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## SPECIAL AND DIFFERENTIAL TREATMENT UNDER A POTENTIAL TRADE FACILITATION AGREEMENT

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### I. BACKGROUND

Negotiations of a trade facilitation (TF) agreement under the World Trade Organization (WTO) were launched pursuant to the 2004 July Framework Package<sup>1</sup> (referred to as the post-Cancun decision). They are based on a mandate established in Annex D (“Modalities for Negotiations on Trade Facilitation” ) of the 2004 decision<sup>2</sup> to “clarify and improve” relevant aspects of trade facilitation articles under the GATT 1994, including Articles V, VIII and X GATT<sup>3</sup> (See annex 1 for text of articles). The negotiations aim at further expediting the movement, release, and clearance of goods, including goods in transit. The negotiating text is divided into two sections; section I includes the new rules under negotiations, and section II addresses special and differential treatment (SDT), technical and financial assistance and capacity building. A trade facilitation agreement is propped as one of the outcomes of the ninth ministerial meeting of the WTO to be held in Bali, Indonesia during December 2013.

Special and differential treatment and enhancing technical assistance and support for capacity building has been central to the negotiations on trade facilitation. The 2004 negotiating mandate (i.e. Annex D) included several points on SDT.

Annex D established that negotiations shall take fully into account the principle of special and differential treatment for developing and least-developed countries (LDCs), and that SDT would extend beyond transitional periods for implementation. The mandate conditioned implementation by developing countries and LDCs on the acquisition of financial, technical, and capacity building, based on the delivery of such assistance by developed countries Members of WTO (See Box A and annex 2 for full text of Annex D).

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<sup>1</sup> See WT/L/579.

<sup>2</sup> See: Annex D of the “July package” WT/L/579.

<sup>3</sup> Article V provides for hassle-free movement of transit goods through the territory of other WTO Members. Article VIII seeks to rationalize and simplify border procedures, formalities and charges. Article X requires prompt publication of trade laws and regulations and their uniform, impartial and reasonable administration.

**Box A: Annex D of the “July package” (WT/L/579)**

*“Paragraph 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.*

*Paragraph 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.*

*Paragraph 5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed 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 support and assistance during the negotiations.*

*Paragraph 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.”*

The mandate reflected in Annex D embodies several objectives and principles, including promotion of economic development of developing countries and LDCs, and application of the principles of flexibility and progressivity for developing countries and LDCs<sup>4</sup>. Accordingly, the national policy objectives, level of development, and economic growth needs of developing and least developed countries (LDCs) Members of the WTO had to be fully reflected in the outcomes of the negotiations. The mandate requires full flexibility in terms of the extent and nature of the commitments undertaken by these countries. Thus, it underlines the inadequacy of a ‘one-size-fits-all’ approach to capacity building with respect to trade facilitation.

<sup>4</sup> See: South Centre (2004) «Detailed Analysis of Annex D to the General Council Decision July 2004: Modalities for Negotiations on Trade Facilitation», page 4.

Moreover, negotiations had to deal with modalities and commitment for operationalization of SDT, including ensuring that SDT-related commitments are made in mandatory and self-executory language<sup>5</sup>. This could include exemptions and possible carve-outs necessary for developing countries in their strive towards economic development, and automatic waivers of commitments upon application by developing countries.

Furthermore, the mandate recognizes the need to address the cost implications of the agreement through the provision of technical assistance and capacity building, both during the negotiations and in the implementation phase. This is acknowledged as necessary in order to address the trade facilitation needs and priorities of developing countries and LDCs. Furthermore, the mandate recognizes the importance that technical assistance and capacity building be designed on a long-term, non-time-bound approach, that is led by the recipient party. The mandate recognizes the right of developing countries and LDCs to opt-out of implementing new trade facilitation commitments whose implementation requires 'support for infrastructure development' in the cases where such support is not provided by developed countries<sup>6</sup>.

Annex E of the Hong Kong Ministerial Declaration (2005) outlined the work program of the negotiating group on trade facilitation. The Annex required that technical assistance and capacity building commitments contained in Annex D of the July 2004 Framework be 'made operational in a timely manner' and be made 'precise, effective, and operational, and reflect the trade facilitation needs and priorities of developing countries and LDCs' (See Annex 3, paragraph 6 of Annex E). Annex E recognizes the need for SDT provisions that 'allow for necessary flexibility in implementing results of the negotiations' (See Annex 3, paragraph 7 of Annex E). Furthermore, Annex E establishes that developed country Members are expected to provide support and assistance to developing and least developed country Members in a comprehensive manner and on a long term and sustainable basis, backed by secure funding, in order to allow implementation

Section II is central to ensuring that developing countries and LDCs have 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. WTO members face the challenge of reflecting the intent of the agreed trade facilitation negotiating mandate in operational rules to be embodied in a potential multilateral trade facilitation agreement. The following brief reflects on the propositions on SDT that came in the initial WTO Members' proposals on trade facilitation. It then gives a brief on the negotiations, highlighting the idea of 'categorization' of TF provisions as SDT. The brief discusses the obligations of developed country members and the operationalization of conditioning implementation on acquisition of capacity, as well as other flexibilities central to Annex D mandate.

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<sup>5</sup> See: South Centre (2004) «Detailed Analysis of Annex D to the General Council Decision July 2004: Modalities for Negotiations on Trade Facilitation».

<sup>6</sup> It is worth noting that the legal effect of this 'opt-out' option under paragraph 6 of the Annex D in cases of future dispute settlement cases is not clear, since paragraph 2 of the Annex D states that "The General Council agrees that this Decision and its Annexes shall not be used in any dispute settlement proceeding under the DSU and shall not be used for interpreting the existing WTO Agreements" (WT/L/579).

## II. Recap of propositions on SDT in initial WTO Members' proposals on trade facilitation

Overall, the main premise established in the 2004 Annex D, and reflected in Annex E of the Hong Kong Ministerial Declaration, includes (1) the conditioning of implementation by developing countries and LDCs on the acquisition of capacity to implement, (2) linking that to self-assessment and determination of acquisition of capacity by the recipient Members themselves, and (3) responsibility of developed country members to provide assistance and capacity building. This approach has been presented in communications by WTO member states and member groupings, reflecting their understanding of the intent and content of Annex D.

In 2005, the **African group** had underlined that SDT should be reflected in legally binding provisions that are precise, effective, and operational (TN/TF/W/33). This was re-iterated in the **collective communication presented by the core group of developing countries<sup>7</sup>, the ACP group, the African group, and the LDCs group** in 2007 (TN/TF/W/147).

The African group had stressed that paragraph 2 of Annex D requires that SDT should also be reflected in legally binding provisions that “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 with respect to national structural or sector-specific trade facilitation-related projects or programs identified by developing or least-developed countries as being necessary, in their view, to allow them to fully implement such new commitments” (TN/TF/W/33). In this respect, the African group perceived that the goal of assisting developing countries, especially LDCs, to address cost implications effectively needs to be treated as priority (TN/TF/W/33).

In the same line, **the ACP group** had stressed that SDT in favor of developing countries and LDCs is accorded and made fully effective and operational; that international cooperation is enhanced through the provision of sufficient and effective technical assistance and capacity-building in trade facilitation; and that the outcomes of the negotiations reflect the needs of these countries for development policy space and flexibility (TN/TF/W/73). The group noted the importance that a balance be struck between the legitimate objective of border control and the economically desirable goal of trade facilitation, calling for a full account of the economic structures and levels of development in ACP countries (see TN/TF/W/73).

Furthermore, the ACP group had highlighted the flexibilities in Annex D, including that the extent and timing of entering into commitments shall be related to delivery of the required

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<sup>7</sup> The group includes: Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, Philippines, Rwanda, Tanzania, Trinidad and Tobago, Uganda, Venezuela, Zambia, and Zimbabwe.

support and assistance and to implementation capacities of developing and LDCs; that LDCs will be required to undertake commitments only to the extent consistent with their individual needs and capabilities; that the principle of SDT for developing and LDCs must be fully reflected and made directly operational in any negotiated outcome; and that the concerns of developing and LDCs relating to the cost implications of proposed measures shall be effectively addressed.

On **maintaining flexibility as part of SDT** under the TF agreement, the African group stressed the need for “a country specific approach that would make implementation of any new rules a matter of national priority. This implies that new rules would be implemented only when this conforms with or supports the attainment of national development objectives” (TN/TF/W/95). On this issue, the collective communication by the core group of developing countries, the ACP group, the African group, and the LDCs group in 2007 (TN/TF/W/147) noted that “new trade facilitation commitments should therefore be approached in a way that would enable developing Members to commit to a specified minimal level or standard of implementation of commitments, with appropriate flexibility for least-developed Members, and subject to the provision of technical assistance and capacity building 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”. As an example, the communication indicated that “developing Members could agree to a commitment requiring mandatory publication in government gazettes of relevant existing customs procedures in the local or national language, but Internet publication of such procedures would be at their discretion as and when capacity arises to enable them to do so”.

On the **principle of progressivity**, the African group noted that it means that a developing country should enter into a commitment only after a certain benchmark is achieved indicating its ability to implement a commitment and indicating that the technical assistance and capacity building obligations by developed countries have been met (TN/TF/W/95). The group also called for an opt-out possibility from applying negotiated disciplines, allowing developing countries to undertake fewer or limited obligations. On the issue of dispute settlement, the African group requested that future disciplines should exclude the dispute settlement mechanism, i.e. they should be “best-endeavor commitments”.

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). Within this context, they envisioned that the support for implementation would include: support for acquisition or transfer of appropriate trade facilitation-related equipment, technologies, systems or methodologies that could be adopted or adapted by developing countries as they deem necessary; support for regional trade facilitation initiatives and programs in ACP and other developing countries; and enhancement of ACP and other developing countries’ human and technical resource base in trade facilitation, among other factors.

On **modalities of technical assistance and capacity building and related coordination mechanisms**, the core group of developing countries, the ACP group, the African group, and the LDCs group in their 2007 collective communication highlighted the importance of “providing adequate modalities and mechanisms through which such technical assistance and capacity building could be accessed by those who need it” (TN/TF/W/147). The communication notes that “developing countries should not be required to implement TF commitments for which technical assistance and capacity building is needed if such technical assistance and capacity building is absent” (TN/TF/W/147). They have further underlined that “the TF agreement should contain clear and operational commitments by developed Members to provide technical assistance and capacity building support to developing Members. Operational modalities that facilitate and improve the delivery of such technical assistance and capacity building to the recipients, and which are appropriate to the requirements and resource constraints of developing Members, should also be incorporated in a TF agreement” (TN/TF/W/147).

The African group underlined that support required to implement trade facilitation commitments goes beyond the traditional technical assistance provided by the WTO secretariat (TN/TF/W/56). The African group urged members to consider establishing a coordination mechanism in order to enhance synergies and ensure efficient use of available resources, and underlined the importance of long-term sustainability of technical assistance programs (TN/TF/W/56).

The group of Latin American countries (TN/TF/W/41) called for an assessment of the desirability of establishing a mechanism to organize and coordinate technical assistance and capacity building in the area of trade facilitation, pooling the efforts of donors, recipients, and other international organizations.

The ACP group highlighted the need for “an operational inter-agency coordinating mechanism set up for the provision of technical assistance and capacity building to developing countries during and after the negotiations to help them design and undertake trade facilitation-related projects or programs identified as part of their trade facilitation negotiations needs or priorities” (TN/TF/W/73). The group noted that such mechanism should be a “trade facilitation technical assistance and capacity building ‘one-stop shop’ or ‘single window’ facility for the expeditious processing, allocation, and evaluation of funding for technical assistance and capacity building requests from developing countries in connection with specific projects or programs ...” (TN/TF/W/73). Thus the group called for special Trade Facilitation Technical Assistance and Capacity-Building Fund that would be managed by an inter-agency coordinating mechanism, which would receive technical assistance and capacity building proposals and requests.

Other members have suggested the need for a long-term mechanism, in the form of either a committee, a working group, a task force, annual periodic meetings, any other appropriate structure, or even recourse to an existing mechanism, in order to deal with: reviewing the effectiveness of the support and assistance provided to developing Members, especially least-developed Members, so as to ensure progress on the implementation of the results of the negotiations; granting to developing Members, especially LDCs, upon request, specified, time-limited exceptions from obligations, in whole or in part, taking into account their

financial, trade and development needs with a view to ensuring full compliance with the final results of the negotiations; providing a regular forum to allow Members to consult on any matters relating to trade facilitation; and serving as a coordination platform, for sharing national experiences, and maintaining close contact with the relevant international organizations (see TN/TF/W/62).

Furthermore, the core group of developing countries has recommended the establishment of a 'trade facilitation technical assistance and capacity-building support unit- TFTACBSU' (TN/TF/W/142, 2006). The core group explained that the WTO Secretariat would establish the TFTACBSU within its structure, during a period of three months from the date of signing the trade facilitation agreement. According to the suggestion of the core group of developing countries, the unit would report to the WTO Committee on Trade Facilitation, to:

- (i) monitor and annually report on the compliance by developed Members with their obligations to provide technical assistance and capacity-building support to developing and least-developed Members, including low-income economies in transition, under the Agreement;
- (ii) monitor and annually report on the extent, efficacy, and usefulness for the beneficiaries of the bilateral provision of trade facilitation-related technical assistance and capacity-building support among Members;
- (iii) monitor and inform Members of the various trade facilitation-related technical assistance and capacity-building facilities being provided by other relevant international organizations which developing and least-developed Members, including low-income economies in transition, could access or resort to;
- (iv) work with other relevant international organizations to establish and/or expand trade facilitation-related technical assistance and capacity building resources for developing and least-developed Members, including low-income economies in transition; and
- (v) serve as the focal point for coordinating the provision of technical assistance and capacity-building by establishing a Trade Facilitation Register for the entry of notifications and requests for technical assistance and capacity-building provided by Members.

### **III. Negotiating special and differential treatment under a trade facilitation agreement**

A horizontal SDT framework is reflected in Section II of the trade facilitation draft consolidated negotiating text (TN/TF/W/165/Rev.17).

#### *a. Categorization of TF provisions as SDT; attempt to capture intent of Annex D*

One of the main propositions emerging out of developing countries' proposals on Section II was the suggestion to categorize the provisions under Section I of the TF agreement. This proposition aims at capturing the intent of Annex D, thus allowing for self-selection by developing countries and LDCs of a set of commitments that would be implemented subject to the acquisition of technical and financial assistance and capacity building (TN/TF/W/147).

According to the core group of developing countries, the ACP group, the African group, and the LDCs group in their 2007 communication, developing countries and LDCs should be able to define a category of minimal set of commitments which would be determined individually to be implemented after entry into force; another category of commitments that would be implemented after the conclusion of a transition period of a number of years after the entry into force of the TF agreement; and a third category of other commitments that do not fall under either of the previous categories and that would be implemented by developing and least developed Members as and when appropriate in their development context.

In their 2007 communication, the core group of developing countries, the ACP group, the African group, and the LDCs group have underlined that “the implementation of mandatory commitments shall be undertaken by developing Members after a number of months from the time they conclude that individual implementation capacity has been acquired pursuant to the provision of the necessary TACB support. Verification of capacity acquisition shall be self-determined or, if agreed by the developing Member concerned, in consultation with the donor or developed Member that provided the relevant technical assistance and capacity building support” (TN/TF/W/147).

This proposition builds on the communication of the core group of developing countries (TN/TF/W/142) which presented two classes of trade facilitation obligations for developing countries and LDCs; one that contains the mandatory obligations based on a pre-agreed closed list, and another that contains ‘best-endeavor’ obligations based on a pre-agreed closed list. According to their proposition, the first class of mandatory obligations would be divided into two categories. The first category would include obligations without a transition period or requirement for technical assistance and capacity building, as well as obligations with a transition period that are identified based on capacity self-assessment of each country among developing countries and LDCs. The second category would include the mandatory obligations whose implementation is deferred subject to acquisition of implementation capacity.

In relation to these suggestions, a previous proposal by the African Group (TN/TF/W/95) suggested that GATS-rules type provisions could be used as the possible template for making binding commitments in a new TF agreement. This meant that for each specific obligation, developing Members could also indicate the limitations or restrictions that they wish to place on their commitment to implement such obligation. According to the group, this would help provide for effective, precise and operational SDT that goes beyond transition periods, as provided for in Annex D of the 2004 July Framework.



*b. Brief on the negotiations of Section II*

Section II entitled “SDT provisions for developing country members and least developed country members” includes nine articles addressing the following areas: general provisions and basic principles; definitions of categories of commitments; notification and implementation of category A provisions; notification and implementation of category B and category C commitments (see more on categorization under section III.a); early warning mechanism: extension of implementation dates of provisions under categories B and C; shifting between categories B and C; grace period for the application of the understanding on rules and procedures governing the settlement of disputes; provision of technical assistance, financial assistance and capacity building; and information on assistance to be submitted to the trade facilitation committee.

The discussions on SDT remained stalled at the conceptual level for a major part of the negotiations period. After the 17<sup>th</sup> revision of the negotiating text on trade facilitation, section II remains with a significant amount of bracketed text that is not agreed. Overall, as reflected by the 17<sup>th</sup> revision of the trade facilitation negotiating text, Section II fails to capture the agreed intent reflected in the Ministerial mandate in Annex D of the July 2004 framework. As currently standing (based on TN/TF/W/165/Rev.17 released in July 2013), Section II falls short of presenting binding rules that could serve as strong basis for capturing the obligations of developed countries towards operationalization of SDT. It also puts burdensome obligations on developing countries and LDCs, including through limited timeframes for defining allocation of provisions under different categories, and burdensome procedures for notification to and/or request from the trade facilitation committee.

Some of the unresolved and heavily bracketed areas under Section II (according to draft negotiating text TN/TF/W/165/Rev.17) include: undertaking binding commitments by developed countries in regard to provision of technical and financial assistance; operationalizing the condition of linking implementation to acquisition of capacity; extension of the implementation period of commitments in the cases where Members face difficulties; and agreement on grace periods for the application of the dispute settlement mechanism to disputes against developing countries and LDCs arising from TF provisions under the various categories.

*c. Obligations of developed country members*

It was recognized in Annex E to the Hong Kong Ministerial Declaration that developed countries shall provide support and assistance to developing and LDC Members in a comprehensive manner and on a long-term and sustainable basis, backed by secure funding.

Accordingly, Section II of the TF agreement should capture a direct obligation by developed country members to provide support and assistance to developing and least developed country Members. For these purposes, it is important to clarify the definition of ‘donor members’ under the agreement (see Article 9 under TN/TF/W/165/Rev.17). In this regard, the agreement should guarantee that each developed country Member registered with the trade facilitation committee to be established by the agreement shall be referred to as “Donor Member”. The agreement should also guarantee that all developed countries members of the WTO have the

obligation to define their contribution to technical and financial assistance, as well as capacity building ahead of time. This along their obligation to submit to the trade facilitation committee information on their contributions, including the status and amount committed/ and disbursed in the preceding twelve months and committed in the forthcoming twelve months. In addition, it is important to strengthen the mandatory nature of the articles addressing the obligations of developed countries (see for example articles 1.4, 4, 8, and 9 under the draft negotiating text TN/TF/W/165/Rev.17).

Furthermore, it is important to ensure that no arbitrary or unjustified non-tariff barriers are imposed in the process of provision of technical and financial assistance and capacity building, including, *inter alia*, the imposition of any unilateral financial or trade measures regarding the provision of such technical and financial assistance and capacity building support. It is also crucial to ensure that the provision of such assistance is demand-driven, such that the capacity-building projects or programmes to be assisted or financed are designed and implemented upon the initiative of the developing or least developed country Member concerned.

For the purposes of facilitating the provision of technical, financial, and capacity building assistance needed for implementation of commitments under the Trade Facilitation Agreement and in order to achieve an approach that is based on longer-term and consistent assistance, it is useful to consider the potential of setting up a Trade Facilitation Fund. This proposition stems from the ideas reflected in developing countries' communications on coordination mechanisms of assistance (reflected under Section II of the brief). Such a Fund would be governed by a Board composed of representatives from developed and developing country Members in a manner that reflects the geographical distribution of the WTO membership. The Board would be responsible for the disbursement of funding consistent with the needs of the requesting developing and LDC Member. The governance, terms of reference, and operational modalities of the Fund would be developed by the trade facilitation Committee no later than a set period of time after the entry into force of the Agreement.

It is worth recalling that the core group of developing countries has spelled out multiple benchmarks and principles in regard to the obligations of developed Members relating to technical and financial assistance and capacity building support (TN/TF/W/142, 2006). The group noted that developed countries should, prior to entry into force of the agreement, "establish appropriate mechanisms or modalities for the provision of technical assistance and capacity-building support to developing and least-developed countries that lack the necessary implementation capacity to adopt and implement such obligations" (TN/TF/W/142). The core group of developing countries added that "such mechanisms or modalities shall provide for simple and time-bound procedures to be followed for such assistance and support to be accessed, and shall also identify the financial and technical assistance resources that they are going to make available" (TN/TF/W/142). The group stressed that assistance should be "demand-driven, need-based, and specifically tailored to the needs and requirements of each individual recipient country" and be "additional and complementary to the developed Members' existing or already allocated resources for official development assistance".

*d. Operationalizing the condition of implementation on acquisition of capacity*

It is clear from Annex D that the priority in shaping the SDT provisions that would be applicable in the negotiated outcome should not simply be in relation to transition periods but should also reflect the level of implementation capacity of developing and LDC members. This is currently sought to be achieved through the establishment of three Categories (A, B, and C) for allocating the binding provisions to be agreed under Section I of the potential TF agreement. This design is built on the proposals put forward by developing country Members in the earlier years of negotiations (reflected under Section II of the brief). The underlying understanding for this approach is that developing countries and LDC Members themselves are the ones who can best determine whether they are in a position or have the capacity to implement new TF binding provisions and the timeframe and capacity conditions under which they would be able to do so.

The definitions of the categories (provided under Article 2 of the draft negotiating text TN/TF/W/165/Rev.17) establish that provisions to be allocated by a developing country or LDC member under Category A would be implemented upon entry into force of the trade facilitation Agreement; those to be allocated under Category B would be implemented on a date after a transitional period of time following the entry into force of this Agreement; while those to be allocated under Category C would be implemented after entry into force of the agreement and upon the satisfaction of two conditions including a transitional period of time and the acquisition of implementation capacity through the provision of technical and financial assistance and support for capacity building.

Given the intent reflected in the negotiating mandate from Annex D, the implicit approach in Section II would be to consider provisions as falling under Category C rather than under Categories A or B. By explicitly pegging the extent and timing of entering into commitments to the implementation capacities of developing and LDC members, Annex D conditions commitment to implementation to the prior existence of implementation capacity. Accordingly, implementation capacity must first be proven to exist, generally by having the Member indicating so through allocating the binding provision under Category A or B or after acquiring implementation capacity under Category C. If the developing or LDC Member does not indicate that it has implementation capacity with respect to a specific binding provision right away (Category A) or after a certain transition period (Category B) provision, then the provision should be assumed as automatically falling under Category C. In effect, this also means that if a developing country or LDC Member does not categorize a binding provision under any of the Categories, for whatever reason, applying the approach in Annex D would mean that such binding provision should be implicitly considered as a Category C provision – i.e. it can be implemented by the developing or LDC Member only after such Member has acquired the capacity to implement.

It is worth noting that the core group of developing countries have presented a similar understanding of the ‘categorization’ approach. Their communications dated 31 July 2006 (TN/TF/W/142) notes that obligations for developing countries and LDCs not selected for implementation upon entry into force of the agreement or after a transition period “shall, without need for prior notification, be deemed as requiring the acquisition of capacity to implement by individual developing or least-developed Members, including low-income

economies in transition. These obligations shall be implemented by such Members only after: (a) the entry into force of the Agreement or the deposit of their respective instruments of ratification, whichever is later, (b) the provision of the necessary technical assistance and capacity-building support hereunder; and (c) the submission of the Notifications of acquisition of implementation capacity ....”<sup>8</sup>.

Category C reflects the full embodiment of the mandate and intent agreed under Annex C. Thus, the design of procedures related to category C (see Article 4 of TN/TF/W/165/Rev.17) should provide basis for developing countries and LDCs to access technical and financial assistance and capacity building needed for acquisition of capacity to implement specific provisions they deem themselves not capable of implementing. The obligation of developed countries in terms of provision of technical and financial assistance and capacity building should be captured in agreements with developing countries and LDCs. In the event that such an agreement is cancelled, concluded or otherwise terminated while the developing country member deems that it has not resulted in the development of adequate capacity to implement the provisions designated under Category C to which the agreement refers, then the developing country Member shall not be obliged to implement such provisions under Category C.

The procedural rules under this Category should not be burdensome on developing countries and LDCs in a way that dilutes their rights captured under Annex D. Accordingly, the interface of developing countries and LDCs with the trade facilitation committee in regard to Category C should be based on a ‘notification’ with automatic implementation and not a ‘request’. It is also essential that the evaluation of acquisition of capacity that would trigger the obligation to implement provisions allocated by developing countries and LDCs under Category C be based on individual capacity self-assessment by each Member country.

Furthermore, it is important to clarify in the trade facilitation agreement that developing countries and LDCs are not expected to categorize the provisions of a ‘best endeavor’ nature under Section I. Such provisions shall be implemented based on the full discretion of the Member country, since they do not put a time-bound commitment on the WTO members. Categorization of such provisions could lead to over-riding the rights of developing countries and LDCs achieved through negotiating Section I rules to secure ‘best endeavor’ language that provide more flexibilities in the implementation and less binding ‘results obligations’ compared to language of a ‘mandatory’ nature.

*e. Other flexibilities central to Annex D mandate*

Among the SDT provisions under Section II is the ‘early warning mechanism: extension of implementation dates of provisions under categories B and C’ (see article 5 of TN/TF/W/165/Rev.17), ability of ‘shifting between categories B and C’ (see article 6 of TN/TF/W/165/Rev.17), and ‘grace period for the application of the understanding on rules and procedures governing the settlement of disputes’ (see article 7 of TN/TF/W/165/Rev.17). These provisions are meant to be an in-built flexibility to deal with exigencies and are essential to capture the SDT and flexibilities designed under Annex D.

<sup>8</sup> See: paragraph 11(iii) of communication TN/TF/W/142, page 5.

Under the ‘early warning mechanism’, a developing country Member or least developed country Member that considers itself to be experiencing difficulty in implementing a provision under category B or C by the date they notified would have the option to notify the Committee of new dates by which they would be able to implement the provision concerned. According to the negotiating text (TN/TF/W/165/Rev.17), a member is obliged to submit a ‘request’ from the committee in the case it considers that it requires a second or any subsequent extension. In order to achieve effective benefit from this provision, Section II rules should guarantee that the Committee shall consider the granting of an extension positively taking into account the specific circumstances of the Member submitting the request.

Under the provision on ‘shifting between Categories B and C’, developing country members and least developed country Members who have notified provisions under Categories B and C may shift provisions between such categories through the submission of a notification to the Committee. Such a step would presume that additional time will be required for implementing the provision taking into account the time needed to secure an agreement with a donor and completion of the technical and financial assistance and capacity building to enable capacity to implement.

Under the provision on ‘grace period for the application of the understanding on rules and procedures governing the settlement of disputes’, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against developing country and LDC members concerning any provision under Category A, B, and C for a certain period of time.

It is worth noting that the core group of developing countries (TN/TF/W/142, 2006) had noted that “no developing or least-developed Member, including low-income economies in transition, shall be brought by any other Member to dispute settlement proceedings under the Dispute Settlement Understanding in order to enforce compliance with obligations that such developing or least-developed Member, including low-income economies in transition, is not yet obliged to implement”. The group highlighted in its communication that “members shall prioritize the use of consultations, good offices, conciliation or mediation as mechanisms for ensuring compliance with the obligations, including the obligations relating to the provision of technical assistance and capacity building support ... which they are implementing. As the last resort, the Dispute Settlement Understanding may be resorted to in order to settle disputes in this regard” (TN/TF/W/142).

The trade facilitation committee is referred to multiple times throughout the negotiating text (including under Articles 3, 4, 5, 6, 7, 8, and 9 of Section II). The role of the Committee and procedures it undertakes in terms of reviewing notifications and requests from developing countries and LDCs should be made clear, including its decision-making procedures and related timeframes.

Furthermore, members negotiating the TF agreement should consider the relevance of the timeframes made available for developing countries and LDCs in regard to notifications, re-

notifications, and requests of new dates for implementation. The calculation of the timeframes allocated under Section II should reflect a level of flexibility and should be based on the practices and capacities that developing countries and LDCs have. This is especially important given that some practices stipulated under Section I are more complicated and need more time than others.

#### **Priorities for the purpose of preserving the intent of Annex D in negotiating Section II**

- Establish clear and mandatory rules to operationalize the condition of implementation by developing countries and LDCs on **acquisition of capacity**.
- Ensure that developing countries and LDCs are **not expected to categorize the provisions of a ‘best endeavor’ nature** under Section I.
- Ensure that **procedural rules** under the agreement, especially Category C, are not burdensome on developing countries and LDCs in a way that dilutes their rights captured under Annex D.
- Safeguard the **self-assessment in determining the acquisition of capacity** by the developing countries and LDCs.
- Guarantee procedural rules that ensure **effective implementation and use of ‘early warning mechanism: extension of implementation dates of provisions under categories B and C’ and ‘shifting between categories B and C’**, through establishing rules that guarantee that the Committee give positive consideration to Members’ requests.
- Ensure that the **timeframes** made available for developing countries and LDCs in regard to notifications, re-notifications, and requests of new dates for implementation are relevant to achieving effective SDT.
- Base the **relation of the developing and LDC members with the trade facilitation committee** under Section II on a ‘notification’ procedure and not a ‘request’ process.
- Establish mandatory rules to capture a **direct obligation by developed country members** to provide support and assistance to developing and least developed country Members
- Guarantee that all developed countries members have the obligation to **define their contribution** to technical and financial assistance, as well as capacity building ahead of time.
- Establish an **effective process to monitor and annually report on the compliance by developed Members** with their obligations to provide technical assistance and capacity-building support to developing countries and LDCs, and monitor and annually report on the extent, efficacy, and usefulness for the beneficiaries.
- Ensure that **no arbitrary or unjustified non-tariff barriers** are imposed in the process of provision of technical and financial assistance and capacity building, and that the latter is demand-driven and designed and implemented upon the initiative of the recipient Members.
- Establish a **Trade Facilitation Fund** to guarantee longer-term and consistent assistance.

#### **IV. Concluding remarks**

Annex D (2004) reflects consensus of the WTO membership and their intent to work towards SDT rules that extend beyond traditional transitional periods. It reflects a consensus to establish rules that conditions implementation by developing countries and LDCs on the acquisition of capacity to implement, and the provision of technical and financial assistance and capacity building by developed country members. This approach has been presented in communications by WTO member states and groupings, reflecting their understanding of the intent and content of Annex D. The WTO membership faces the challenge of crafting rules that capture the full intent behind Annex D and reflect SDT in legally binding provisions that are precise, effective, and operational. A strong, effective, and operational Section II on SDT is central to potentially achieving internal balance in a trade facilitation agreement.

## Annex 1: Articles V, VIII, and X GATT

### Article V

#### Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.
3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.
5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.\*
6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a



requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

### **Article VIII**

#### **Fees and Formalities connected with Importation and Exportation\***

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).

(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.\*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

- (a) consular transactions, such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

## Article X Publication and Administration of Trade Regulations

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.  
(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.  
(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of

administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

## Annex 2: Annex D

### Modalities for Negotiations on Trade Facilitation

(source: [http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm#annexd](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#annexd))

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 (\*). Negotiations shall also aim at 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.
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.
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.
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.
5. It is recognized that the provision of technical assistance and support for capacity building is vital for developing and least-developed 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 support and assistance during the negotiations (\*\*).
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.

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.

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, WCO and the World Bank to undertake a collaborative effort in this regard.

9. Due account shall be taken of the relevant work of the WCO and other relevant international organizations in this area.

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 Facilitation and appoint its Chair. The first meeting of the Negotiating Group shall agree on a work plan and schedule of meetings.

*(4): 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.*

*(5): In connection with this paragraph, Members note that paragraph 38 of the Doha Ministerial Declaration addresses relevant technical assistance and capacity building concerns of Members.*

### Annex 3: Annex E: Trade Facilitation

#### Report by the Negotiating Group on Trade Facilitation to the TNC

(source: [http://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/final\\_annex\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min05_e/final_annex_e.htm))

1. Since its establishment on 12 October 2004, the Negotiating Group on Trade Facilitation met eleven times to carry out work under the mandate contained in Annex D of the Decision adopted by the General Council on 1 August 2004. The negotiations are benefiting from the fact that the mandate allows for the central development dimension of the Doha negotiations to be addressed directly through the widely acknowledged benefits of trade facilitation reforms for all WTO Members, the enhancement of trade facilitation capacity in developing countries and LDCs, and provisions on special and differential treatment (S&DT) that provide flexibility. Based on the Group's Work Plan (TN/TF/1), Members contributed to the agreed agenda of the Group, tabling 60 written submissions sponsored by more than 100 delegations. Members appreciate the transparent and inclusive manner in which the negotiations are being conducted.

2. Good progress has been made in all areas covered by the mandate, through both verbal and written contributions by Members. A considerable part of the Negotiating Group's meetings has been spent on addressing the negotiating objective of improving and clarifying relevant aspects of GATT Articles V, VIII and X, on which about 40 written submissions<sup>9</sup> have been tabled by Members representing the full spectrum of the WTO's Membership. Through discussions on these submissions and related questions and answers (JOB(05)/222), Members have advanced their understanding of the measures in question and are working towards common ground on many aspects of this part of the negotiating mandate. Many of these submissions also covered the negotiating objective of enhancing technical assistance and support for capacity building on trade facilitation, as well as the practical application of the principle of S&DT. The Group also discussed other valuable submissions dedicated to these issues<sup>10</sup>. Advances have also been made on the objective of arriving at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues, where two written proposals have been discussed<sup>11</sup>. Members have also made valuable contributions on the identification of trade facilitation needs and priorities, development aspects, cost implications and inter-agency cooperation<sup>12</sup>.

<sup>9</sup> TN/TF/W/6-W/15, W/17-W/26, W/28, W/30-W/32, W/34-36, W/38-W/40, W/42, W/44-W/49, W/53, W/55, W/58, W/60-W/62, W/64-W/67, W/69, W/70.

<sup>10</sup> TN/TF/W/33, W/41, W/56, W/63, W/73 and W/74

<sup>11</sup> TN/TF/W/57 and W/68

<sup>12</sup> TN/TF/W/29, W/33, W/41, W/62 and W/63

3. Valuable input has been provided by a number of Members in the form of national experience papers<sup>13</sup> describing national trade facilitation reform processes. In appreciation of the value to developing countries and LDCs of this aspect of the negotiations, the Negotiating Group recommends that Members be encouraged to continue this information sharing exercise.

4. Building on the progress made in the negotiations so far, and with a view to developing a set of multilateral commitments on all elements of the mandate, the Negotiating Group recommends that it continue to intensify its negotiations on the basis of Members' proposals, as reflected currently in document TN/TF/W/43/Rev.4, and any new proposals to be presented. Without prejudice to individual Member's positions on individual proposals, a list of (I) proposed measures to improve and clarify GATT Articles V, VIII and X; (II) proposed provisions for effective cooperation between customs and other authorities on trade facilitation and customs compliance; and, (III) cross-cutting submissions; is provided below to facilitate further negotiations. In carrying out this work and in tabling further proposals, Members should be mindful of the overall deadline for finishing the negotiations and the resulting need to move into focussed drafting mode early enough after the Sixth Ministerial Conference so as to allow for a timely conclusion of text-based negotiations on all aspects of the mandate.

5. Work needs to continue and broaden on the process of identifying individual Member's trade facilitation needs and priorities, and the cost implications of possible measures. The Negotiating Group recommends that relevant international organizations be invited to continue to assist Members in this process, recognizing the important contributions being made by them already, and be encouraged to continue and intensify their work more generally in support of the negotiations.

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.

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<sup>13</sup> TN/TF/W/48, W/50, W/53, W/55, W/58, W/60, W/61, W/65, W/69 and W/75.

7. The Negotiating Group also recommends that it deepen and intensify its negotiations on the issue of S&DT, with a view to arriving at S&DT provisions that are precise, effective and operational and that allow for necessary flexibility in implementing the results of the negotiations. Reaffirming the linkages among the elements of Annex D, the Negotiating Group recommends that further negotiations on S&DT build on input presented by Members in the context of measures related to GATT Articles V, VIII and X and in their proposals of a cross-cutting nature on S&DT.





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