

# **KEY ISSUES STILL UNDER BRACKETS IN THE TRADE FACILITATION TEXT PRESENTED TO THE MINISTERIAL CONFERENCE IN BALI**

**(Based on Room W- JOB/TNC/35)**

*The following document comments on the remaining bracketed articles in the trade facilitation (TF) draft text (Room W- JOB/TNC/35) presented to the ministerial conference in Bali. It includes five main sections, including:*

- 1) One page summary note and recommendations on the TF draft text*
- 2) General comments on the balance within the latest TF draft text;*
- 3) Comments of Section I*
- 4) Comments on the provisions under ‘institutional arrangements’ of the TF text;*
- 5) Comments on the ‘general provisions’ of the TF text;*
- 6) Comments on Section II*

*The document includes the following annexes:*

Annex (1): Recalling main parts of the Negotiating Mandate`

Annex (2): Note on the **scope of the ‘Expedited Shipments’ provision under Section I of the trade facilitation draft text; services liberalization from the backdoor.**

Annex (3): Note on the Reference to ‘Making Category B and C provisions an integral part of the Agreement’

Annex (4): Comments on Bracketed Articles under TF text Section I

Annex (5): What did LDCs get under Section II of the Trade Facilitation draft text raised to the Ministerial Conference in Bali?

## TABLE OF CONTENTS

I. SUMMARY NOTE ON TRADE FACILITATION NEGOTIATIONS .....	3
II. GENERAL COMMENT.....	4
III. COMMENTS ON BRACKETED TEXT UNDER SECTION I.....	5
IV. COMMENTS ON INSTITUTIONAL ARRANGEMENTS (ARTICLE 14) .....	5
V. COMMENTS ON KEY ISSUES UNDER ‘GENERAL PROVISIONS’ .....	6
VI. KEY ISSUES STILL BRACKETED UNDER SECTION II .....	9
VII. ANNEXES .....	11

## I. SUMMARY NOTE ON TRADE FACILITATION NEGOTIATIONS

Developing countries were by and large not demandeurs of the Trade Facilitation rules. Most of the Section I rules have come from developed countries and are in fact, to a large degree, the current practices of many developed countries.

Developing countries agreed to start negotiating a trade facilitation agreement in 2004 based on the premise that (1) they would be able to self-designate the provisions that they can immediately implement and those for which they need technical and financial assistance and (2) the obligation to implement would be conditional on their acquisition of capacity through provision of technical and financial assistance by developed country Members of the WTO, and after a self-assessment of their capacity to implement.

Yet, the negotiations has resulted thus far in a significant dilution of the three main special and differential treatment concepts mentioned above: ‘self-designation’, ‘self-assessment’, and ‘conditioning implementation on acquisition of capacity.’ Moreover, while financial support was considered a core element since the commencement of the negotiations, it is now dropped from the text except for a weak and non-binding reference in one of the footnotes.

Within this context, seeking more internal balance in the TFA requires that Section I be made more flexible. **For the rest of the bracketed provisions under Section I on new rules, developing country Members should seek to:**

- **Adopt a ‘best endeavor’ basis in regard to the obligation on ‘expedited shipments’ and ‘authorized operators’.** (\*Note that: the provision on expedited shipments overlaps with negotiations on regulatory issues under GATS)
- **Drop from the text the provisions that override rights under the GATT and other WTO agreements,** including the bracketed provision on ‘consularization’, ‘pre-shipment inspections’, and ‘customs brokers’.
- **Retain the reference to requirements for registration with national authorities and requirements of implementation in accordance with national legislation** and customs procedures and regulations, including in the case of ‘expedited shipments’.
- **Confine the scope of the provision on ‘freedom of transit’** to that under GATT Article
- V, and remove the areas extending beyond the negotiating mandate, such as ‘national treatment for goods in transit’.

Section II on special and differential treatment was supposed to present developing countries and LDCs with flexibilities in the implementation of their obligations under Section I. **However, the content of Section II- in the draft text raised to the Ministerial- became a highly burdensome procedure imposing complicated measures on developing countries and LDCs. It opens up channels through which the self-designation of provisions and self-assessment of capacity by developing countries could be challenged by other Members or effectively short-circuited. Furthermore, Section II does not capture any binding obligation for provision of financial and technical assistance by developed country Members. In the way forward, Members are advised to:**

- **Safeguard self-designation of provisions and dates** through dropping reference to indicative and definitive dates (See Article 4). The time lapse between the two will be used to put pressure on Members to alter or limit the time allocated for implementing provisions under Categories B and C. Besides, there is no clear role for the need to include reference to indicative dates.
- **Remove the reference to ‘making categories an integral part of the Agreement’.** This language appears in the general provision on ‘Annexes’ and under provision 4.5 of Section II. Such reference would have the effect of undermining flexibilities of Section II.
- **Drop provision 4.4;** the provision would override the flexibilities available for Members under Section II, specifically self-assessment of acquisition of capacity. If this provision is maintained, Members will be obliged to implement irrespective of their capacity to implement.
- **Capturing stronger reference to financial assistance in the body of Section II.**

- **Categorization of non-binding provisions;** Members are advised to clarify that only binding provisions under Section I would be categorized in accordance with Section II.

## II. GENERAL COMMENT

Developing countries were by and large not demanders of the Trade Facilitation rules. Most of the Section I rules have come from developed countries and are in fact, to a large degree, the current practices of many developed countries.

Whilst many developing countries acknowledge the utility of trade facilitation guidelines, taking on binding rules which are associated with expanded regulatory requirements, high and recurring costs, and which are likely to increase imports while not contributing to building the productive and trade capacities of developing countries, has been a concern especially for a large number of lower-income and net-importing developing countries.

Many developing countries are apprehensive that they might be pressured into implementing these commitments on a permanent basis at a time when they have not acquired sustained implementation capacity and when they have more pressing national priorities to deal with.

The original premise of Section II of the negotiating text, dealing with special and differential treatment and technical and financial assistance and capacity building, was that Members would have the full right to self-designate the obligations under Section I across three Categories (A, B, and C) that allow them to define the time frame and ways of implementing those provisions. Implementation of Category C provisions was designed to be conditional on the acquisition of sustained implementation capacity by developing countries and LDCs, through the provision of adequate, new, and long-term technical and financial assistance and capacity building by developed countries. Countries were to self-assess whether or not they have the implementation capacity.

Yet, the outcome of the negotiations thus far has been disappointing. By adopting a framework where Members have to provide ‘indicative’ and ‘definitive’ dates for implementation of Categories B and C, the process of self-designation would be open for pressure by some Members on others. Moreover, the position of developing countries and LDCs on self-assessment has been considerably eroded. The current text establishes grounds for a third party- in the form of ad hoc expert group- to consider the Member’s self-assessment.

Moreover, the provision of support and capacity building by donor members is not binding under the current text. While financial support was considered a core element in the design of Section II, it is now dropped from the text except for a weak and non-binding reference in the second footnote of Section II.

Developing countries and LDCs can end up in a situation where they have to implement but did not receive adequate support and technical assistance. Moreover, the current text lacks a mechanism to review the effectiveness of the support provided to developing countries and LDCs. This is despite the fact that WTO Members have agreed under the original negotiating mandate of TF to ‘review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations’ (See para. 7 of Annex D of the July 2004 package in Annex 1).

Overall, Section II became a highly burdensome procedure that stipulates for complicated measures that developing countries and LDCs have to abide with, while it does not capture any binding obligation for provision of assistance by developed country Members.

Members are advised to address these imbalances in the TF text. Suggested technical propositions are outlined in the following sections.

On a more general note, Members are advised to ask for a complete record of the negotiating meetings of the TF agreement, which should be made available to Members, before the TFA text is considered final. This could be done at the Ministerial Conference in Bali or a General Council meeting thereafter<sup>1</sup>.

### III. COMMENTS ON BRACKETED TEXT UNDER SECTION I

*This section addresses the remaining bracketed issues under the TF draft text raised to the Ministerial Conference. For a more comprehensive discussion of the TF negotiations, Members are advised to review the South Centre Expert Group Report entitled “WTO Negotiations on Trade Facilitation: Development Perspectives”*

Given the significant concessions developing countries and LDCs undertook in Section II, whereby the two core elements of the original architecture of this Section were diluted- including the condition of acquisition of sustained capacity to implement as prerequisite to implementing Category C and the obligation of developed countries to provide new long-term financial and technical assistance- achieving an internal balance in the TFA requires a flexible approach from developed countries in regard to their demands under Section I.

**For those purposes, Members should seek to:**

- **Adopt a ‘best endeavor’ basis in regard to the obligation on ‘expedited shipments’ and ‘authorized operators’.** (\*Note that: the provision on expedited shipments overlaps with negotiations on regulatory issues under GATS. A more detailed note on this issue is included in Annex 2).
- **Drop from the text the provisions that override rights under the GATT and other WTO agreements,** including the bracketed provision on ‘consularization’, ‘pre-shipment inspections’, and ‘customs brokers’.
- **Retain the reference to requirements for registration with national authorities and requirements of implementation in accordance with national legislation** and customs procedures and regulations, including in the case of ‘expedited shipments’.
- **Confine the scope of the provision on ‘freedom of transit’** to that under GATT Article V, and remove the areas extending beyond the negotiating mandate, such as ‘national treatment for goods in transit’.

*(More details on the Section I articles that are still bracketed is included in Annex 4).*

### IV. COMMENTS ON INSTITUTIONAL ARRANGEMENTS (ARTICLE 14)

**The role of the TF committee in reviewing the operation and implementation of the Agreement** is provided for under Article 14.1.6.

The Article establishes that:

“The Committee shall review the operation and implementation of this Agreement 4 years from its entry into force, and periodically thereafter”.

The EU is proposing an addition to allow the Committee to ‘consider any amendment or modification to the provision of the Agreement with the aim of providing further facilitation’.

Such language will basically give a mandate to the TF Committee to look into reviewing Section I provisions with the sole perspective of providing further trade facilitation. The role of the Committee in reviewing whether the provision and implementation of Section II is effective and enabling acquisition of capacity to implement by developing countries and LDCs will be absent.

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<sup>1</sup> Such a request can also be included in the statements by delegations at the Ministerial Conference, or they can raise such a request to the WTO secretariat. Members should have the right to review and comment on the report and add any reservations before it is considered a final record of the TFA negotiations.

- Developing countries and LDCs are advised to strengthen the review clause with a focus on making more effective the operationalization of Section II in particular the provision of technical and financial assistance and capacity building.

**For example, one of the following language propositions could be added under provision 14.1.6:**

1. “The review shall cover Section II, with a view towards taking action to improve and strengthen the effectiveness of flexibilities available to developing countries and LDCs, and facilitate and enhance the provision of technical and financial assistance and capacity building to enable the acquisition of implementation capacity by developing and least developed country Members”.
2. “The review shall cover Section II, including the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations” (This language is a copy of agreed language from para.7 of Annex D).
3. “The review shall cover Section II, in accordance with para. 7 of Annex D”.

## V. COMMENTS ON KEY ISSUES UNDER ‘GENERAL PROVISIONS’

### i. Article on Scope:

The draft TF text provides that:

“ This Agreement applies to measures relating to trade in goods, including goods in transit.

For the purpose of this Agreement, the term “Member” is deemed to include the competent authority of that Member.

[All provisions of Section I are binding [on all Members in accordance with their terms]. Developing and least-developed countries shall implement in accordance with Section II.]

[Nothing in this Agreement shall be construed as diminishing the [rights and] obligations of Members under the GATT 1994.]”

- Members are advised to drop the brackets in the text and retain the proposed language. Retaining the following language ‘All provisions of Section I are binding [on all Members in accordance with their terms]’ underscores that the scope of the obligation is defined by the legal language adopted under each provision of Section I, and that Members should guard the flexibilities related to each provision based on the way each provision is crafted.
- The language on ‘rights and obligations under GATT 1994’ helps in asserting that where a contradiction arises between the TFA and Articles V, VIII, and X of the GATT, Members would still be able to revert back to the GATT to retain their rights stipulated there.

**IT IS WORTH NOTING THAT:** Previous TF text drafts have included an article on the relationship of the TFA with the General Agreement on Tariffs and Trade 1994 as following:

“[Article - Relationship to the General Agreement on Tariffs and Trade 1994

In the event of conflict between a provision of GATT 1994 and a provision of this Agreement, the provision of this Agreement shall prevail to the extent of the conflict.] (Footnote here includes: ‘Assumption is that this will be an Annex 1 A Agreement and we will not need these provisions.’”

This article is based on customary international law. However, Members negotiating the TFA are seeking to preserve their rights and obligations under the GATT V, VIII, and X.

For example, under Article 6.2.2 of the TF negotiating text, some delegations asked for addition of the following language through which they seek to preserve their rights under the GATT article VIII.

“[6.2.2 This provision is without prejudice to the right of each Member to levy fees and charges pursuant to article VIII of GATT 1994]. (Footnote here includes: ‘The relation between this provision and Article VIII of GATT will be dealt with as part of the cross-cutting issues’).

**→ IN CASE AN ARTICLE ON THE RELATION WITH GATT 1994 IS REINTRODUCED, MEMBERS ARE ADVISED TO:** add at the end of the Article on: **“except as otherwise specifically provided for in this Agreement”**.

This will give value to the language on preserving rights under GATT, such as the one proposed under provision 6.2.2.

## ii. **Article on Exceptions:**

This article currently provides that: “All exceptions and exemptions\* under the General Agreement on Tariffs and Trade 1994 shall apply [, as appropriate,] to the provisions of this Agreement. Waivers [, as appropriate,] applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement establishing the WTO and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.” (\* Footnote here includes: ‘Such as GATT Article V:7, Ad note to GATT Article VIII, third sentence of GATT Article X:1’.

This is a very important provision because Members should guarantee the application of the general exceptions under the GATT to the TFA.

### **To clarify and strengthen this provision, Members are advised to<sup>2</sup>:**

- Have a more clear reference to the applicability of the exceptions<sup>3</sup>, through removing reference to the terms ‘as appropriate’ from first sentence.
- Add direct reference in the body of the agreement (such as through a footnote) to the exception articles that would apply. If members will retain reference to examples on exemptions in the footnote, then they are advised to add reference to the main exceptions that they intend to apply as well (such as Articles XX on general exceptions and XXI on security exceptions under GATT)
- Waivers could play the role of modifying the existing rules of WTO law or limiting the WTO's jurisdiction in favour of another international legal regime. Members are advised to split this provision and address waivers on their own. Application of Waivers to the TFA should pass through discussion under the TF Committee. If retained, Members should remove the reference to ‘and any amendments thereto as of the date of entry into force of this Agreement’ from the second sentence.

<sup>2</sup> Members are advised to note that: ‘Provisions in the Chair’s trade facilitation (TF) text may contradict existing legal obligations under other international treaties such as the World Health Organization’s Framework Convention on Tobacco Control (FCTC), which has 177 countries which are Parties. For example, the FCTC requires governments to protect their health policies from tobacco industry interests (e.g. it recommends governments only interact with the tobacco industry to the extent strictly necessary), yet the TF text requires ‘interested parties’ (including the tobacco industry) to be allowed to comment and have their inputs taken into account in areas such as formalities and documentation requirements.

<sup>3</sup> In the case China-Raw Materials, the panel and appellate body gave a clear opinion<sup>3</sup> on the availability of Article XX GATT as a defense under specialized WTO agreements. They noted that attempts to invoke Article XX will be evaluated on a case-by-case basis, allowing its use where there is evidence that the drafters intended the defense to be available to address an exceptional violation of the specific provision<sup>3</sup>. → Thus, the relation between Article XX GATT, as well as other relevant exception articles under GATT, with the potential TF agreement should be addressed in a more explicit and crosscutting manner in the main body of the agreement.

Such language would allow applying a waiver whose content is currently not known. Members should also retain the reference to ‘as appropriate’ and allow for the TF Committee to revise the implications of the application of the Waiver.

**iii. Article on Annexes:**

The draft text currently includes the following language:

“[1. The Category A commitments of developing country Members and least developed country Members annexed to this Agreement are hereby made an integral part thereof.  
2. The Category B and C commitments of developing country Members and least developed country Members shall be annexed to this Agreement and made an integral part thereof in accordance with Section II.]

[The Category A, B and C commitments of Developing Country Members and Least-Developed Country Members annexed to this Agreement in accordance with Section II are made an integral part thereof.]

EU addition: [The relevant periods for implementation of Category B and C commitments shall start counting from the day of official entry into force of the Agreement.]”

**Members are advised to:**

- Drop the reference to ‘made an integral part of the agreement’. This is in line with Members’ objections to including Article 4.5 (previously 4.6) under Section II and their objection to using the term ‘schedule’.
- Note that the reference to making commitments ‘an integral part of the agreement’ would bring a level of rigidity into the notifications of developing countries and LDCs under Section II (including re-notifications (Article 4), extensions (Article 5), and shifting among categories (Article 7). Moreover, there is no clarity in regard to the procedures required for annexing commitments. (See in annexes to this brief a more detailed note on why the terms ‘integral part of the agreement’ should be avoided)
- **In case Members are asked for an alternative formulation in this regard, they can refer to the process that will apply to developing countries under Article 9 of Section II, which deals with the information on assistance. Accordingly, Members could consider replacing the current process under the article on Annexes with another where Members would submit the information on their Category B and C commitments to the TF Committee in a format specified in an agreed annex to the TFA.**

**In regard to the EU proposed addition;** this language is crafted as a tool to pressure countries to ratify the agreement. If this language is retained, then for each country that ratifies the agreement after the date of entry into force of the TFA, such country would lose the grace periods allocated for notifying categories B and C and the grace periods for application of dispute settlement rules. This will specially hit LDCs, which have longer grace periods under Section II.

To address this issue across the TFA, the language proposed by the EU should be complemented by the following addition: “[The relevant periods for implementation of Category B and C commitments shall start counting from the day of official entry into force of the Agreement, **for each concerned Member.**]

**iv. The EU proposition on a ‘standstill’ clause :**

The current text includes a proposal by the EU to include the following standstill clause:

“Pending the implementation of the Agreement, a Member shall not introduce any measure that defeats the object and purpose of this Agreement.]”

Members are advised to oppose the inclusion of this language due to:

- (1) Lack of clarity of the terms ‘pending the implementation of the Agreement’ since Members will start implementing based on different timeframes given the nature of the ratification process associated with the TFA and the nature of the obligations;
- (2) This phrase is of very broad scope- it refers to ‘any measure’, which could capture measures outside the customs procedures that the TFA covers;
- (3) For many developing countries and LDCs implementation of the TFA would require setting in place new institutions and regulations that were not in place earlier to that. Such clause could subject any such changes to being questioned and challenged as measures that ‘defeats the object and purpose of this Agreement’.

## VI. KEY ISSUES STILL BRACKETED UNDER SECTION II

The core pillars of section II- i.e. self-designation, acquisition of technical and financial assistance, and self-assessment of capacity to implement the provisions allocated under Category C, have been significantly diluted.

**Members are advised to strengthen those pillars within the draft text and drop the bracketed provisions that further override and dilute their flexibilities. Below is a list of the main provisions that need attention:**

- **Safeguarding self-designation of provisions and dates of implementation**, through avoiding reference to indicative and definitive dates (See how this language is used under Article 4). The time lapse between the two will be used to put pressure on Members to alter or limit the time allocated for implementing provisions under Categories B and C. Besides, there is no clear role or added value for the use of such terminology as ‘indicative’ and ‘definitive’ dates.
- **Removing the reference to ‘making categories an integral part of the Agreement’**. This language appears in the general provision on ‘Annexes’ (discussed above under Section IV) and under provision 4.5 of Section II. As noted under the discussion of the Article on ‘Annexes’ above, such reference would have the effect of undermining flexibilities of Section II. (See Annex 3 for more details and alternative language suggestions for provision 4.5).
- **Drop provision 4.4**; the provision would override the flexibilities available for Members under Section II, specifically self-assessment of acquisition of capacity. If this provision is maintained, Members will be obliged to implement irrespective of their capacity to do so. Members are advised to argue against retaining this provision. If other Members want to object the lack of notification by a developing country member, they can use the processes of the TF Committee or the DSU.
- **Capturing stronger reference to financial assistance**; the term ‘financial’ have been under attack throughout the negotiations process. It is now removed from the body of Section II and inserted in a diluted footnote. This is despite the fact that WTO members have repeatedly reaffirmed their commitment to ensure secure and adequate levels of funding to conclude the Doha Work Programme (See Hong Kong Declaration)<sup>4</sup>.
- **Categorization of non-binding provisions**; Members are advised to clarify that only binding provisions under Section I would be categorized, in accordance with Section II. For the sake of clarification and safeguarding the flexibilities for developing countries and LDCs, Members can consider the following additions under paragraphs 1.1 and 2.2:

<u>Proposition (in bold) to insert under 1.1 of Section II</u>
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<sup>4</sup> Hong Kong 2005 Declaration (Para 54) establishes that: “54. ... We reaffirm our commitment to ensure secure and adequate levels of funding for trade-related capacity building, including in the Doha Development Agenda Global Trust Fund, to conclude the Doha Work Programme and implement its results”<sup>4</sup>.

The provisions contained in {Section I}{Articles X-Y} of this Agreement, **that are binding on developing and least developed countries, respectively**, shall be implemented ...

Proposition (in bold) to insert under 2.2 of Section II:

Developing country and least developed country Members shall self-designate, on an individual basis, the **binding** provisions to be included under each of the Categories A, B and C **as defined in paragraph 2.1 of this Section.**

**It is also important to clarify ‘which provisions are binding’.** Yet, what is ‘binding’ is still unclear – is ‘shall endeavor’ binding or not, and what level of flexibility it incorporates?

To address this issue, Members can add the following footnote for clarification: “The terms ‘shall endeavor’, ‘shall to the extent possible’ ... are not considered ‘binding’ provisions”.

## VII. ANNEXES

### ANNEX 1: RECALLING THE MAIN PARTS OF THE NEGOTIATING MANDATE OF TRADE FACILITATION

#### Annex D of the July Package 2004

**Para. 2.** The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.

**Para. 3.** Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

**Para. 6.** Support and assistance should also be provided to help developing and least-developed countries implement the commitments resulting from the negotiations, in accordance with their nature and scope. In this context, it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, that in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required. While every effort will be made to ensure the necessary support and assistance, it is understood that the commitments by developed countries to provide such support are not open-ended.

**Para. 7.** Members agree to review the effectiveness of the support and assistance provided and its ability to support the implementation of the results of the negotiations.

#### Annex E of the Hong Kong Ministerial Conference

**Para. 6.** In light of the vital importance of technical assistance and capacity building to allow developing countries and LDCs to fully participate in and benefit from the negotiations, the Negotiating Group recommends that the commitments in Annex D's mandate in this area be reaffirmed, reinforced and made operational in a timely manner. To bring the negotiations to a successful conclusion, special attention needs to be paid to support for technical assistance and capacity building that will allow developing countries and LDCs to participate effectively in the negotiations, and to technical assistance and capacity building to implement the results of the negotiations that is precise, effective and operational, and reflects the trade facilitation needs and priorities of developing countries and LDCs. Recognizing the valuable assistance already being provided in this area, the Negotiating Group recommends that Members, in particular developed ones, continue to intensify their support in a comprehensive manner and on a long-term and sustainable basis, backed by secure funding.

**ANNEX 2: NOTE ON THE SCOPE OF THE ‘EXPEDITED SHIPMENTS’ PROVISION UNDER SECTION I OF THE TRADE FACILITATION DRAFT TEXT; SERVICES LIBERALIZATION FROM THE BACKDOOR.**

The provision on ‘expedited shipments’ under Section I of the trade facilitation draft text (provision still bracketed) touches upon regulatory matters that are supposed to fall under the auspices of the GATS negotiations. The provision covers expedited release of goods entered through air cargo facilities, which pertains to the negotiations on postal and courier services under GATS.

Market access and regulatory disciplines in this area have been a major demand by developed countries under the GATS negotiations. This is why negotiating binding regulatory disciplines on this issue under the TFA could entail negotiating services liberalization through the backdoor. This would clearly be a stretch beyond the original mandate of negotiations on trade facilitation, which is confined to ‘clarifying and improving Articles V, VIII, and X of the GATT’.

The provision on ‘expedited shipments’ lays down detailed obligations for minimizing documentation requirements, applying the treatment for shipments of any weight or value (still bracketed), allowing for release of expedited shipments before the final determination and payment of applicable customs duties based on a guarantee (still bracketed), and provision of a de minimus shipment value or dutiable amount for which customs duties and taxes will not be collected.

It is worth noting that a recent paper by the WTO secretariat (See: WTO document S/WPDR/W/48, June 2012), calling for more emphasis on regulatory issues in the services sector, have cited ‘border procedures and shipment requirements’ as regulatory issues for postal and courier services. The paper suggests that ‘scheduling additional comments under the GATS could be an instrument to deal with these issues’. It also highlights that related issues, such as weight or value restrictions on expedited shipments, have been negotiated through preferential trade agreements (PTAs).

Many developing countries lack the regulatory frameworks in the area of postal and courier services. This is one of the reasons why many developing countries have been hesitant to undertake commitments in this area under GATS and PTAs.<sup>5</sup>

Undertaking binding commitments on strict disciplines under the provision on ‘expedited shipments’ would be commensurate to agreeing a standstill on certain regulatory disciplines in the area of postal and courier services. It would be counter to the positions of many developing countries’ under GATS and PTAs, and would circumscribe the ability to build future regulatory systems in the area of postal and courier services.

**For all the reasons above, Members are advised to:**

- Avoid a mandatory obligation on expedited shipments and confine the provision to a ‘best endeavor’ obligation
- Subject the disciplines under the provision to domestic laws and regulations.

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<sup>5</sup> It is worth noting that many developing countries have not taken commitments in the area of ‘postal and courier services’ under GATS. For more details on WTO Members commitments in this area, visit: <http://i-tip.wto.org/services/ComparativeReports.aspx>

**ANNEX 3: NOTE ON THE REFERENCE TO ‘MAKING CATEGORY B AND C PROVISIONS AN INTEGRAL PART OF THE AGREEMENT’ (LANGUAGE USED UNDER ARTICLES 3, 4.5 OF SECTION II, AND GENERAL PROVISION ON ANNEXES)**

**Background**

Under WTO law, when annexes or notifications become an integral part of the agreement, there is usually a specific procedure stipulated in regard to any modifications that a Member introduces to such Annexes. The cases of GPA and GATS below show how modifying an annex that is integral part of an agreement puts detailed procedural obligations on Members.

This is why Members should take notice of the implications of such context on the flexibilities they have under para. 4, 5, and 6 of the Section II.

The case of the GATS Annex on Negotiations on Maritime Transport Services – cited below- show that Members can agree on a language that guarantee their right to modify the annexes without obligation to give compensation in return. For example, the Members in this case added the following language: “...**a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI**” (Article XXI of GATS deals with modification of schedules).

**MEMBERS NEGOTIATING THE TFA ARE ADVISED TO:**

**(1) Try to drop the reference to the lapse time between notification of definitive dates and the process of taking note by the Committee, and drop the reference to the language ‘make an integral part of the agreement’ and replace it by less harmful language:**

[4.5 ~~No later than 60 days after~~ **Upon** the dates for notification of definitive dates for implementation of Category B and Category C in accordance with paragraphs 4.1, 4.2 or 4.3, the Committee shall take note of ~~and annex to the Agreement~~ each Member’s definitive dates for implementation of Category B and Category C provisions, **which will be annexed to this Agreement in the format specified in Annex [Y]**\* ~~including any dates set under paragraph 4.4, making these annexes an integral part of this Agreement.]~~

(add a footnote: \*Nothing in this provision shall constraint or undermine the Member’s right to modify the annex in accordance with Articles 5, 6, and 7 of Section II)

**(2) In case the reference to ‘make an integral part of the agreement is retained under Section II’, then Members can consider similar language in case the reference to ‘making Category B and C an integral part of the agreement’ is retained.**

**Proposed language:** “Nothing in this provision [Section II] shall constraint or undermine the rights of developing countries and LDCs under Articles 2, 4, 5, 6, 7 of Section II”.

Members can consider adding this language in each provision where the words ‘making an integral part of the agreement’ appear.

Or, Members can argue for removing this the reference to ‘making an integral part of agreement’ from the body of Section II, and address this issue under the provision on Annexes that have been introduced as a general provision under the TF consolidated negotiating text of November 14. The proposed language could be added there.

**Examples from GPA and GATS**

**The case of Government procurement Agreement (GPA):**

*Appendices and Annexes to the GPA*

The Agreement on Government Procurement contains four Appendices with regard to each Party. The Appendices are an integral part of the Agreement (see [Article XXIV:12 of the Agreement](#))<sup>6</sup>, and address the [coverage of the Agreement](#) with respect to each party as well as [publications](#) through which Parties fulfil various transparency obligations set out in the Agreement.

The Appendices and Annexes to the GPA are kept in the form of a “loose-leaf” system, so that they can be updated as necessary pursuant to [Article XXIV:6 of the Agreement](#).

#### ***Article XXIV:6 of the Agreement of GPA: Rectifications or Modifications***

(a) Rectifications, transfers of an entity from one Annex to another or, in exceptional cases, other modifications relating to Appendices I through IV shall be notified to the Committee, along with information as to the likely consequences of the change for the mutually agreed coverage provided in this Agreement. If the rectifications, transfers or other modifications are of a purely formal or minor nature, they shall become effective provided there is no objection within 30 days. In other cases, the Chairman of the Committee shall promptly convene a meeting of the Committee. **The Committee shall consider the proposal and any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Agreement prior to such notification.** In the event of agreement not being reached, the matter may be pursued in accordance with the provisions contained in Article XXII.

(b) Where a Party wishes, in exercise of its rights, to withdraw an entity from Appendix I on the grounds that government control or influence over it has been effectively eliminated, that Party shall notify the Committee. Such modification shall become effective the day after the end of the following meeting of the Committee, provided that the meeting is no sooner than 30 days from the date of notification and no objection has been made. In the event of an objection, the matter may be pursued in accordance with the procedures on consultations and dispute settlement contained in Article XXII. In considering the proposed modification to Appendix I and any consequential compensatory adjustment, allowance shall be made for the market-opening effects of the removal of government control or influence.

#### **Another example: GATS: Annex 1B: General Agreement on Trade in Services**

##### **GATS Article XXIX: Annexes**

“The Annexes to this Agreement are an integral part of this Agreement”.

**GATS article XXI<sup>7</sup> on ‘modifications of schedules’** establishes detailed procedures for modification and the obligations to offer compensation in certain cases.

**Yet, the “Annex on Negotiations on Maritime Transport Services” of the GATS explicitly address the right of Members to modify without offering compensation (See the text below)**

1. Article II and the Annex on Article II Exemptions, including the requirement to list in the Annex any measure inconsistent with most-favoured-nation treatment that a Member will maintain, shall enter into force for international shipping, auxiliary services and access to and use of port facilities only on:

(a) the implementation date to be determined under paragraph 4 of the Ministerial Decision on Negotiations on Maritime Transport Services; or,

(b) should the negotiations not succeed, the date of the final report of the Negotiating Group on Maritime Transport Services provided for in that Decision.

2. Paragraph 1 shall not apply to any specific commitment on maritime transport services which is inscribed in a Member’s Schedule.

3. From the conclusion of the negotiations referred to in paragraph 1, and before the implementation date, **a Member may improve, modify or withdraw all or part of its specific commitments in this sector without offering compensation, notwithstanding the provisions of Article XXI.**

<sup>6</sup> This para establishes that “the Notes, Appendices and Annexes to this Agreement constitute an integral part thereof”.

<sup>7</sup> Footnote added: this Article deals with modification of schedules under GATS

**ANNEX 4: COMMENTS OF BRACKETED ARTICLES UNDER SECTION I OF TRADE FACILITATION DRAFT TEXT AS PRESENTED TO THE MINISTERIAL CONFERENCE**

<p><b>Article 5.1</b> on ‘Notifications for enhanced controls and inspections’</p>	<p>This article could help in tightening the procedural rules on implementing such systems and limit the ‘non-tariff barrier’ effect they lead to when implemented expansively against goods from developing countries  <b>Members are advised to: drop the brackets under the TF text (i.e Articles 5.1 b and 5.1 c),</b> for it is important that Members undertaking the notification have the obligation to announce the termination or withdrawal of the notification, and that announcements be published in same places where the notifications were given.</p>
<p><b>Article 6.2.2</b> on specific disciplines on fees and charges</p>	<p>This provision includes brackets on text referring to safeguarding Members’ rights under the GATT. <b>Members are advised to retain this language, especially because the term ‘customs processing’ is not defined under the agreement nor under the GATT.</b></p>
<p><b>Article 6.3.7</b> on penalty disciplines</p>	<p>This article still includes brackets in regard to setting a fixed and finite period within which it may initiate proceedings that may lead to a penalty relating to breach of customs law, regulation, or procedural requirement. Such a stipulation would limit the policy space of Member States and will not allow countries with limited administrative resources to pursue breaches in due time. <b>Members are advised to drop this provision or keep it on a best endeavor basis through bracketing the wordings ‘Each Member is encouraged to...’</b></p>
<p><b>Article 7.3.1</b> on separation of release from final determination of customs duties, taxes, fees and charges</p>	<p>Pre-arrival processing is already a significant concession agreed to be developing countries. This process is considered as an “exception” to normal declaration processing and thus implementation of this provision requires changing the workflow at the national level. It also necessitates administering a complex guarantee system. <b>Members are advised to adopt the bracketed language ‘within a reasonably short period thereafter’, which will give them a certain flexibility in administering this process.</b></p>
<p><b>Article 7.7.1</b> on authorized operators</p>	<p>While most of this provision has been settled, Members still have brackets around ‘may’ and ‘shall’ in the first sub-paragraph. Overall, this provision is over-prescriptive provide wide grounds for challenging the practice of Members. <b>Members are advised to adopt the term ‘may’ and keep the provision on best endeavor basis.</b></p>
<p><b>Article 7.8.1 and 7.8.2</b> on expedited shipments</p>	<p>This provision touches upon regulatory matters that are supposed to fall under the auspices of the GATS negotiations, especially those pertaining to postal and courier services. This could entail negotiating services liberalization through the backdoor. Many developing countries and LDCs lack the domestic laws and regulations that disciplines postal and courier services, and the provision will circumscribe the ability to legislate in this domain. <b>Members are advised to adopt a ‘best endeavor’ approach to this provision through adopting the term ‘may’ in the first subparagraph, and adopting the language currently bracketed under 7.8.1(i) in reference to applicant’s obligation to register with relevant authorities, and safeguard the language referring to Member’s right to require additional entry procedures under 7.8.2(c).</b></p>
<p><b>Article 8</b> on consularization</p>	<p>This Article clearly goes beyond the mandate. Article VIII.4 of the GATT explicitly allows Members to undertake consular transactions in connection with importation and exportation. Six Arab countries undertake consular fees. The political support of these countries is necessary in this regard, taking into consideration that consular fees are eliminated among the members of the ‘Pan-Arab Free Trade Area’. <b>Members are advised to drop this provision from the text.</b></p>

<p><b>Article 11.5</b> on pre-shipment inspections And 11.6 on use of customs brokers</p>	<p>These provision extend beyond the negotiating mandate, especially in terms of limitations on pre-shipment and post-shipment inspections (which is a right for members under Agreement on pre-shipment inspections), and those on provision on ‘customs brokers’. <b>Members have full right to argue for dropping these provisions from the text. If Members want to consider the proposed text in the draft, they would be providing the demandeurs of these provisions with a significant concession. For 11.6, Members are advised to delete the language proposed by Panama.</b></p>
<p><b>Article 12 on Freedom of Transit</b></p>	<p>This Article extends beyond the negotiating mandate and Article V GATT on traffic in transit and intrudes on national policy space. It will specifically impact those Members with fixed infrastructure for transit of energy products within their territory (e.g., transit pipelines or high-voltage transmission grids) and those Members who have state or private enterprises with exclusive or special privileges that regulate or apply formalities or fees to transit traffic. <b>Members are advised to confine</b> the article to the scope of article V GATT, removing the areas extending beyond the negotiating mandate, such as dropping ‘national treatment for goods in transit’ under para. 12.4, and strengthening the reference to what is stipulated in national laws and regulations.</p>

## **ANNEX 5: WHAT DID LDCs GET UNDER SECTION II OF THE TRADE FACILITATION DRAFT TEXT RAISED TO THE MINISTERIAL CONFERENCE IN BALI?**

Least developed countries and developing countries have agreed to the negotiations on trade facilitation in 2004 with the condition that Section II ensures them the needed flexibilities, taking into consideration their individual level of development and circumstances, and ability to implement new TF obligations at their own pace and subject to available resources.

**However, the content of Section II- in the draft text raised to the Ministerial- became a highly burdensome procedure imposing complicated measures on developing countries and LDCs. It opens up channels through which the self-designation of provisions and self-assessment of capacity by developing countries could be challenged by other Members or effectively short-circuited. Furthermore, Section II does not capture any binding obligation for provision of financial and technical assistance by developed country Members.**

**The text settled for LDCs under Section II of the draft trade facilitation text does not offer them much more. LDCs were able to get a few more years in terms of grace period for notifying their commitments under Categories B and C, and additional years for grace period in terms of dispute settlement. However, LDCs did not get additional substantive provisions in regard to the three main premises of Section II, including self-designation, self- assessment of capacity to implement, and guarantee of technical and financial assistance.**

While LDCs have been exempted from commitments under various areas of the DDA or attained special treatment (See for example: Article 15.2 of Agreement on Agriculture, NAMA modalities para. 14, GATS Article XIX.3, TRIPS articles 66.1 and 66.2), LDCs were not offered similar treatment under the trade facilitation negotiations.

### **Recalling the understanding of the African Group and ACP for Section II, as noted in their official communications during 2005**

The **African group** had stressed that Section II provide “policy space and flexibility for developing and LDCs while determining (based on their own assessment of their implementation capacity) when, how, and the extent to which new commitments on trade facilitation are to be implemented by them; and condition the implementation by developing and LDCs of such new commitments to the provision by developed countries of effective, adequate, long-term, and sustainable technical and financial assistance and support for capacity-building...” (TN/TF/W/33).

**On assistance and capacity building, the ACP group** stressed that “an important task in fulfilling the letter and the spirit of the negotiating mandate will clearly be the identification of the needs and priorities of developing countries for technical assistance and capacity building on Trade Facilitation ...we [ACP group] believe that such assistance can and should include financial assistance...” (TN/TF/W/73).

### **THE LDC SPECIFIC LANGUAGE UNDER SECTION II OF THE DRAFT NEGOTIATING TEXT:**

#### **➔ PROVIDES LDCS WITH:**

- One to two additional years for notifying Category B provisions and related implementation dates (See para. 4.2 a & b).
- One additional year to notify Category C commitments and one extra year on top of that to notify the assistance and support needed (See para. 4.2 c & d).
- In regard to the expert group examining countries’ self-assessment, the LDCs were provided with (1) guarantee to have at least one national from and LDC in the group (See para. 6.3) and exemption from the DSU application until a decision by the Committee is taken in regard to the review of their self-assessment (this period not to extend beyond 24 months).
- More clarity in regard to the right of LDCs to revert back to the Committee and the Expert Group mechanism in the case their capacity to implement has not been sustained (See para. 6.6).

#### **➔ YET LACKS THE MOST CRITICAL ISSUES SOUGHT FOR UNDER SECTION II:**

- **Safeguards of LDCs self-designation:** LDCs, as other developing countries, will be facing pressures upon notifying the designation of provisions across categories and their implementation dates. LDCs have to notify indicative and definitive dates for implementing their provisions and will face another scrutiny of their

designations across categories (See Article 4). The time lapse between the two will be used to put pressure on Members to alter or limit the time allocated for implementing provisions under Categories B and C. Besides, Members may face similar pressure between the time they notify their dates of implementation and the date that the Committee takes note of these notifications (See para. 4.5).

- **Safeguards of LDCs self-assessment:** LDCs self-assessment of capacity to implement, as that of developing countries, will be open for scrutiny by the ad hoc expert group process, and could be challenged or effectively short-circuited.
- **Guarantee of financial and technical assistance.**