PARAGRAPH 47 OF THE DOHA DECLARATION

16. Paragraph 47 of the Doha Declaration establishes that:

“With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and *entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking*. However, agreements reached at an early stage *may* be implemented on *a provisional or a definitive basis*. Early agreements shall be taken into account in assessing the overall balance of the negotiations” (emphasis added).

17. It is clear from para. 47 that entry into force of a TFA shall be treated as part of the single undertaking. Thus, it cannot be detached from the conclusion of the Doha mandate. Only upon the conclusion of the single undertaking, and fulfillment of procedures under Article X of the Marrakesh Agreement, would the TFA come into force and become a binding agreement on WTO members.

18. **Accordingly, until the TF Agreement enters into force, there is no need in fact for Members to provisionally apply it. This is in line with the concept of the ‘single undertaking’ of para 47. In case Members want to give a concession and provisionally apply it (as allowed for under para. 47), then Members should explicitly stipulate that the DSU shall not apply, nor be invoked in any way, to the TF agreement applied on a provisional basis.**

To have a TF Agreement that is applied provisionally in accordance with Para. 47, the following can be added to the TF text.

“This Agreement will be provisionally applied until the conclusion of the Doha Round based on paragraph 47 of the Doha Ministerial Declaration. No proceedings under the DSU in relation to the provisions of the Agreement shall be initiated by any Member. (Alternative formulation: The provisions of the WTO DSU shall not apply, nor invoked in any way, to the TF agreement applied on a provisional basis)”.

Comments on para. 47:

19. Para. 47, of the Doha Declaration provides grounds for considering implementation on a provisional or definitive basis.
20. Yet the language used is not clear, and para. 47 have not been previously used as a legal basis for implementing a WTO agreement. For example, there is no clarity whether provisional application of the agreement would apply to all Members or it would be on a voluntary basis.
21. This is why it is important that Members explicitly articulate their interpretation and understanding of using para. 47 to implement an agreement on a provisional or definitive basis.



22. This should include a clear point that the DSU shall not apply during provisional application of the agreement. In fact, any application of the agreement before the conclusion of the single undertaking and the fulfillment of the requirements under Article X of the Marrakesh Agreement cannot be binding.
23. It is worth noting that Members could take a decision at the Ministerial Conference to amend para. 47 of the Doha Declaration. Accordingly, some Members may try to amend the linkage that the first sentence of para. 47 establishes between entry into force of a possible TFA and the conclusion of the Single Undertaking. However, any change to be introduced to para. 47 cannot override the obligations Members have in respect to Article X of the WTO Agreement, which provides the main legal basis for entry into force of a TFA.

IMPLICATIONS OF THE ARTICLE ON 'DISPUTE SETTLEMENT' UNDER THE TFA

The following article is proposed under the TFA (draft negotiating text of November 25, 2013- JOB/TNC/35)

"Article - Dispute Settlement

The provisions of Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided for in this Agreement".

Such article should not override the unavailability of the DSU throughout the period of provisional application (i.e. before the agreement enters into force). DSU applies to agreements that are included in Appendix 1 to the 'Understanding on Rules and Procedures Governing the Settlement of Disputes' (See Article 1 of the DSU on Coverage and Scope). This would be the case of a TFA after the Annex 1 A of the WTO agreement is amended and the TFA is added there. Such amendment requires fulfillment of requirements under article X.3 of the Marrakesh Agreement.

There should not be any legal vagueness in regard to the relation of the Article on dispute settlement under the TFA to this process. **However, to gain clarity and certainty, Members are advised to add the following language at the beginning of the Article on dispute settlement under the TFA: "Subject to entry into force of this Agreement,...".**

Guarding against a Definitive Application of TFA under Para. 47 of the Doha Declaration

24. If Members agree to apply the agreement on a definitive basis under para. 47 of the Doha Declaration, then effectively they might be binding themselves to the implementation of the agreement on the long-term.



25. While the entry into force of the agreement will have to be part of the Single Undertaking and in accordance with the procedural requirements under Article X of the WTO Agreement, yet Members would still lose the leverage of using the agreement to push for progress on issues of interest to the developing countries under the Doha mandate.
26. This is because in case the Doha Round Single Undertaking is not concluded and/or kept in limbo, the TFA accepted as 'early harvest' and applied on a definitive basis could continue to be in force. There is no rule under the WTO that stipulates otherwise.
27. Also, given the nature of the practices covered under the TFA, once implementation starts a country would not easily roll back the investments, as well as institutional and regulatory changes it has undertaken.
28. **Accordingly, Members are advised to avoid the scenario where they agree to apply the agreement on a definitive basis at a certain date, before the entry into force of the agreement through fulfillment of Article X of the WTO Agreement.**

IV. DECONSTRUCTING SOME OF THE WTO ARTICLES THAT HAVE BEEN MENTIONED AS POTENTIAL LEGAL BASIS FOR ENTRY INTO FORCE OF A TFA

29. Some WTO Members have been trying to position Articles III.2 and XIV of the WTO Agreement as legal basis for entry into force of the TFA (Article III.2 addresses the functions of the WTO, and Article XIV addresses the entry into force of the WTO Agreement itself).

Article III.2 provides that: "The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations *in matters dealt with under the agreements in the Annexes to this Agreement*. The WTO may also provide a forum for *further negotiations among its Members* concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference" (emphasis added).

Comment on Article III.2 of the WTO Agreement:

30. The first sentence of this provision deals with providing a forum for WTO Members to negotiate concerning their trade relations in matters dealt with under the agreements in the Annexes to the WTO Agreement. This is the case of the TFA, which is a negotiation in regard to "clarifying and improving the three GATT articles V, VIII, and X".
31. The first sentence of Article III.2 is silent in regard to implementation of the results of such negotiations given that the WTO Agreement already addresses the matter.



32. The second sentence deals with providing a forum for 'further' negotiations among WTO Members on their multilateral trade relations, in matters supposedly not covered under the agreements in the Annexes to the WTO agreement. For those purposes, the second sentence speaks about providing a framework for implementation of those results as agreed by the Ministerial Conference.
33. It is notable that the first sentence of the provision is silent on the implementation issue, while the second sentence addresses implementation of the specific results. It can be understood that the crafters of the provision chose to subdivide the paragraph this way and stay silent on implementation of results arising from negotiations regarding the agreements in the Annexes to the WTO Agreement because that is already dealt with under the WTO Agreement itself, such as in Article X.
34. Some Members may tend to argue that a TFA would fall under the second sentence of Article III.2 and the Ministerial Conference could decide on the framework of implementing the TFA. Such an approach would not hold because the Ministerial Conference cannot take a decision that overrides or contradicts the WTO Agreement. Given that the TFA would alter the rights and obligations of the WTO Members, it is clear that the only legal basis to bring it under WTO law would be Article X of the WTO Agreement.
35. Finally, using Article III.2 as the basis for the Ministerial Conference to define the conditions under which the TFA enters into force, without referring to or complying with the conditions for entry into force of amendments under Article X.3, would create in itself a new mode in which amendments or new agreements which alter WTO Members' rights and obligations could be incorporated into WTO law. However, the Ministerial Conference cannot override through its decisions or interpretation of the WTO Agreement any provision of the WTO Agreement that explicitly and squarely covers a given situation – such as amendments that alter the rights and obligations of WTO Members. This new mode, however, is not consistent with the WTO Agreement because it would have the effect of rendering Article X.3 inutile.
36. All provisions of the WTO Agreement have to be read in consistency with each other and all of them have to be given legal force and effect. This means that Article III.2 have to read together with Article X.3, such that the conditions under Article X.3 for entry into force of amendments that alter the rights and obligations of Members are respected and are observed by the Ministerial Conference with respect to any decisions that it may take under Article III.2.



Article XIV of the WTO Agreement on 'Acceptance, Entry into Force and Deposit' provides that:

"1. This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to GATT 1947, and the European Communities, which are eligible to become original Members of the WTO in accordance with Article XI of this Agreement. Such acceptance shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto. This Agreement and the Multilateral Trade Agreements annexed hereto shall enter into force on the date determined by Ministers in accordance with paragraph 3 of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations and shall remain open for acceptance for a period of two years following that date unless the Ministers decide otherwise. An acceptance following the entry into force of this Agreement shall enter into force on the 30th day following the date of such acceptance.

2. A Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force.

..."

Comment on Article XIV of the WTO Agreement:

37. The Article dealt with the acceptance, entry into force and deposit of the WTO Agreement itself. It was crafted within the context of negotiating the Uruguay Round and giving legal effect to the WTO Agreement.
38. There is no indication in the paragraph that its crafters intended for it to be used as model for amending the WTO Agreement itself, or for giving legal effect to future Agreements.
39. Moreover, the negotiators of the WTO Agreement have designed detailed rules for the process of amendments of the WTO Agreement or the provisions of the Multilateral Trade Agreements listed in Annex 1A and 1C, which is enshrined in Article X of the WTO Agreement on 'Amendments'. The Ministerial Conference cannot take a decision that overrides that. The effect of Article IX.2 on 'Decision Making' in guarding against attempts to override article x of the WTO agreement



Article IX.2 of the WTO Agreement provides that: “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X”. (emphasis added)

Comment on Article IX.2 of WTO Agreement:

40. Article IX.2 of the WTO Agreement addresses the exclusive authority of Members meeting within a Ministerial Conference or General Council to adopt- through three fourth majority, an interpretation of provisions under the WTO Agreement and the trade agreements under Annex 1.
41. Yet, it is worth highlighting that this provision explicitly mentions that such authority shall not be used in a manner that undermines Article X on ‘Amendments’ (highlighted above). This is a clear indication that the crafters of the WTO Agreement intended to safeguard the process of amending the WTO Agreement and avoid a scenario where Members override the requirements of Article X. It also provides basis to argue that the Ministerial Conference or General Council cannot take a decision to override the processes stipulated under Article X.

V. CONCLUDING REMARKS

42. The Articles of the WTO Agreement addressing the ‘functions of the WTO’ (Article III), ‘decision making’ (Article IX), and ‘amendments’ (Article X)- read in conjunction- provide clear legal basis to conclude the following:
 - The TFA will only enter into force upon the fulfillment of requirements under Article X of the WTO Agreement.
 - Members can also argue for pegging the entry into force of the WTO to the conclusion of the Doha Mandate Single Undertaking, basing that on the current content of para. 47 of the Doha Declaration.
 - The Ministerial Conference cannot take a decision that overrides the requirements of Article X of the WTO Agreement.
 - All provisions of the WTO Agreement must be read consistent with each other so as to give them effect. No interpretation or decision can be made by the Ministerial Conference that would make any provision null and void.
 - Anything outside this framework carries a significant threat to the rules-based nature of the WTO, undermines the Marrakesh agreement, sets a problematic precedent, and calls into question the legitimacy of the outcome.



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