

## BRIEF ON TRADE FACILITATION NEGOTIATIONS

An agreement on trade facilitation is being propped as a viable outcome from the World Trade Organization (WTO) 9<sup>th</sup> Ministerial Conference, to be held in Bali at the end of 2013. WTO Members formally agreed to launch negotiations on trade facilitation in 2004 pursuant to the July 2004 Framework Package (referred to as the post-Cancun decision)<sup>1</sup>. It is worth remembering that trade facilitation was part of the four ‘Singapore Issues’, along with investment, government procurement, and competition, which developing countries have opposed to include in the WTO negotiations agenda at the 5<sup>th</sup> WTO Ministerial Conference in Cancun.

When the negotiations on trade facilitation were re-launched in 2004, the negotiations mandate (Annex D of the “July package”)<sup>2</sup> explicitly stressed that the negotiations “shall aim to clarify and improve” relevant aspects of trade facilitation articles under the GATT 1994 (i.e. Articles V, VIII and X GATT<sup>3</sup>), with a view to further expediting the movement, release and clearance of goods, including goods in transit. Thus, the negotiations are not meant to limit or eliminate the rights and obligations under the three GATT articles or impinge on national policy and regulatory space. Such tendencies would be commensurate to going beyond the negotiations mandate.

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. The negotiations mandate set an intrinsic link between the two tracks of the negotiations, whereby it 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.

The current rules under negotiations do not allow for internal balance of a potential trade facilitation agreement. New rules under Section I are mandatory with very limited flexibilities that could allow for Members’ discretion in implementation. Special and differential treatment under section II is being diluted, and developed countries are not accepting binding rules on their obligation to provide technical and financial assistance and capacity building. Overall, the challenges that developing countries have repeatedly pointed to regarding a trade facilitation agreement have as yet not been addressed.

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<sup>1</sup> The General Council Decision of 1 August 2004 ([WT/L/579](#)), referred to as ‘July Package’ or post-Cancun decision, established that: “taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document”.

<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.

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## CONTENT AND SCOPE OF THE NEGOTIATIONS:

- Negotiations are focused on measures and policies intended for the simplification, harmonization and standardization of border procedures. They **do not address the priorities for facilitating trade by developing countries**, which include enabling infrastructure, building productive and trade capacity, and enhancing inter-regional trade. Facilitation of trade under a new binding WTO agreement would thus most likely lead to higher imports without corresponding higher exports and irreplaceable loss of tariff revenue, with adverse effects on the trade balance.

- Most TF provisions under negotiations are entirely new or go far beyond what the WCO Revised Kyoto Convention (RKC) requires. **The arguments that the TF Agreement is largely a copy of the RKC, or that the TF Agreement is simply reaffirming what most Member states already agreed to in the RKC, do not hold.** Furthermore, any obligation undertaken under a new agreement on trade facilitation could be enforced through the dispute settlement body of the WTO and through sectoral cross retaliation among countries, unlike the Kyoto Convention.

## POTENTIAL IMPLICATIONS:

- **The trade facilitation agreement is a binding agreement that could be subject to WTO dispute settlement.** Moreover, the trade facilitation negotiating text is designed based on mandatory language in most provisions, which includes limited and uncertain flexibilities in some parts. The implications of accepting binding commitments in a new trade facilitation agreement and the cost of non-compliance could be significant. A non-complying country may in certain cases have to invest in infrastructure and incur substantial costs to comply with its binding commitments. A member may also accept commitments for activities that may get outsourced to the private sector and over which there might be little control. It is worth noting that several WTO members have been already challenged under WTO dispute settlement based on the grounds established by TF articles V, VIII, and X of the GATT.

- A trade facilitation agreement would carry significant implications for WTO Member States at each of the regulatory, institutional, and legislative fronts, and would carry short-term and recurring long-term costs.

- **The rules under negotiations are currently over-prescriptive in many areas and could intrude on national policy and undermine the regulatory capacities and space of WTO Member States.** The negotiating text is charged with undefined and vague legal terminology as well as ‘necessity tests’<sup>4</sup>, beyond what the GATT articles include. These could

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<sup>4</sup> When a ‘necessity test’ is applied, the WTO DSB consider the following factors (as applied in US- Gambling case: (1) the importance of the interest and value intended to be protected (2) the extent the measure contributes to realization of those ends (3) trade impact of the measure and (4) if reasonable available WTO consistent alternatives exist. A ‘necessity test’ includes a comparison between the challenged measure and possible alternatives, the results of which are considered in light of the importance of the interests at issue. In this process, the DSB could be involved in questioning the actual interests at hand or the objectives being served by the measure invoked by the state. The appellate body noted that the word ‘necessary’ refers to a range of degrees of necessity, depending on the connection in which it is used (see AB report Korea- Various measures on Beef, para. 161), whereby the appellate body noted: “at one end of this continuum lies ‘necessary’ understood as ‘indispensable’; at the other end is ‘necessary’ taken to mean as ‘making a contribution to’”; See also WTO analytical booklet 2011-2013 page 62.

establish multiple grounds for challenging a broad range of WTO Members' laws, rules, regulations, and measures that are not limited to customs, but are more broadly trade-related or regulations 'on or in connection with' import, export and transit of goods.

- Several of the provisions under negotiations could hold **significant administrative and institutional burdens on Member States, especially developing countries and LDCs**, whose customs and customs-related institutional mechanisms are not as advanced compared to developed countries. Moreover, it is worth noting that most of the proposals based on which negotiations are undertaken were presented by developed countries, reflecting the nature and form of practice that they already undertake at the national level. Thus, developing countries are asked to converge to the practice and standards of developed countries. It is worth noting that Members will be obliged to put in practice these requirements across the board at the national level. While some Members may have the practice implemented in some regions or custom agencies, it remains significantly difficult to ensure a homogenous alignment with the requirements across the national level.

- Several provisions would have **significant influence on national legislative processes**. Some of the articles proposed under the agreement refer to an undefined open-ended category of 'interested parties'. The reference to the category 'interested parties' does not appear in the GATT language, and in this sense could be considered an extension beyond the mandate of negotiations wherever it appears in the negotiating text. This category could include an expanded list of entities that have a direct or indirect relation to the trade transactions covered by the agreement, and do not necessarily have to be located in the territory of the Member State implementing the measure. For example, the language of the negotiating text in regard to 'prior publication and consultation on laws and regulation' include reference to 'interested parties'. This reference could result in an obligation on the Member to open the legislative process to prior consultation and comments on draft, new, and amended rules by traders and other interested parties located outside the territories of the Member. This may lead to speculation, lobbying pressures, and profiteering by interest groups. Such lobbying and influence could tilt the balance in national regulatory and legislative processes away from the national constituencies and development priorities.

- Costs would include human resource expenses, equipment and information-technology systems, as well as other significant infrastructure expenditures. These **costs would not be limited to a one-time investment and most of them are of a recurring nature**. Accordingly, meeting these costs will necessitate a carve-out of the national budgets on a yearly basis, and could essentially lead to a disproportionate diversion of limited resources from other vital institutions and public services to customs administration.

## STATUS OF THE NEGOTIATED AGREEMENT AND PRIORITIES FOR DEVELOPING COUNTRIES

- There is still a **significant imbalance within the text. A pre-requisite for a balanced text is a strong Section II that preserves the intent reflected in the mandate of the negotiations (Annex D, 2004)**, which includes clear and mandatory rules to operationalize the condition of implementation by developing countries and LDCs on acquisition of capacity. Procedural rules under the agreement should not be burdensome on developing countries and LDCs in a way that dilutes their rights captured under Annex D. Moreover, developing countries and LDCs should have the right to self-determine acquisition of

capacity. The agreement should include mandatory rules to capture a direct obligation by developed country members to provide support and assistance to developing and least developed country Members, as well as a mandate for establishing a Trade Facilitation Fund to guarantee longer-term and consistent assistance.

- Overall, new TF commitments should 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 technical assistance and capacity building where needed. Developing Members could then, at their discretion, progressively move into higher levels or standards of implementation as and when capacity exists to do so, taking into account their development context.

**ANNEX: SUMMARY OF IMPLEMENTATION ISSUES THAT MIGHT ARISE FROM NEW TRADE FACILITATION RULES (based on: TN/TF/W/165/REV.16)**

<p><b>Article 1: Publication and Availability of Information</b></p>	<p>Article 1 expands the obligations stipulated under Article X GATT (Publication and administration of trade regulation). Implementation of this provision would be administratively burdensome, and would imply high recurring costs.</p> <p>Article X GATT was used as grounds for challenging Member States practices under the WTO dispute settlement mechanism; the proposed language under Article 1 adds additional grounds based on which Members could be challenged.</p> <p>The proposed language also broadens the scope of laws, regulations, and measures that could be challenged based on the grounds of Article 1.1. Article 1 refers to “other interested parties”, which is new language that does not appear under Article X GATT, and as currently used could encompass a wide range of stakeholders that could claim rights under this provision.</p> <p>Article 1.3 on enquiry points prohibits certain types of fees; it thus extends beyond GATT disciplines, which link fees to the approximate cost of services rendered, and could be considered an intrusion on policy space. Moreover, answering enquiries would have significant legal implications, especially if there were no restrictions on who could enquire.</p>
<p><b>Article 2: Prior Publication and Consultation</b></p>	<p>Article 2 holds cost implications, is administratively burdensome, and could prove intrusive on national policy space.</p> <p>The Article gives the right to traders and other interested parties to comment on the introduction or amendment of laws and regulations. It extends the rights to the category of “interested parties” including foreign entities not located in the territories of the concerned Member State. This could lead to speculation, lobbying pressures, profiteering by interest groups that seek to block the changes.</p> <p>While national trade related laws and regulations should primarily be defined according to the developmental priorities and interests at the national level, this provision could distort this process with significant influence from foreign entities and private interests. Implementing this Article would entail changes to the legislative process in many Members in order to accommodate publishing new or amended trade laws and regulations prior to their entry into force, and accommodate the right of the parties covered by the article to comment.</p> <p>This Article extends beyond the negotiation mandate.</p>
<p><b>Article 3: Advanced Rulings</b></p>	<p>Article 3 has significant implications in terms of costs and administrative burdens, and could have implications on the revenues of governments.</p> <p>The Article does not consider the specifics of advanced rulings based on the nature of the goods being treated, although advanced rulings on tariff classification may be easier for some goods versus others.</p> <p>The provision leaves the category of “applicant” who has a right for advanced ruling broad without any clear qualification. This could cause significant burdens on Members (see 3.7, definitions). It also requires advanced rulings for 6 different areas, which adds the complications and costs of the advanced ruling system required from Members.</p> <p>The Article provides limited grounds for declining rulings (Article 3.2). The grounds for revoking rulings should be safeguarded (Article 3.3).</p> <p>By using terminology like ‘promptly’ and ‘reasonable’ (Article 3.1), the Article provides grounds based on which a Member could be challenged in regards to implementing the provision. The WTO dispute settlement body would examine the adequacy of the time a Member undertook to issue an advance ruling or the time span between the moment a Member declines to issue an advance ruling and the time it notifies the applicant in writing of its decision.</p> <p>This Article extends beyond the mandate of negotiations.</p>

<p><b>Article 4: Appeal or Review Procedures</b></p>	<p>The article entails significant administrative burdens and is intrusive on national appeal procedures. It expands the appeal obligation to cases of administrative decisions by customs and other relevant border agencies (4.1.1), whereas the GATT X focuses on customs matters.</p> <p>The use of terminology like “non-discriminatory manner” (4.1.3) to qualify appeal or review procedures sets ground for interpretation and questioning of the national appeal procedures. Other terminology like “within set periods as specified in its laws or regulations or without undue delay” (4.1.4) establishes grounds outside the national legal system upon which appeal procedures could be questioned.</p> <p>The requirement of harmonization of systems at the national level (4.1.6) is not in practice in most countries, and would cause significant burden.</p> <p>The reference to customs unions under the article would require: certain level of harmonization of appeals against customs decisions; binding effect of an appeal decision across various members of the customs unions; in addition to creation of supranational institutions to ensure uniform interpretation.</p> <p>There is lack of clarity of the implications on customs unions in which some countries are WTO members and others are not.</p>
<p><b>Article 5: Other Measures to Enhance Impartiality, Non-discrimination, and Transparency</b></p>	<p>This article addresses the systems of import alerts, which often result in significant non-trade barriers. The Article could help in addressing such challenges, but is currently not articulated in a useful manner.</p> <p>As currently proposed, the provision could impose a mandatory ‘import alert’ system on Members, many of which do not implement such a system. If the Article is mandatory, then it would entail significant administrative burdens to ensure the procedures of import alert/ rapid alert system are undertaken as stipulated in the overly prescriptive provisions of 5.1.2. and 5.3.</p>
<p><b>Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation</b></p>	<p>Article 6 could carry significant implications on government revenues as well as on regulatory space. Compared to Article VIII GATT, Article 6 introduces additional requirements for publishing specified information about fees and charges (6.1.4 &amp; 6.1.5), publishing any new or amended fees or charges and making available “adequate time” prior to their entry into force, and undertaking mandatory periodical review of fees and charges in order to reduce their number and diversity.</p> <p>The Article prohibits fees or charges on ad valorem basis (still bracketed). It is expected that poorer countries are more adversely impacted because they seem more likely to use ad valorem fees than richer countries. Moreover, specific rates for fees and charges can create inequitable results.</p> <p>The Article sets a list of ‘costs of services’ based on which assessment of fees and charges would be undertaken (6.1.2), and which could impose limitations on Members when evaluating any new or existing fees and charges for compliance and aligning them with these rules. Such a list is not included under Article VIII GATT.</p> <p>Article 6.2 on penalty disciplines could dilute the penalty system and limit the ability to deter breachers, which is counter intuitive within a system where extensive facilitative measures are taken for the interest of the trader. It is also overly prescriptive and intrudes on national policy space, especially when it comes to grounds for: evaluation of ‘penalty’ (6.2.2) that usually differs from country to the other; setting the remuneration of a government official; and setting time limitations for initiating penalty disciplines.</p> <p>Overall, this article extends beyond the mandate of negotiations.</p>
<p><b>Article 7: Release and Clearance of Goods</b></p>	<p>This Article is one of the longest and most complicated provisions in the text, and its various parts carry significant implications in terms of costs, administrative burdens, and impacts on revenues of government, as well as intrusion on national regulatory space.</p> <p>As currently articulated, the Article includes multiple grounds for challenging Members’ practices.</p>

	<p>Pre-arrival processing (7.1) is considered as an “exception” to normal declaration processing and thus implementation of this provision requires changing the workflow at the national level. It also necessitates administering a complex guarantee system.</p> <p>The provision on electronic payments (7.2) could extend beyond or contradict the mandate of minimizing the incidence and complexity of import and export formalities and decreasing and simplifying import and export documentation requirements. In many countries it will necessitate legislative changes to allow for electronic payments of customs duties, taxes, fees and charges, and would necessitate significant infrastructure investments.</p> <p>The provision on separation of release from final determination of customs duties, taxes, fees, and charges (7.3) would intrude on the sovereign function of collecting customs duties. It could hold significant impacts on governmental revenues. It could also prove unfair for SMEs, which may not be in a position to furnish guarantees/ securities stipulated under this provision.</p> <p>The provision on risk management (7.4) establishes categories of ‘high risk consignments’ and ‘low risk consignment’, and the obligation to expedite release of the former. Thus, it establishes potential preferential treatment for some goods versus others. The provision sets wide grounds for questioning and challenging the manner in which Members design and apply the risk management system. It includes a list of criteria to be used as the basis for the risk management system (7.4.3), which would be used to evaluate and judge the adequacy of the Members’ practices.</p> <p>Post-clearance audit (7.5) could increase the hazards and risks associated with some goods, and especially those that cannot be easily retrieved after release in the market. It may make developing countries’ borders more porous with serious consequences.</p> <p>Establishment and publication of average release time (7.6) could be extremely administratively difficult. It is based on non-mandatory language. The published averages are critical, as they would be used as benchmarks to evaluate the Member’s practices under other provisions of Article 7, such as the obligation under 7.3 (separation and release).</p> <p>The provision on ‘authorized operators’ (7.7) establishes grounds for special or preferential customs treatment to be provided to reliable traders, and includes over-prescriptive provisions on criteria defining this category. The schemes and selection criteria under this article are over prescriptive and linked to international standards. International standards are often established in a selective manner; it often do not reflect the concerns and realities of various countries and especially developmental concerns, which could leave the developing countries and their traders at a disadvantage in terms of applying and meeting these standards.</p> <p>The provision on expedited shipments (7.8) is administratively burdensome and has serious financial implications. By setting a minimum benchmark focused on goods entered by air cargo, the provision is tilting the preferential treatment among traders to this category of goods.</p> <p>The provision on ‘perishable goods’ (7.9) stipulates preferential treatment for a wide range of goods, that is not limited to perishable food or goods that would undertake decay naturally in the case of delay. The provision lacks a useful definition of ‘perishable goods’ that would be covered by the Article. The provision could create tensions with undertaking the SPS –related checks and requirements.</p>
<p><b>Article 8: Consularization</b></p>	<p>This Article clearly goes beyond the mandate.</p> <p>Article VIII.4 of the GATT explicitly allows Members to undertake consular transactions in connection with importation and exportation. Accordingly, many developing countries oppose this provision.</p>
<p><b>Article 9: Border Agency Cooperation</b></p>	<p>This Article would entail substantial costs to re-engineer border processes in order to synchronize or harmonize data capture, controls and all other formalities, including human resource training. It also entails setting automated processing systems that can accommodate the domestic transit operation and track effective clearance procedures (9 bis Alt 1).</p>

<p><b>Article 10: Formalities Connected with Importation and Exportation and Transit</b></p>	<p>This Article entails significant cost implications and is highly intrusive on national regulatory processes.</p> <p>The Article extends beyond the negotiating mandate, especially in terms of the limitations it sets on pre-shipment and post-shipment inspections and prohibition on introduction of pre-shipment inspections (10.6). This would over-ride Members' rights under the Agreement on Pre-shipment inspections and extend beyond the mandate of clarifying and improving Article V, VIII, and X GATT.</p> <p>The Article sets the 'decrease and simplification' (10.2.2) of formalities and documentation as benchmark for evaluating the practice of Members in reviewing the formalities and documentation. It thus limits the consideration of other objectives that could be commensurate and needed within the national context. It also includes a list of criteria to be taken into account in this review process. Accordingly, it restricts the grounds based on which Members would address formalities and documentation relating to import, export, and transit (See 10.1).</p> <p>The Article includes reference to 'interested parties' as a stakeholder whose input should be taken into account in the review of formalities and documentation (10.1); inclusion of such an open-ended category would be highly burdensome and intrusive on Members practices.</p> <p>It also sets multiple grounds for challenging formalities and documentation requirements, through language such as "less trade restrictive manner" and "in a manner as not to constitute an unnecessary obstacle to trade" (See 10.2).</p> <p>Accordingly, Members would be significantly prone for being found in violation of their obligations under this Article.</p>
<p><b>Article 11: Freedom of Transit</b></p>	<p>This Article extends beyond Article V GATT on traffic in transit and intrudes on national policy space.</p> <p>The Aarticle will specifically impact those Members with fixed infrastructure for transit of energy products within their territory (e.g., transit pipelines or high-voltage transmission grids) and those Members who have state enterprises (e.g., state-owned railways) or private enterprises with exclusive or special privileges (e.g., pipeline operators or toll road concessionaires) that regulate or apply formalities or fees to transit traffic.</p> <p>It extends beyond the GATT, especially in: requiring prohibition of calculating charges on ad valorem basis; requiring periodic review of charges on traffic in transit with a view to reducing them; and prohibiting customs convoys except in specific 'high risk' cases (leaving high risk undefined).</p> <p>Moreover, the requirement of national treatment for goods in transit extend beyond what the GATT stipulates; goods in transit and domestically produced goods are not "like" goods (see 11.5).</p> <p>According to this article, Members may not be allowed to apply controls of compliance with technical standards on goods in transit, which may restrict Members' abilities to address concerns with hazardous goods. Members would be required to limit customs controls, data and document requirements and formalities on goods in transit to those 'necessary to identify the goods and ensure compliance with transit requirements'. There is no clarity whether this would take into consideration transit requirements on certain goods as stipulated under national law.</p> <p>Overall, the article as designed would establish multiple layers that could challenge the ability of Members to administer formalities, documentation, and controls with a view to limit hazardous spills from certain kind of goods in transit, including through the use of language as 'more restrictive on traffic in transit than necessary'(11.3), 'addressed in a less restrictive manner'(11.3), 'not applied in a manner that constitute disguised restriction on transit traffic' (11.3), and 'not more burdensome than necessary' (11.8).</p>
<p><b>Article 12: Customs Cooperation</b></p>	<p>This Article regulates customs-to-customs exchange of information for purposes of verifying doubtful goods' declarations submitted by an importer, exporter, or its agent. The article clearly states the scope</p>



	<p>of requests and obligations of the “requesting members” vis-à-vis the confidentiality of information received and the use of this information solely for the purpose for which it is intended. The Article also spells out the obligations and rights of the “requested Member”.</p> <p>Given that the TF agreement would be putting in place multiple measures in order to facilitate and enhance trade flows between countries, such cooperation between customs on exchange of information would play an essential role in assisting Members in controlling against criminal activities and loss of customs revenue, which is crucial for developing countries.</p> <p>Yet, as currently drafted, the article includes very wide grounds that could dilute the functionality and effective use of this article (see for example provisions 12.7 and 12.8 on use of the exchanged information, and provisions 12.9 and 12.16 on grounds for refusal by requested Member). It would need revision to make these provisions more in line with the objectives of the Article.</p>
<p><b>Article 13: Institutional Arrangements</b></p>	<p>This Article establishes a committee on trade facilitation. Besides the stipulations under this Article, the role of the committee is addressed across the different provisions of the negotiating text. A broad mandate of the Committee is under discussion, including mandates related to reviewing the operation and implementation of the TF agreement, developing procedures, managing notification and categorizations of provisions under Section II, including the extension of deadlines for Members facing difficulties in implementation. This could hinder the access of developing and least-developed country Members to special and differential treatment in the implementation phase of the agreement.</p>
<p><b>Article 14: National Committee on Trade Facilitation</b></p>	<p>Members may face capacity, infrastructural, or resource constraints, as well as challenges with ensuring legal consistency with domestic laws and regulations, with respect to complying with new obligations in relation to setting up national committees or mechanisms on trade facilitation.</p>
<p><b>Article 15: Preamble/ Cross- Cutting Matters</b></p>	<p>This section is expected to be addressed after the substantive rules under the agreement have been established.</p>



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