

TRADE FACILITATION STATE OF PLAY AND IMPLICATIONS OF AN “EARLY HARVEST” ON DEVELOPING COUNTRIES

SYNOPSIS

Recently there has been an indication that some WTO members (especially developed countries) are proposing that an agreement on Trade Facilitation be one of the items to be an Early Harvest in the Doha negotiations in the WTO. In particular, the proposal is for a Trade Facilitation agreement or text to be adopted by the WTO Ministerial Conference in December 2011. This Note describes the state of play of the TF negotiations and analyses the implications of an Early Harvest on TF for the developing countries.

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TRADE FACILITATION STATE OF PLAY AND IMPLICATIONS OF AN “EARLY HARVEST” ON DEVELOPING COUNTRIES

INTRODUCTION

1. Recently there has been an indication that some WTO members (especially developed countries) are proposing that an agreement on Trade Facilitation be one of the items to be an Early Harvest in the Doha negotiations in the WTO. In particular, the proposal is for a Trade Facilitation agreement or text to be adopted by the WTO Ministerial Conference in December 2011.
2. This Note describes the state of play of the TF negotiations and analyses the implications of an Early Harvest on TF for the developing countries.
3. An agreement on Trade Facilitation would most likely benefit developed countries more than developing countries. This could be the reason for the developed countries’ advocacy of this issue. Firstly, the developed countries have already put in place the procedures, equipment and infrastructure and thus the requirements of a TF agreement can be easily met by them. The developing countries on the other hand are far behind, and would have to incur considerable costs to comply with a TF agreement. Secondly, a TF agreement will most likely have the effect of increasing the rate and volume of imports into developing countries, while having much less effects on the exports of developing countries. This enables the developed countries to increase their market access into developing countries.
4. There are two major components in the draft of the trade facilitation text, the first being the new rules and the second being special and differential treatment (SDT) for developing countries. Since there are still many contentious issues in the SDT component, the proposal being made by developed countries is to reach an agreement by December 2011 on just the first component. This would of course be against the interest of developing countries, which will bear all the burden of complying with their new obligations, and which will not enjoy the benefits of SDT, including the payment by developed countries of technical assistance and capacity building activities in developing countries.

5. According to trade expert Bhagirath Lal Das: '[T]here are grave dangers involved in potential agreements in this area if the proposals of the proponents are incorporated in the form of binding commitments. The main objective of the proponents is to have the developing countries adopt rules and procedures in this area which are similar to theirs. It ignores the wide difference in the level of administrative, financial and human resources between the developed countries and developing countries. Also it does not give weightage to the wide difference in social and working environments.'¹

6. This was echoed in a paper by a UNESCAP staffer 'The main reason for the reluctance of many developing countries (DCs) to negotiate on trade facilitation as part of the Doha Development Agenda seemed to be the fear that implementation of such agreement would entail substantial investment in infrastructure and human resources for them, while at the same time requiring nothing from the developed countries who have already implemented many of the trade facilitation measures (TFMs) likely to be included in a multilateral trade facilitation agreement. Some also feared that a trade facilitation agreement might not reflect the needs and priorities of their countries in this area, as most of the standards and international best practices were established by a few developed countries based on their own needs and priorities. Finally, a binding trade facilitation agreement could have serious consequence on some countries because many of the lesser developed countries still derive a significant share of their Government revenue from Customs activities.'²

7. On 21 April 2011, the Chair of the Negotiating Group on Trade Facilitation, Guatemala Ambassador H.E. Mr. Eduardo Ernesto SPERISEN-YURT, issued the eighth revision of the compiled negotiating text for the trade facilitation negotiations (TN/TF/165/Rev.8). This text is divided into two (2) sections: Section I (with 15 articles) pertaining to negotiating texts on new rules or obligations relating to trade facilitation; and Section II on special and

¹ Bhagirath Lal Das (2003), *WTO: The Doha Agenda – The New Negotiations on World Trade*, London and New York: Zed Books and Penang: Third World Network

² Duval, Yann. "Cost and Benefits of Implementing Trade Facilitation Measures under Negotiations at the WTO: an Exploratory Survey." Asia-Pacific Research and Training Network on Trade Working Paper Series 3 (January 2006): 3.

differential treatment provisions for developing and LDC Members in relation to trade facilitation.

8. The negotiations on trade facilitation were launched in 2004 pursuant to the July 2004 Framework Package. However, it is worth recalling that Annex D of the July 2004 Framework (WT/L/579) and Annex E of the Hong Kong Ministerial Declaration (WT/MIN (05)/DEC) stressed the importance and necessity of providing precise, effective, and operational technical assistance and capacity-building (TACB) to developing Members during the TF negotiations and for the implementation of the results thereof by such Members. Furthermore, special and differential treatment (SDT) in TF is a key element in ensuring a development-oriented outcome in the TF negotiations, as clearly recognized by the Hong Kong Ministerial Declaration (Annex E, paras. 6-7, WT/MIN (05)/DEC).

I. General Comments on the Current Negotiating Text

A. Possible Implementation Issues

9. Going through the negotiating texts proposed for Section I on new TF rules and obligations, many of which continue to be bracketed, would seem to clearly indicate that developing countries are likely to face implementation difficulties either individually or collectively should these new TF rules and obligations be adopted and enter into force. These implementation challenges will need to be considered and addressed. These are likely to include, inter alia, the following issues:
 - Article 1 (Publication and Availability of Information) – capacity, infrastructural, or resource constraints to complying with new TF transparency obligations such as making information available through the Internet, establishment of TF enquiry points
 - Article 2 (Prior Publication and Consultation) – ensuring legal consistency with domestic constitutional or statutory rules relating to the drafting, adoption, and entry into force of domestic legislation or regulations, including possible requirements to effect changes in domestic law

- Article 3 (Advance Rulings) – capacity, infrastructural, or resource constraints to complying with timeframes to provide advance rulings, e.g. lack of dedicated customs personnel to provide advance rulings upon request
- Article 4 (Appeal Procedures) – ensuring legal consistency with domestic rules relating to administrative and judicial appeals and review of customs decisions
- Article 5 (Other Measures to Enhance Impartiality, Non-Discrimination and Transparency) -- capacity, infrastructural, or resource constraints to complying with new obligations in relation to establishing an import alert/rapid alert system, a goods detention notification system, test procedures
- Article 6 (Disciplines on Fees and Charges Imposed On or In Connection with Importation and Exportation) – ensuring legal consistency with domestic laws or regulations concerning penalties for breaches of customs laws or regulations, establishment of new tribunals and procedures for the review of administrative customs actions in relation to customs fees or charges
- Article 7 (Release and Clearance of Goods) -- capacity, infrastructural, or resource constraints to complying with new obligations in relation to electronic-based pre-arrival processing procedures, risk management, post-clearance or customs audits, authorized operators, expedited shipments; difficulties in developing countries arising from capacity, infrastructural, or resource constraints in ensuring collection of customs duties, fees and charges in the event that shipment release is separated from final payment of such duties, fees and charges
- Article 8 (Consularization) – ensuring legal consistency with domestic laws on consularization; possible revenue loss arising from the disappearance of consularization fees
- Article 9 (Border Agency Cooperation) -- capacity, infrastructural, or resource constraints to complying with new obligations in relation to border agency cooperation, including on harmonization and coordination of procedures
- Article 10 (Formalities Connected with Importation and Exportation) -- capacity, infrastructural, or resource constraints to complying with new

obligations in relation to review and reduction or limitation of formalities and documentation requirements, use of international standards, establishment of single windows, elimination of pre-shipment and post-shipment inspections, use of customs brokers, application of common border procedures and requirements, use of uniform customs clearance forms and requirements across all border points, return of rejected goods to the exporter, temporary admission of goods for re-export; ensuring legal consistency with domestic laws or regulations relevant to such new obligations

- Article 11 (Freedom of Transit) -- capacity, infrastructural, or resource constraints, as well as ensuring legal consistency with domestic laws or regulations, with respect to complying with new obligations in relation to goods in transit
- Article 12 (Customs Cooperation Mechanism for Trade Facilitation and Compliance) -- capacity, infrastructural, or resource constraints, as well as ensuring legal consistency with domestic laws or regulations, with respect to complying with new obligations in relation to customs cooperation among WTO Members
- Article 13 (Institutional Arrangements) - this will require further stretching of personnel in resource-limited developing country missions to the WTO in order to cover meetings of the new Committee on Trade Facilitation
- Article 14 (National Committee on Trade Facilitation) -- capacity, infrastructural, or resource constraints, as well as ensuring legal consistency with domestic laws or regulations, with respect to complying with new obligations in relation to the setting up of national committees or mechanisms on trade facilitation
- Article 15 (Preamble/Cross-Cutting Matters)

10. New TF commitments should therefore be approached in a way that would provide developing Members with policy space and flexibility to adopt and implement commitments commensurate with their capacity to do so, and subject to the provision of TACB where needed. Developing Members could then, at their discretion, progressively go into higher levels or standards of

implementation as and when capacity exists to do so taking into account their development context.

B. *The Need for Technical Assistance and Capacity Building (TACB)*

11. The negotiating mandate also requires that there must be clearly defined operational mechanisms established to ensure that TACB is actually provided to those Members that need them. A mutually beneficial win-win outcome of the TF negotiations requires that Members engage in a partnership in which TACB is provided by developed Members to assist developing Members in the implementation of new TF commitments. Such TACB should be tailored to the specific needs, circumstances and priorities of the recipients in order for it to be effective, precise and operational. TACB should be equitably provided to all those that require it.
12. The importance of TACB also necessarily implies the equal importance of ensuring that any new TF agreement requires the donor community, including developed Members, to commit to providing adequate modalities and mechanisms through which such TACB could be accessed by those who need it. Developing countries should not be required to implement TF commitments for which TACB is needed if such TACB is absent.

C. *The Need for a Horizontal Special and Differential Treatment Framework*

13. A clear SDT framework in favour of developing countries also needs to be defined for the new TF rules. Developing countries have, since the launch of the TF negotiations, expressed their preference to have a horizontal SDT mechanism in place – e.g. having a set of rules in relation to SDT that would then be horizontally applicable to all new TF obligations. This obviates the need to provide for specific SDT provisions within each new TF obligation. Such a horizontal SDT framework is reflected in Section II (Special and Differential Treatment Provisions for Developing Country Members and Least Developed Country Members) of TN/TF/W/165/Rev.8. Unfortunately, however, the entire section is bracketed.

14. Section II is derived from various proposals that have been put forward by, inter alia, various groups of developing countries in the TF negotiations, including:

- Guatemala et al. (room document, February 2010)
- African, Caribbean and Pacific (ACP) Group (TN/TF/W/161, 29 October 2009)
- Core Group of Developing Countries, ACP Group, African Group, Least-Developed Countries (LDC) Group (TN/TF/W/147, 18 July 2007)
- Core Group of Developing Countries (TN/TF/W/142, 31 July 2006)
- African Group (TN/TF/W/95, 9 May 2006)
- ACP Group (TN/TF/W/73, 10 November 2005)
- African Group (TN/TF/W/56, 22 July 2005)
- Argentina et al. (TN/TF/W/41, 2 June 2005)

15. The common elements that come up in relation to SDT that are present in these various proposals on a horizontal SDT framework for TF would be as follows:

- S&D should extend beyond the granting of traditional transition periods for implementing commitments. The extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members – i.e. the implementation of commitments by developing countries must be commensurate to the implementation capacity of developing countries, which in turn must be related to the delivery of technical assistance and capacity-building (TACB), as needed by developed countries to developing countries and LDCs, in order to establish such implementation capacity.
- 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
- Members shall seek to identify their trade facilitation needs and priorities, particularly those of developing and least-developed countries.
- Members, in particular developed countries, commit themselves to adequately ensure the provision of TACB to developing and LDC Members to enable them to fully participate in and benefit from the negotiations.
- In 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.

- Developing and least-developed Members would not be obliged to undertake investments in infrastructure projects beyond their means.
 - 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.
 - Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.
 - Developing and LDC Members should not be brought to dispute settlement for commitments that are not yet being implemented or which cannot be implemented due to the lack of implementation capacity.
16. The inclusion of a horizontal SDT framework for TF is crucial to ensuring that developing countries, including LDCs, will have the needed flexibility, taking into account their individual circumstances, to implement at their own pace and subject to available resources, any new TF obligations.

II. Implications for Developing Countries of a Trade Facilitation “Early Harvest”

17. Currently, some developed countries are suggesting that TF can be one of the “early harvest” issues that can go into a “Early Harvest” or a “Doha-lite” package that WTO Members could agree to before the end of 2011. However, these suggestions all are generally premised on essentially having a TF outcome that would be concentrated primarily on reaching agreement on Section I of the TF negotiating text – i.e. the new rules section of the TF negotiating text – as it is in this section that one can see some unbracketed texts. Section II on SDT continues to be heavily, if not totally, bracketed, signifying that there is very little agreement on any of the SDT elements that are reflected in Section II.
18. However, agreeing to a Early Harvest or “Doha-lite” TF outcome composed only of Section I (on new TF rules and obligations) and excluding Section II (on SDT and TACB) would have adverse effects on developing countries. Doing so will entail, inter alia, the following:

- **New Obligations on Developing Countries:** A new agreement on trade facilitation will lock developing countries into a new set of TF rules and obligations that are more detailed and rigid than current GATT Articles V, VIII and X, but without the policy flexibility to be able to adjust the level or scope of adoption or implementation of commitments according to specific national circumstances
- **New implementation Problems:** Increase the potential for developing countries to face implementation problems in the future in relation to these new TF rules and obligations which could render developing countries open to WTO dispute settlement proceedings
- Enhance the ability of developed countries, particularly, to penetrate and increase their market access in developing countries by limiting the ability of developing countries to put in place and apply customs procedural or regulatory regimes that would allow for more calibrated or strategically sequenced market opening as and when needed by domestic development priorities
- Significantly increase the ability of developed countries, particularly, to shape and influence domestic customs procedures and policy-making in developing countries as a result of the greater levels of informational transparency and consultations required under the new TF obligations
- **Escape for developed countries from providing assistance to developing countries:** An “early harvest” TF agreement (that does not include SDT) will relieve developed countries of their commitment under Annex D of the July 2004 Framework Package to provide technical assistance and capacity building (TACB) to developing countries in relation to TF both during and after the negotiations, thereby making such provision voluntary and without any concrete linkage to the specific needs and priorities of developing countries
- **Absence of SDT element:** The proposed early harvest on TF will create a new WTO TF Agreement that does not, within itself, contain a framework for SDT, whether specific to various provisions or of a horizontal nature. This would therefore go against the negotiating mandate in paragraph 44 of the

Doha Ministerial Declaration as well as Annex D of the July 2004 Framework Package and Annex E of the Hong Kong Ministerial Declaration.

- **Paying for Heavy Costs of Implementation:** Developing countries will be committing themselves to implementing new procedures and setting up new and expensive infrastructure for which they will incur significant or heavy costs, which they have to pay for themselves, especially if the SDT portion of the trade facilitation text is excluded from the Early Harvest agreement (since there are still too many issues not agreed on). According to a OECD 2004 report, the costs of implementing the trade facilitation measures include:
 - a. Regulatory Costs: of enacting new legislation, amending of existing laws, other resources required for legislative & regulatory work³
 - b. Institutional Costs: for the establishment of new units such as the post-clearance team, a risk management team, a central enquiry point; human resources to recruit new expert staff or redeploy existing staff
 - c. Training costs, relocation costs, planning costs
 - d. Equipment and Infrastructure Costs which are often the most costly elements.

 - **Facilitating Imports Rather Than Exports:** The trade facilitation agreement will be mainly facilitating imports into developing countries, rather than exports. This is because: (1) Most of the procedures and infrastructure envisaged are for accelerating the flow of imported goods into the country; (2) Most developing countries lack the supply capacity to increase their exports especially in the short term; thus unless the trade facilitation agreement focuses on boosting technology, production and marketing networks of developing countries, the export expansion element in trade facilitation will be very limited. (3) There are many provisions in the text that relate to imports, some relate to both imports and exports, but none that deal only with exports; this shows that the agreement will address the facilitation of imports rather than exports.

 - **The increase in imports may cause a deterioration of the trade balance.** If the trade facilitation agreement is implemented, there will be an expansion of imports into developing countries, and this would lead to a deterioration in the trade balance. The amounts of increased imports can be very large. A 2002 study conducted by APEC and the World Bank,
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sought to find the impact of trade facilitation for APEC member countries. They found that an improvement in port logistics would increase imports of goods by \$2.7 billion in Peru⁴; \$10.8 billion in Indonesia⁵; and \$5.8 billion in Thailand⁶. An improvement in standard harmonization indicator would increase imports by: \$1.5 billion in Peru⁷; \$2.3 billion in Indonesia⁸; and \$9.0 billion in Thailand⁹. An improvement in transparency and professionalism would increase imports by: \$3.5 billion in Indonesia¹⁰. On the other hand, the same studies show that developing countries would gain far less in new export earnings compared to their new imports. A study by the TWN shows that the establishment of new port facilities (under a Trade Facilitation programme in APEC countries) would result in new imports to exceed new exports by \$9 billion for Indonesia, \$3.6 billion for Thailand, \$68 billion for China and \$16 billion for the Philippines. On the other hand, the US would gain (new exports exceeding imports) by \$52 billion while Australia and Canada would gain by \$3 billion each.

- **Reduced customs duties and tax revenues for developing countries.** Government revenue may also be reduced through a trade facilitation agreement by lower or fewer fees and charges being able to be charged by developing countries. For example if the bracketed text in Article 6 of the Chair's text¹¹ is accepted, this removes ad valorem fees and charges and requires WTO Members to periodically review their fees and charges with a view to reducing their number and diversity, where practicable. If adopted, this will reduce government revenue from fees and charges. The proposed disciplines on transit fees and charges may also reduce revenue.¹² An OECD (2005) study recognizes that governments use some of these charges to raise revenue and to protect industries. And "Concerns have been raised about the impact of reforming fees and charges on government revenue, particularly in countries where receipts from

⁴ APEC & WB, 51

⁵ APEC & WB, 51

⁶ APEC & WB, 51

⁷ APEC & EB, 51

⁸ APEC & WB, 51

⁹ APEC & WB, 51

¹⁰ APEC & WB, 51

¹¹ TN/TF/W/165/Rev.8

¹² Article 11, TN/TF/W/165/Rev.8

customs play a significant role in the government's budget."¹³ A 2009 study by Zanamwe found that elements of these proposals may pose difficulties for African countries: "The above proposals will affect poor countries adversely because they seem more likely to use ad valorem fees for revenue purpose and protection than richer countries."¹⁴ According to Zanamwe, many African countries use some of these charges to raise revenue for port development and other customs-related purposes; thus, provisions of technical and financial assistance to help poor countries upgrade their ports and roads to assuage their loss is necessary.¹⁵

III. Conclusion

19. If there is to be an agreement on trade facilitation, it is crucial that it contains strong SDT provisions that not only reduces the commitments of developing countries but that ensures that their implementation depends on the extent to which they obtain resources to pay for the costs involved. Thus an early harvest that contains only the new disciplines while doing away with the SDT component of the text or postponing the adoption of the SDT component to a future date would be damaging to the interests of developing countries.

¹³ WTO, Negotiating Group on Trade Facilitation. "Communication from the European Communities & Australia." TN/TF/W/23. 18 March 2005.

¹⁴ Zanamwe, Gainmore (2009). "Trade facilitation and the WTO: a critical analysis of proposals on trade facilitation and their implications for African countries." Chapter 8. Trade Law Centre for Southern Africa (www.tralac.org): 28.

¹⁵ *Ibid.*

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