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PART IV

## DETAILED ANALYSIS OF ANNEX D TO THE GENERAL COUNCIL DECISION JULY 2004 "MODALITIES FOR NEGOTIATIONS ON TRADE FACILITATION"

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Annex D to the July 2004 Decision of the WTO General Council	Analytical comments
I. SCOPE OF THE NEGOTIATIONS	
1. Negotiations shall aim to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit <sup>4</sup> .	4 is particularly important in terms of ensuring that there continues to be flexibility with respect to the results of the negotiations and what its outcomes could be. That is, as a result of Footnote 4, the launch and conduct of negotiations shall be without prejudice to the outcome as regards the ultimate form of agreement – e.g. a
Negotiations shall also aim at	For developing countries, the key issue as far as Trade Facilitation is concerned (now that negotiations have been



enhancing technical assistance and support for capacity building in this area. The negotiations shall further aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues. <u>Footnote in original text</u> :	<ul> <li>launched) is that any new disciplines or commitments should not unduly adversely impact on the existing policy space and flexibility of developing countries in adopting and implementing trade facilitation measures.</li> <li>Hence, as the negotiations proceed, developing countries need to insist that these negotiations should not include the complete and indiscriminate adoption and application of disciplines or concepts such as non-discrimination, transparency, procedural fairness, and proportionality, to trade facilitation or disciplines relating to trade facilitation. Members need to note that Paragraph 1 of Annex D does not explicitly indicate which particular "relevant aspects of Articles V, VIII and X of the GATT 1994" need to be clarified and improved. This therefore provides developing countries with an opening in which to insist that the scope of the negotiations be limited and circumscribed so as not to adversely impact on the policy space and flexibility of developing countries in this area.</li> </ul>
<sup>4</sup> It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.	<ul> <li>In this regard, developing countries could insist that only the following areas should be covered by the Trade Facilitation negotiations:</li> <li>Clarifications and improvements of GATT 1994 Articles V, VIII, and X, provided that: (i) existing rights and obligations of WTO Members shall not be amended or altered in ways that would be prejudicial to developing countries' rights to flexibly and progressively comply with such provisions; (ii) international harmonization of trade facilitation regimes, procedures, or standards, should not be required; and (iii) the right of developing country Members to specify and determine customs fees and charges, formalities and procedures, and documentation requirements, with respect to imported goods as well as goods in transit, in accordance with their development needs and priorities should be fully recognized and respected;</li> </ul>
	<ul> <li>Modalities for varying levels of cooperation and exchange of information among national trade facilitation or customs authorities. Such levels could range from mandatory cooperation in the case of countries that are members of customs unions to voluntary cooperation in the case of countries that are not members of customs unions. This could also include operational commitments on stable and meaningful technical assistance and capacity-building in the development of trade facilitation policy that addresses the development needs of developing countries with appropriate flexibility and progressivity;</li> <li>General and specific exceptions to obligations. These exceptions shall include and cover, <i>inter alia</i>: (i) systemic exceptions or general carve-outs for specific economic sectors or activities and measures (e.g. government procurement and internal taxation and regulation); (ii) balance of payments safeguards; (iii)</li> </ul>

	XIV and XIVbis; (iv) country-specific exceptions to obligations for economic sectors, activities or measures to provide appropriate flexibility to every WTO Member, in particular developing and least-developed countries;
	Modalities and commitments for the operationalization of special and differential treatment. This should include ensuring that commitments with respect to the provision of special and differential treatment are made in mandatory and self-executory language. This will include exemptions including possible carve- outs, which are absolutely necessary for developing countries as they strive towards a higher level of economic development. The much needed policy space for attaining developmental objectives including affirmative action programmes has to be an integral element of the structure of any agreement. Provisions for facilitated or automatic waivers of commitments upon application by developing countries should also be provided;
-	Development of a <i>sui generis</i> (i.e. not covered within the DSU) compliance and dispute settlement mechanism, which should include modalities and commitments with respect to reporting, assessment and evaluation of compliance, peer review on a voluntary basis, and dispute settlement rules of procedure. Non-violation complaints under GATT 1994 Article XXIII should not be applicable under any circumstances to any commitments that may result from these negotiations. Provisions for appropriate flexibility for developing countries should be included;
-	The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) in the WTO should not be made applicable for the settlement of any disputes with respect to the implementation or enforcement of any new disciplines or commitments on trade facilitation made by developing and least-developed Members, unless such a developing or least-developed Member party to such a dispute voluntarily agrees to have it be settled pursuant to the DSU. This provision should not prejudice the rights of Members to seek authoritative interpretation of the provisions of any new agreement on trade facilitation under Article IX, Paragraph 2 of the WTO Agreement, nor the rights of Members to voluntarily undertake consultations or to seek good offices, conciliation, or mediation procedures, in order to settle disputes relating to any new trade facilitation disciplines or commitments;
-	Rules relating to: decision-making and recourse to voting; waivers of compliance with commitments; implementation period and "sunset" clauses for commitments; non-applicability to non-participating Members, or "opt-out" options for participating Members; amendments and interpretation procedures;

	accession or ratification procedures; and entry into force.
	II. SPECIAL AND DIFFERENTIAL TREATMENT
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-	<ul> <li>objectives and principles should be observed:</li> <li><i>Promotion of economic development of developing countries</i></li> <li>The objective of the negotiations is to effectively address and promote the economic development needs and aspirations of developing countries, including the need to increase and facilitate market access in developed countries for the products of export interest to developing countries, through the flexible and progressive use of domestic competition policy as an economic development tool. The national policy objectives, level of</li> </ul>
developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.	negotiations with respect to the extent and nature of commitments and the policies to be adopted pursuant to such
	<ul> <li>commitments relating to competition policy.</li> <li>The principle of flexibility in capacity-building with respect to trade facilitation denotes the non-applicability of a "one size fits all" approach. It requires taking full account of the needs of developing and least-developed country participants, in that any evolution of trade facilitation had to reflect the needs and the specific situations of Members, and their ability to implement whatever may be agreed upon in the future, to allow for the full enjoyment of the benefits accruing from trade facilitation. It also precludes requiring Members to harmonize their trade facilitation regimes at levels that may not be realistic nor achievable by developing countries in view of their lower levels of economic development.</li> <li>Principle of progressivity</li> </ul>

	The right of Members to progressively maintain and adopt trade facilitation-related regulations in the domestic context should be recognized. Developing and least-developed country Members should have full and appropriate flexibility to progressively develop their trade facilitation policies according to the needs of their economy and at their own pace and discretion. To this end, developing and least-developed countries should not be required to undertake commitments or adopt trade facilitation policies other than those that they may consider to be suitable for their economic development policy objectives.
	Progressivity refers to the approach or methodology in developing and implementing a trade facilitation regime. It allows for the gradual and selective introduction of instruments to control and facilitate trade into and out of the domestic market. This allows government departments and other stakeholders the time to accommodate and adjust to the changes that are required. Progressivity is particularly important in small economies due to the lack of sufficient human and financial resources to establish a fully functional trade facilitation regime for the first time.
	- Modalities and commitments for the operationalization of special and differential treatment
	This should include ensuring that commitments with respect to the provision of special and differential treatment are made in mandatory and self-executory language. This will include exemptions including possible carve-outs, which are absolutely necessary for developing countries as they strive towards a higher level of economic development. The much needed policy space for attaining developmental objectives including affirmative action programmes has to be an integral element of the structure of any agreement. Provisions for facilitated or automatic waivers of commitments upon application by developing countries should also be provided.
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	This paragraph does not automatically and completely exempt LDCs from undertaking commitments. However, while it still requires LDCs to undertake Trade Facilitation-related commitments, it does provide LDCs the basis for refusing to undertake any Trade Facilitation-related commitments that they think would not be compatible with their development, financial or trade needs or their administrative and institutional capabilities. This is an important provision to have and to use.
capabilities.	In order for LDCs to be able to effectively use this provision and thus exempt themselves from undertaking new Trade Facilitation-related commitments, they need to be able to determine <i>a priori</i> what their "individual development, financial and trade needs or their administrative and institutional capabilities" are so that they can then determine whether any new proposed commitments would be consistent with such needs or capabilities. What needs to be stressed, however, is that the determination of such needs or capabilities is an autonomous determination based solely on the discretion of the LDC concerned. Other Members have no right to call into

	question or to reject such unilateral determination by the LDC. In this regard, a particular LDC may even decide that it is not in its best national interests to undertake any new commitments at all, considering its development, financial and trade needs or its administrative and institutional capabilities, and no other Member may force such LDC to reverse or amend such determination or decision.
	III. TECHNICAL ASSISTANCE AND CAPACITY-BUILDING
<ul> <li>4. As an integral part of the negotiations, Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries, and shall also address the concerns of developing and least-developed countries related to cost implications of proposed measures.</li> <li>5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed</li> </ul>	Paragraph 4 of Annex D implicitly recognizes that the negotiations must be supportive and reflective of the trade facilitation needs and priorities of Members, especially developing countries and LDCs, and that in order for new trade facilitation commitments to be supportive of such needs and priorities, the cost implications of proposed new trade facilitation measures need to be addressed. One way of addressing such cost implications is through the provision of technical assistance and capacity-building support, both during and after the negotiations. In this regard, the provision of technical assistance and capacity-building support for developing countries in the field of trade facilitation should reflect the principles of flexibility and progressivity. Capacity-building for developing countries in the field of trade facilitation should reflect the principles of flexibility and non-time-bound exercise focused on creating sufficient knowledge, skills, experiential, and institutional foundation to enable developing countries to effectively and actively participate in the negotiations and, if they so wish, in the adoption and implementation of their own national trade facilitation legislation. It should take account of the different needs of developing countries and must be supportive of their developmental priorities.
countries to enable them to fully participate in and benefit from the negotiations. Members, in particular developed countries, therefore commit themselves to adequately ensure such	As worded, Paragraphs 5 and 6 of Annex D provide for two (2) types of technical assistance and support for capacity-building. These are: (i) technical assistance and capacity-building in the course of the negotiations; and
support and assistance during the negotiations <sup>5</sup> .	<ul> <li>(ii) technical assistance and capacity-building in implementing the commitments resulting from the negotiations.</li> </ul>
Footnote in original text: <sup>5</sup> It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow	Paragraph 5 commits Members, especially developed countries, to "adequately ensure" such support and assistance in the course of the negotiations. Although the provision is couched in mandatory language, there are no modalities or parameters provided that would operationalise this commitment. Some suggestions on how to operationalise this could include the following:
consideration of various forms of	- provision of funding for the prior conduct of a trade facilitation-related mapping and needs assessment

outcomes.	study, conducted jointly by the WTO Secretariat, the World Customs Organization, UNCTAD, and in
6. Support and assistance should also	consultation with WTO Members, which should have two (2) components. The first component of the
be provided to help developing and	assessment study should look at the extent and status of autonomous developing country adoption and
least-developed countries implement	implementation of trade facilitation legislation; and the second component should identify, upon
the commitments resulting from the	consultation with Members (especially developing countries and LDCs), the trade facilitation needs and
negotiations, in accordance with their	priorities of developing countries and LDCs. This study should be complemented by analytical work
nature and scope. In this context, it is	relating to trade facilitation issues identified by developing countries as being of particular concern to them
recognized that negotiations could lead	in the context of the negotiations. The study and the analytical work should be completed prior to the actual
to certain commitments whose	conduct of negotiations on the text of new trade facilitation-related commitments among Members; and
implementation would require support	
for infrastructure development on the	- establishment of a Trade Facilitation Negotiations Support Fund to which developed Members should
part of some Members. In these limited	mandatorily contribute a specified amount (perhaps an amount equivalent to an agreed-upon percentage of
cases, developed-country Members	their 2004 contribution to the WTO budget), to be administered by the WTO Secretariat (with oversight
will make every effort to ensure	from the TNC through the Negotiating Group on Trade Facilitation), and the funds of which would be used
support and assistance directly related	to implement a negotiations-oriented technical assistance and capacity-building program that would support
to the nature and scope of the	and fund: (i) Trade Facilitation negotiations-oriented research and capacity-building projects identified and
commitments in order to allow	proposed by developing country Members; and (ii) specific travel support for capital-based delegates of
implementation. It is understood,	developing country Members who are knowledgeable on trade facilitation issues to enable them to
however, that in cases where required	participate actively in the Trade Facilitation negotiations.
support and assistance for such	
infrastructure is not forthcoming, and	Under Paragraph 6 of Annex D, the commitment by developed countries to provide support and assistance with
where a developing or least-developed	respect to the implementation of trade facilitation commitments under Paragraph 6 of Annex D is a "best
Member continues to lack the	endeavour" commitment that is "not open-ended." The positive thing about Paragraph 6, though, is that it
necessary capacity, implementation	effectively allows developing countries and LDCs to opt out of implementing those of their new trade facilitation
will not be required. While every effort	commitments "whose implementation would require support for infrastructure development" in the absence of such
will be made to ensure the necessary	support and assistance by developed countries. However, the legal effect of this effective "opt-out" clause for
support and assistance, it is understood	developing countries and LDCs in Paragraph 6 of Annex D vis-à-vis future disputes under the DSU relating to the
that the commitments by developed	implementation of new trade facilitation commitments could be ambiguous because Paragraph 2 of the July
countries to provide such support are	Decision sates that "this Decision and its Annexes shall not be used in any dispute settlement proceeding under the
not open-ended.	DSU and shall not be used for interpreting the existing WTO Agreements."
7. Members agree to review the	
effectiveness of the support and	In view of the above, the Trade Facilitation negotiations should result in clear and unambiguous modalities for

effectiveness of the support and In view of the above, the Trade Facilitation negotiations should result in clear and unambiguous modalities for assistance provided and its ability to effective and substantive long-term post-negotiations technical assistance and capacity-building for developing

support the implementation of the results of the negotiations.	countries in trade facilitation that would include firm and operational commitments, with appropriate flexibility for developing countries, for the establishment of a Trade Facilitation Implementation Support Fund.
8. In order to make technical	
assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD,	Such Fund should come from minimum mandatory annual contributions from developed country Members (perhaps an amount equivalent to an agreed-upon percentage of their annual contribution to the WTO budget) and voluntary contributions from developing country Members, as well as from unspent and unallocated funds remaining in the Trade Facilitation Negotiations Support Fund after the conclusion of negotiations.
WCO and the World Bank to undertake a collaborative effort in this regard.	The Fund should be administered by the WTO Secretariat, with oversight from the General Council, and the funds of which would be used to implement a technical assistance and capacity-building program that would support and fund projects or programmes identified by developing countries and LDCs which are relevant to the following areas:
	(i) Capacity-building and assistance in trade facilitation legislation formulation;
	<ul> <li>(i) Support for the creation of a national human resource base for trade facilitation in developing countries;</li> </ul>
	<ul> <li>(iii) Technical and financial support for national government institutions dealing with trade facilitation; and</li> <li>(iv) Technical cooperation, advice, and assistance vis-à-vis specific procedural and conceptual areas of trade facilitation.</li> </ul>
	In addition, appropriate modalities should be established for the creation of institutional linkages between relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank, for the provision of technical assistance and capacity-building support in trade facilitation for developing countries that would be additional and complementary to the WTO's Trade Facilitation Implementation Support Fund.
9. Due account shall be taken of the	Work and discussions on trade facilitation is already on-going in other international organizations such as the WCO
relevant work of the WCO and other	and UNCTAD. This paragraph takes such work into account but does not, however, provide for clear parameters on
relevant international organizations in	how such work could be taken into account.
this area.	
	In this regard, the Negotiating Group on Trade Facilitation could extend immediately ad hoc observer status for the
	duration of the negotiations to the WCO, UNCTAD, and other international organizations doing relevant work and
	indicating their interest to observe the negotiations, and request the input of such organizations as technical input into the negotiations for the benefit of Members.

IV. NEC	GOTIATING PROCESS IN THE NEGOTIATING GROUP ON TRADE FACILITATION
10. Paragraphs 45-51 of the Doha Ministerial Declaration shall apply to these negotiations. At its first meeting after the July session of the General Council, the Trade Negotiations Committee shall establish a Negotiating Group on Trade	Paragraph 10 of Annex D incorporates the Trade Facilitation negotiations within the DWP negotiations' single undertaking. As such, the negotiating timeframe for the trade facilitation negotiations is the same as that of the other negotiating areas for which no specific end-date has been provided. This paragraph provides the mandate for the establishment of the Negotiating Group on Trade Facilitation, under the oversight of the TNC. The Negotiating Group on Trade Facilitation is, therefore, also subject to the same rules on the conduct and organization of the negotiations under Paragraphs 45 to 51 DMD.
Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.	However, it should be noted that Paragraph 1 of Annex D does not prohibit the Negotiating Group on Trade Facilitation from specifying more detailed operational rules and procedures, consistent with the general rules on the conduct of negotiations under the DMD, to govern the trade facilitation negotiations. In this regard, developing countries may wish to propose the following rules and procedures as <i>sui generis</i> procedures applicable to the trade facilitation negotiations:
	- Negotiations should be transparent and open to participation by all Members and acceding States and separate customs territories. To this end, notices of formal meetings of the Negotiating Group on Trade Facilitation should be distributed, in accordance with regular WTO practice, no later than ten (10) working days in advance of the date of the meeting to which the notice pertains. As a general rule, all Negotiating Group on Trade Facilitation meetings should be formal. The conduct of informal Negotiating Group on Trade Facilitation meetings should be undertaken only in exceptional circumstances, as may be agreed upon by the participants;
	- Notices of all exceptional informal Negotiating Group on Trade Facilitation meetings or consultations, as well as of informal meetings or consultations by some participants in connection with the negotiations, and the agenda for such informal meetings should be circulated to all participants not later than three (3) working days before the date of the meeting to which the notice pertains. All participants should be free to decide whether or not to participate in these informal meetings or consultations;
	- The needs of smaller delegations should be taken into account, e.g. by scheduling meetings in sequence and not in parallel. Formal and informal trade facilitation-related meetings of the Negotiating Group on Trade Facilitation, as well as informal meetings of some participants, should hence be scheduled in a manner that will allow all participants, including those without permanent representation in Geneva, to adequately

prepare for and attend the meeting, or to make their views known; Minutes of each formal and informal negotiating trade facilitation-related meeting of the Negotiating Group on Trade Facilitation should be recorded. Minutes of each informal negotiating meeting by some participants conducted outside Negotiating Group on Trade Facilitation meetings should also be kept. Such minutes for trade facilitation-related meetings of the Negotiating Group on Trade Facilitation and of some of the participants should be circulated to all participants in the three (3) WTO working languages not later than three (3) working days before the next scheduled formal or informal Negotiating Group on Trade Facilitation meeting; All decisions taken by the Negotiating Group on Trade Facilitation in connection with the negotiations should be by explicit consensus. Where decisions cannot be arrived at by explicit consensus, the matter in issue should be decided by voting in accordance with Article IX.1 of the WTO Agreement. A vote of a simple majority of all Members participating in the negotiations should be sufficient to decide the matter in issue: and At least nine (9) months prior to the conclusion of the negotiations, the Negotiating Group on Trade Facilitation should initiate a participatory and transparent assessment and evaluation exercise, with support from the WTO Secretariat and such other international organizations as any Member may suggest, to determine whether or not the range of possible commitments and outcomes of the negotiations are balanced, provide a mutuality of benefits to all participants, and support the development needs and aspirations of developing country participants. The results of this assessment and evaluation exercise should be distributed to Members and made publicly available through the WTO website. The results should not prejudice the right of any Member to maintain or change its negotiating positions and priorities

prior to the conclusion of the negotiations.



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