A LEGAL ANALYSIS OF THE NEW WTO AGREEMENT ON TRADE FACILITATION
- With a focus on developing countries

Lisa Gregorsson

Thesis in International Law, 30 HE credits
Examiner: Pål Wrange
Stockholm, Autumn term 2014
Abstract

The WTO has presented a new agreement on trade facilitation, which will change and expand WTO law. Economic academia on trade facilitation is numerous, while legal scholars have written little about the new WTO agreement. Legal analysis of the agreement is therefore required. The agreement consists of three sections, where one section (constituting almost half of the legal text) is devoted to Special and Differential Treatment of developing countries.

This paper provides a legal analysis of the new WTO agreement on trade facilitation, with particular focus on its consequences for developing country members and its Special and Differential Treatment provisions directed towards them. I argue that the new agreement pays special attention to developing country concerns and encompasses detailed and lengthy provisions on Special and Differential Treatment, where a category system replaces the common “one size fits all” constructions. Furthermore, a conditional link is created between developing country members’ obligation to implement certain provisions and donor members’ supply of assistance and support for capacity building. However, the language used implies that such assistance cannot, yet again, be enforced legally.

Key words: Trade Facilitation Agreement, Special and Differential Treatment, developing countries and WTO.
# List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
</tr>
<tr>
<td>Committee on Trade Facilitation</td>
<td></td>
</tr>
<tr>
<td>DDA</td>
<td>Doha Development Agenda</td>
</tr>
<tr>
<td>DSB</td>
<td>Dispute Settlement Body</td>
</tr>
<tr>
<td>DSM</td>
<td>Dispute Settlement Mechanism</td>
</tr>
<tr>
<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
</tr>
<tr>
<td>EC</td>
<td>European Communities</td>
</tr>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>GNI</td>
<td>Gross National Income</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>LDC</td>
<td>Least Developed Country</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>SDT</td>
<td>Special and Differential Treatment</td>
</tr>
<tr>
<td>TF</td>
<td>Trade Facilitation</td>
</tr>
<tr>
<td>TFA</td>
<td>Trade Facilitation Agreement</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UN/CEFACT</td>
<td>UN Centre for Trade Facilitation and Electronic Business</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
<tr>
<td>UNDRD</td>
<td>UN Declaration on the Right to Development</td>
</tr>
<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
</tr>
<tr>
<td>WCO</td>
<td>World Customs Union</td>
</tr>
<tr>
<td>WTO</td>
<td>World Trade Organization</td>
</tr>
<tr>
<td>WTO Agreement</td>
<td>Agreement Establishing the World Trade Organization</td>
</tr>
</tbody>
</table>
# Table of Contents

ABSTRACT................................................................................................................................. I

LIST OF ABBREVIATIONS ......................................................................................................... II

TABLE OF CONTENTS .................................................................................................................. III

1 INTRODUCTION .......................................................................................................................... 1
  1.1 BACKGROUND AND CONTEXT .............................................................................................. 1
  1.2 PURPOSE OF THE STUDY .......................................................................................................... 3
  1.3 RESEARCH QUESTION ............................................................................................................ 3
  1.4 METHOD AND MATERIAL ........................................................................................................ 3
  1.5 LIMITATIONS .......................................................................................................................... 4
  1.6 DISPOSITION ............................................................................................................................ 5

2 TERMINOLOGY ............................................................................................................................ 6
  2.1 DEVELOPING COUNTRIES ..................................................................................................... 6
  2.2 DEVELOPMENT ....................................................................................................................... 7
  2.3 SPECIAL AND DIFFERENTIAL TREATMENT ....................................................................... 10
  2.4 TRADE FACILITATION ............................................................................................................. 11

3 TRADE AND DEVELOPMENT WITHIN THE WTO ................................................................ 11
  3.1 HISTORY ............................................................................................................................... 11
  3.2 THE DOHA DEVELOPMENT AGENDA ................................................................................ 13
  3.3 CONCLUDING REMARKS AND COMMENTS ....................................................................... 14

4 THE TRADE FACILITATION AGREEMENT .......................................................................... 14
  4.1 BACKGROUND ....................................................................................................................... 14
  4.2 THE PURPOSE OF THE TRADE FACILITATION AGREEMENT ............................................ 15
  4.3 THE LEGAL TEXT OF THE TRADE FACILITATION AGREEMENT ....................................... 16
    4.3.1 Section I .......................................................................................................................... 17
    4.3.2 Section II – Special and differential treatment provisions for developing country members and least-developed country members ............................................................................. 20
    4.3.3 Section III – Institutional arrangements and final provisions ...................................... 23
  4.4 THE RELATIONSHIP BETWEEN THE TRADE FACILITATION AGREEMENT AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE .................................................. 24
  4.5 CONCLUDING REMARKS AND COMMENTS ..................................................................... 26

5 THE TRADE FACILITATION AGREEMENT FROM A DEVELOPING COUNTRY PERSPECTIVE .......................................................................................................................... 26
5.1 General legal impacts ................................................................. 26
5.2 The traders’ perspective ............................................................. 30
5.3 Implementation aspects ............................................................. 33
5.4 Concluding remarks and comments ............................................. 34

6 Special and differential treatment provisions ................................... 34
   6.1 Construction ........................................................................... 35
   6.2 Language ................................................................................ 39
   6.3 A comparison with special and differential treatment provisions in other
       WTO agreements ..................................................................... 42
       6.3.1 Provisions in other WTO agreements ................................. 42
       6.3.2 Doctrine ........................................................................... 44
       6.3.3 Case law ........................................................................... 46
   6.4 Concluding remarks and comments ............................................. 48

7 Conclusion ..................................................................................... 49

8 List of references ............................................................................. 52

Appendix – Trade Facilitation Agreement .......................................... 61
1 Introduction

1.1 Background and context

The World Trade Organization (WTO) is an international organisation dealing with global rules of trade between states. The purpose of the WTO is to ensure that trade flows as smoothly, predictably and freely as possible.\(^1\) The organisation was established in 1995 and stems from the previous international collaboration around the General Agreement on Tariffs and Trade (GATT). At the core of the WTO lie the numerous WTO agreements on different trade topics. To date the membership consists of 160 states and autonomous customs territories.

There is a constant debate about the WTO’s lack of democracy and protection for the environment and human rights, developing countries find themselves being put to a margin in negotiations and dispute settlements, ministerial meetings collapse, and the list continues, which has resulted in various academic (and non-academic) books, articles and other. There is also an abundance of literature dealing with WTO agreements and their case law. The debate regarding the WTO system concerns areas such as economics, international relations, politics and law.

The course “International Law and the Economy” at Stockholm University opened my eyes to the enormous world of the WTO. Especially interesting is the situation for developing countries, which represent two thirds\(^2\) of the WTO membership. Recognising them being a large and very diverse group of countries, I am interested in how trade and their development is connected.

The latest round of negotiations in the WTO, the Doha round that was launched in 2001, is focusing on the situation for developing countries in the world trade. The very agenda of the negotiations is called the Doha Develop-

---

\(^1\) WTO, 'The WTO… In brief…'.
\(^2\) WTO, ‘Trade and Development’.
ment Agenda (DDA). One area where negotiations have taken on a more positive route and resulted in a drafted agreement, compared to other areas where negotiations at times seem fruitless, is that of trade facilitation (TF).

The achievement, a drafted and adopted agreement, can be explained by the minimal disagreement as to the usefulness of reforms in the area of TF. Furthermore, concerns for implementation aspects have not been neglected, which has been necessary to get developing countries on board. It should also be mentioned that meanwhile WTO negotiations have taken place, developing countries have received significant aid, assistance and financial support for TF projects from institutions such as the World Bank. TF as such has not been very controversial. Differences among the members in the negotiations have primarily concerned how to link new obligations to the provisions of assistance by developed members.

At a first glance one quickly notices that an extensive part of the Trade Facilitation Agreement (TFA) is devoted to Special and Differential Treatment (SDT) of developing country members. It is therefore interesting to analyse how the TFA corresponds to the DDA and what the obligations and SDT for developing countries contain.

The TFA and the very concept of TF is widely described and debated within the area of economics. Turning to the legal aspect of the topic, analyses and literature are virtually absent. A new agreement under the WTO system will set out new rules for member countries to follow. It will, once inserted into Annex 1A of the Agreement Establishing the World Trade Organization (WTO Agreement), change the WTO legal system. Therefore, analysis of this unexplored legal area is necessary and urgent. Aiming to fill a small part of this

---

3 Finger 2009, 96.
4 Jones, 163.
5 Finger 2009, 96.
6 The WTO Agreement can be described as an umbrella agreement to which agreements on specific trade topics are attached. Annex 1A contains multilateral agreements on trade in goods. This is where the TFA needs to be inserted. For further information on WTO legal texts, visit the WTO web page, [http://www.wto.org/english/docs_e/legal_e/legal_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm).
gap, this paper provides a legal analysis of the TFA focusing on its impact on developing country members.

1.2 Purpose of the study
This short study aims to legally analyse the new WTO agreement on TF, with particular attention devoted to developing countries’ concerns. The analysis focuses on legal instruments within the TFA that could be of specific benefit for developing countries, namely Section II that contains SDT provisions for developing country members and least-developed country (LDC) members. The study further aims at broadening the understanding of developing country members’ participation in the WTO, with particular focus on SDT.

1.3 Research question
The TFA will have different impact on different actors participating in international trade, such as states and traders. The research question of this paper is: How is the TFA, the first substantial outcome of the DDA, addressing developing country concerns?
   - To what extent is the TFA legally affecting developing countries, from a state perspective as well as from a trader’s perspective?
   - How are the SDT provisions constructed, and what can developing countries expect in terms of enforceability?

1.4 Method and material
To analyse a new trade agreement under the WTO, which has not entered into force, presents limitations when searching for legal sources, literature and other material. Nevertheless, I choose to do so in order to present a paper that is more than a summary of what has already been said in a certain area.

The legal text of the TFA is at the core of this analysis and it will be interpreted using methods recognised by international law, e.g. the Vienna Convention on the Law of Treaties (VCLT).\(^7\) WTO law is a part of public international law, and it is now recognised that the WTO agreements must be interpreted in the

\(^7\) This method is also recognised by the Appellate Body. See Matsushita, Schoenbaum and Mavroidis, 27.
light of other rules and principles of international law. Article 31(1) of the VCLT calls for treaty interpretation based on the ordinary meaning of the terms in the treaty in their context and in the light of its object and purpose. Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) reaffirms that the VCLT rules apply to WTO law interpretation. It requires that provisions are clarified in accordance with customary rules of interpretation of public international law. Doctrine is a recognised source for interpretation. Materials that will be used in this study will mainly consist of academic articles, published in legal journals and trade journals, and books by authors in the field of world trade law as well as world trade economics.

To understand and interpret the TFA, decisions and recommendations by various WTO organs and acts adopted by various international organisations are recognised as interpretative elements. Other reports, working papers etc. will be used to describe and support facts, contexts and argumentations rather than legal interpretation. Since the study deals with a new agreement there will be no case law to take into account regarding the TFA. However, relevant case law and doctrine on earlier SDT provisions will be analysed to help interpret the new SDT provisions found in the TFA. Comparisons will be made to conclude how this new agreement might differ, and if there is a difference, what does it comprise of?

The concept of TF is not new outside the legal dimension. Numerous are the sources on the economic aspects of the topic, as well as political science, international relations, etc. These perspectives will, to some extent, contribute to the parts describing the concept of trade facilitation.

1.5 Limitations

WTO agreements are of great interest to several different academic fields, such as law, economics, politics, international relations etc. This study will be

---

8 Herdegen, 264-265.
9 ICJ Statute, Article 38(d).
10 Matsushita, Schoenbaum and Mavroidis, 25.
conducted from a legal perspective. However, since the topic for the analysis, the TFA, concerns trade, some economic terms and concepts will be included. The study is further limited by focusing the analysis on a certain part of the TFA, Section II containing the SDT provisions. When analysing Section II of the TFA, comparisons will be made to earlier SDT provisions in previous WTO agreements. In order to limit the studied material, the comparison will be made with regards to a limited number of WTO agreements. The chosen comparative material will consist of multilateral WTO agreements regarding trade in goods inserted in Annex 1A of the WTO Agreement, since the purpose of the TFA is to facilitate trade in goods.

1.6 Disposition

The essay consists of eight chapters where chapter one includes the introduction to the essay, where background, purpose, research question, method and material, limitations and disposition are described. It is followed by chapter two that includes a list of abbreviations and a list of used terminology, both aimed to facilitate the reading. Chapter three then aims to explain the background and previous work within the field of trade and development in the WTO to place the study in a wider and historical context. Chapter four is devoted to explain and describe the TFA, its background, purpose, different sections and provisions, and finally its relationship to the GATT. This chapter provides an introduction to the TFA, which is necessary in order to understand the following two chapters that analyse the agreement. In chapter five the analysis is focusing on Section I of the TFA from a developing country perspective. The general legal impacts from a state perspective are emphasised. From a trader’s perspective, some points of the TFA are discussed to assess the agreement’s usefulness. The chapter then continues with indicating implementation aspects for developing countries before analysing Section II and its SDT provisions in chapter six. I argue that the TFA and its SDT provisions are constructed to be adapted according to different developing countries’ diverse needs and situations. However, similar to earlier SDT the obligation to provide assistance and support for capacity building has not been made mandatory. In chapter seven the findings are concluded. Chapter eight includes a list of
references used, for the convenience of readers wishing to further explore the subject. The TFA is included in the Appendix.

2 Terminology

2.1 Developing countries

Developing countries represent two thirds of the WTO membership.\(^{11}\) The concept of “developing countries” is not easily defined. There are several different definitions of the meaning and one should also keep in mind that there are vast differences within the group regarding how well their economies are integrated into the international trading system.\(^{12}\) One reference system that can be of use is the World Bank’s classification system differentiating countries based on gross national income (GNI).\(^{13}\) Low-income economies are defined as those with a GNI per capita of $1,035 or less in 2012. Middle-income economies are defined as those with a GNI per capita of more than $1,035 but less than $12,616. Lower middle-income and upper middle-income economies are separated at a GNI per capita of $4,085. Many of the upper middle-income economies are often referred to as “newly industrialised” economies or countries.\(^{14}\) High-income economies are defined as those with a GNI per capita of $12,616 or more, this group primarily consists of members of the Organisation for Economic Co-operation and Development (OECD).\(^{15}\)

This essay will refer to the WTO usage of the concept, since the essay deals with a WTO agreement. The WTO itself, however, has no definitions of developed and developing countries. In the WTO system, members announce for themselves whether they are developed or developing countries. Other members of the WTO can challenge the decision of a member to make use of provisions available to developing countries.\(^{16}\) The European Union and the United States have declared that they will not consider a list of countries and

\(^{11}\) WTO, ‘Trade and development’.
\(^{12}\) Matsushita, Schoenbaum and Mavroidis, 764.
\(^{13}\) World Bank, xiii.
\(^{14}\) Matsushita, Schoenbaum and Mavroidis, 764.
\(^{15}\) Ibid.
\(^{16}\) WTO, ‘Who are the developing countries in the WTO?’. 
autonomous customs territories\textsuperscript{17} to be developing, including South Korea, Singapore and Hong Kong.\textsuperscript{18} Among the WTO members announced as developing countries are Argentina, Brazil, Cambodia, China, Egypt, Pakistan and Uruguay.\textsuperscript{19}

The WTO further recognises LDCs as a special group among the developing countries. Recognised as LDCs are those countries that have been designated as such by the United Nations (UN). 34 of the 48 LDCs on the UN list are WTO members.\textsuperscript{20} The LDCs include, to mention a few WTO members, Angola, Bangladesh, Rwanda, Senegal, Uganda and Yemen.\textsuperscript{21}

In conclusion, the term developing countries is vague, there is no international consensus and it is used for different purposes in numerous international contexts.\textsuperscript{22} The same country can be considered developed in some contexts, and developing in others. However, in a WTO context one has to keep track of which countries that have declared themselves to be developing and if there are any member countries that have objected to this. In this paper the term developing countries will be used to refer to both developing countries and LDCs where no differentiation is called for.

2.2 Development

Like the concept of developing countries, the concept of “development” is also difficult to define, there is no single definition and the debate on the appropriate definition continues. Simplified, development can be defined either as “an increase in aggregate production of goods and services (economic growth)” or “in more social terms of improvement of the well-being and quality of life for a community (human development)”\textsuperscript{23}. Other definitions

\textsuperscript{17} Terminology used in the WTO Agreement, Article XII(1).
\textsuperscript{18} Matsushita, Schoenbaum and Mavroidis, 765.
\textsuperscript{19} WTO, ‘Groups in the WTO’.
\textsuperscript{20} WTO, ‘Least-developed countries’.
\textsuperscript{21} Ibid.
\textsuperscript{22} Matsushita, Schoenbaum and Mavroidis, 764.
\textsuperscript{23} Marks, 571.
exist, as well as discussions on the connection between economic growth and improved respect for fundamental rights and freedoms.\textsuperscript{24}

Development as a human right is included in two regional human rights treaties, the African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights.\textsuperscript{25} There is no international treaty guaranteeing a right to development, however, there is an UN declaration on the topic – the UN Declaration on the Right to Development (UNDRD). Since it is a declaration and not a treaty, it is not legally binding. Nevertheless, it is not without importance since it was adopted with only one dissenting vote (that of the US) and eight abstentions in 1986. Full consensus was later reached in 1993 when the US officially supported it. Due to this widespread support, the right to development is argued to have general international recognition.\textsuperscript{26}

Turning to the text of the UNDRD;

\begin{quote}
“development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom”.\textsuperscript{27}
\end{quote}

The wordings of the UNDRD endorse that development has a multidimensional nature and suggest that development goes beyond mere improvements in rates of economic growth, income, production or other statistical measures, and focus on improvements in the material and non-material living standards of individuals.\textsuperscript{28} This perspective links to the right of peoples to self-determination, which is referred to in the preamble of the UNDRD.\textsuperscript{29}

\begin{footnotesize}
\textsuperscript{24} See for example Sen, 35.
\textsuperscript{25} African Charter on Human and Peoples’ Rights, Article 22, and Arab Charter on Human Rights, Article 37.
\textsuperscript{26} Sengupta, 179-180. For a discussion on the distinction between recognising the right to development as a human right and creating legally binding obligations relating to that right, see Sengupta, ‘On the theory and practice of the right to development’, Human Rights Quarterly 24, no. 4, (2002): 837–889, at 841.
\textsuperscript{27} UNDRD, 2\textsuperscript{nd} para. of the preamble.
\textsuperscript{28} Bunn, 93.
\textsuperscript{29} Ibid.
\end{footnotesize}
“[B]y virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development”.

Sen, Nobel prize awarded economist and philosopher, argues that development should be seen as a process of expanding the real freedoms that people enjoy. According to this approach, “expansion of freedom is viewed as both (1) the primary end and (2) the principal means of development. [Emphasis in original]”

International trade is often considered to be important for development and poverty reduction. It is argued that:

“It helps raise and sustain growth – a fundamental requirement for reducing poverty – by giving firms and households access to world market for goods, services and knowledge, lowering prices and increasing the quality and variety of consumption goods, as well as fostering the specialisation of economic activity into areas where countries have a comparative advantage.”

Furthermore, the “New International Economic Order”, which addresses the concerns of developing countries in the international economic system, is closely linked to the right to development.

However, there is no universal consensus as to whether liberalisation of international trade is beneficial to development. The ministerial meetings of the WTO have attracted thousands of demonstrators and non-governmental organisations, claiming that there is a democratic deficit in the WTO and that international trade liberalisation is harmful to developing countries, labour standards, human rights, the environment, etc. The critique against the WTO is part of the broader anti-globalisation movement. The different opinions on trade and development can also be seen in recent negotiations in the WTO.

---

30 UNDRD, 6th para. of the preamble.
31 Sen, 36.
32 See for example Hoekman, Michalopoulos and Winters, 481, and Bunn, 211.
33 Hoekman, Michalopoulos and Winters, 481.
34 Herdegen, 16.
35 Narlikar, 100 ff.
36 Trebilcock, Eliason and Howse, 13.
Disagreements between developed and developing countries have hindered the progress of new trade topics in the WTO since the start of the Doha round of negotiations in 2001.

Since the definition of development has been the topic of numerous debates, books and articles, in economic, legal, political and social studies, what has been presented here is not an exhaustive list. However, this is not the main topic of this essay, therefore this short description will have to suffice. In conclusion, development, today, is usually described as more than mere economic growth.

2.3 Special and differential treatment

Under the various WTO agreements, developing countries hold special rights, which are contained in the so-called “Special and Differential Treatment” provisions. The provisions also contain possibilities for developed countries to treat developing countries more favourably than other WTO members. SDT provisions include:

– Longer time periods for implementing agreements and commitments,
– measures to increase trading opportunities for developing countries,
– provisions requiring all WTO members to safeguard the trade interests of developing countries,
– support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards, and
– provisions related to least-developed country (LDC) members. 37

SDT is an exemption to the core principle of non-discrimination in WTO law. 38

The principle of non-discrimination is expressed in the most-favoured-nation (MFN) treatment 39, which requires that trade advantages granted to one member must be granted to all other members.

37 WTO, ‘Special and differential treatment provisions’.
38 Kishore, 367.
39 GATT, Article I(1).
2.4 Trade facilitation

“Trade facilitation” basically aims at cutting “red tape” (an expression traditionally associated with wasteful and time-consuming bureaucracy)\(^{40}\) at the border, to lower costs and time spent on customs procedures, formalities, quarantine, etc. When tariffs and other non-tariff barriers to trade have been included in WTO agreements and gradually removed in favour of free trade, TF aims at removing those remaining bureaucratic procedures that constitute obstacles for traders.\(^{41}\)

There is no single definition of TF, various definitions exist. One that is often referred to is from a WTO training note describing TF as “[t]he simplification and harmonisation of international trade procedures” with trade procedures being “the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade”.\(^{42}\) In the preamble of the TFA, TF is referred to as “[…]expediting the movement, release and clearance of goods, including goods in transit[…]”.\(^{43}\) In the WTO’s glossary the term is described as “[r]emoving obstacles to the movement of goods across borders (e.g. simplification of customs procedures).”\(^{44}\)

3 Trade and development within the WTO

3.1 History

According to the WTO, its agreements recognise the link between trade and development.\(^{45}\) The WTO Preamble states that:

“[…]their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while

\(^{40}\) Grainger, 42.
\(^{41}\) Persson, 12.
\(^{42}\) Grainger, 41.
\(^{43}\) TFA, 3\textsuperscript{rd} para. of the preamble.
\(^{44}\) WTO, ‘Glossary Term – trade facilitation’.
\(^{45}\) WTO, ‘Trade and development’.
allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development[...].”

Furthermore, that:

“[...] there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development [...]”.

Within the WTO, trade liberalisation is recognised as beneficial to economic development, and developing countries’ participation in international trade has risen dramatically. However, the majority of this increase is attributed to developing countries with emerging economies, such as Brazil, Chile, China, India, and South Korea. Smaller economies in Central and South America have increased their share in trade only slightly, and most LDCs have seen their share stagnate or decline.

The numerous WTO agreements on different topics concerning trade contain special provisions for developing countries, and also special provisions for the LDCs, – SDT provisions. This topic has not always been on the agenda for the WTO and its predecessor the GATT. When the GATT was established in 1947 it had 23 signatories, of which 11 were developing countries. Despite their significant share, nearly 50 per cent, of the membership, developing countries were not recognised as a group nor were they given any special treatment. In the period of decolonisation in the 1950s and 1960s, developing countries raised their voices and demanded special treatment under the GATT. Their growing power could not be ignored, and as a response to the creation of the

---

46 WTO Agreement, 2nd para. of the preamble.
47 WTO Agreement, 3rd para. of the preamble.
48 Kessie, 12.
49 Trebilcock, Eliason and Howse, 605.
50 Kessie, 12.
51 Trebilcock, Eliason and Howse, 607.
52 Ibid., 608.
UN body the United Nations Conference on Trade and Development (UNCTAD) in 1964, Part IV of the GATT on Trade and Development was adopted in 1965 to express a concern for the interests of developing countries. However, it did not contain any legal obligations.\(^{53}\)

In 1979, the so-called Enabling Clause\(^ {54}\) was introduced and guides WTO policy even today.\(^ {55}\) It created a permanent legal basis for preferential tariff treatment of exports from developing countries and greater flexibility in the establishment of preferential trade agreements between developing countries.\(^ {56}\) The Enabling Clause introduced the policy of SDT for developing countries. This policy was continued and developed in the Uruguay Round of negotiations.\(^ {57}\)

Developing countries are in favour of an effective rule-based, rather than power-based, system that has the possibility to protect small or weak countries.\(^ {58}\) Furthermore, they argue that developed countries have not fulfilled their commitments to provide SDT to developing countries.\(^ {59}\) The Doha round of negotiations, described below, further addresses the concerns and possibilities of trade and development under the WTO.

### 3.2 The Doha Development Agenda

The Doha Development Agenda (DDA) was launched in November 2001 at the WTO Doha Ministerial Conference and is on-going. The DDA puts development issues and the interests of developing countries at the centre of the WTO agenda.\(^ {60}\) The DDA comprises a number of trade topics that are being discussed among the 160 members.\(^ {61}\) Among these are trade and environment, SDT, LDCs and TF.

\(^{53}\) Matsushita, Schoenbaum and Mavroidis, 766.
\(^{54}\) GATT Contracting Parties, Decision of November 28 1979, on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries, (L/4903).
\(^{55}\) Matsushita, Schoenbaum and Mavroidis, 766.
\(^{56}\) Trebilcock, Eliason and Howse, 610.
\(^{57}\) Matsushita, Schoenbaum and Mavroidis, 768.
\(^{58}\) Trebilcock, Eliason and Howse, 612.
\(^{59}\) Matsushita, Schoenbaum and Mavroidis, 768.
\(^{60}\) WTO, ‘Trade and development’.
\(^{61}\) For more information, see WTO, ‘Subjects treated under the Doha Development Agenda’.
The Doha round of negotiations has faced difficulties since its start in 2001. Frictions between developed and developing countries have hindered the negotiations.\textsuperscript{62} One of the biggest challenges of the negotiations is the difficulty to regulate the proportionality of commitments between developed and developing countries, and consequently SDT and the implementation problems faced by developing countries.\textsuperscript{63} TF is one of the topics from the Doha round where negotiations have been smoother and an agreement has been presented. The next chapter will describe the TFA.

\textbf{3.3 Concluding remarks and comments}

In the work of the WTO, trade is considered beneficial to development. Throughout the organisation’s history the focus on development has evolved and resulted in several actions, such as Part IV of the GATT on Trade and Development, the Enabling Clause and SDT. The present Doha round of negotiations focuses especially on development and developing countries’ participation in the WTO. However, the negotiations have faced difficulties that to a great extent are caused by disagreements between developed countries and developing countries.

\textbf{4 The Trade Facilitation Agreement}

\textbf{4.1 Background}

The concept of TF is not new in the WTO. In fact, the WTO is all about facilitating trade. However, TF defined more specifically as cutting red tape at the border, is a rather new feature in the WTO system. There are provisions in existing WTO agreements that aim to enhance transparency and efficiency at the borders for export and import. For example, Articles V, VIII and X of the GATT, which deal with freedom of transit for goods, fees and formalities connected with importing and exporting, and the publication and administration of trade regulations. The improvement and clarification of these

\textsuperscript{62} Herdegen, 176.
\textsuperscript{63} Trebilcock, Eliason and Howse, 613.
articles are also at the centre of the purpose for the negotiations on TF, discussed in section 4.2.

The 1996 Singapore Ministerial Conference provided the first mandate for the WTO to proceed in the field of TF. The assignment to “undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area” was given to the Council for Trade in Goods. Concerns for developing countries and LDCs were expressed in the Singapore mandate.

At the Fourth Ministerial Conference in Doha 2001, it was agreed to proceed to negotiations on TF after the Fifth Ministerial Conference in Cancún 2003. Renewing the mandate, the General Council decided on 1 August 2004 to commence negotiations. At the Ninth Ministerial Conference in Bali 2013, a final text was adopted by consensus. However, the deadline, 31 July 2014, set for the adoption of the protocol of amendment of the TFA was not realised. On 27 November 2014 WTO members finally adopted a Protocol of Amendment to insert the TFA into Annex 1A of the WTO Agreement. The TFA will enter into force once two thirds of the members have completed their domestic ratification processes.

4.2 The purpose of the Trade Facilitation Agreement

The aim of the TFA is to “ease trade flows and customs procedures and to facilitate the movement, release and clearance of goods.” In order to so, Articles V, VIII and X of the GATT (concerning freedom of transit for goods, fees and formalities connected with importing and exporting, and the

---

64 WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC, para. 21.
65 Ibid.
66 Ibid., para. 22.
68 Ibid.
69 WTO, Bali Ministerial Declaration, WT/MIN(13)/DEC, para. 1.8.
71 WTO, ‘Briefing notes: Trade facilitation – Cutting red tape at the border’.
publication and administration of trade regulations) will be clarified and improved in the TFA. The agreement is expected to cut bureaucracy and corruption in customs procedures and to make trade cheaper and faster.\textsuperscript{72}

At the Ministerial Conference in Bali, the work on TF was described as addressing the concerns of traders, from both developed and developing countries, regarding the vast amount of red tape that still existed and hindered moving goods across borders. Among the obstacles faced when importing and exporting goods are; lack of transparency of documentation requirements, duplication of such requirements, lack of cooperation between traders and official agencies, slow progress in changing to methods using automatic data submission, etc.\textsuperscript{73}

With lower tariffs, meaning that one of the obstacles to trade has been decreased, the cost of customs formalities’ compliance now at times exceeds the cost of duties to be paid.\textsuperscript{74} As an illustrative example, it can take 116 days for a container to move from a factory in the landlocked Central African Republic onto the ship at the port, while the same journey only takes 5 days in Denmark.\textsuperscript{75} The costs of these delays are detrimental to traders. Lowering tariffs has of course been important to international trade. However, low tariffs are insufficient as a trade facilitator when it takes 116 days to move a container from a factory onto a ship. The TFA is described as a shift of focus: “[…]the Agreement has shifted the system’s focus beyond the ”software” of trade – policy barriers – towards the “hardware” – process frictions.”\textsuperscript{76}

4.3 The legal text of the Trade Facilitation Agreement

The TFA is a 30 pages long agreement that consists of a preamble, three different sections of provisions and one annex. The Preamble explains the mandate and the aims of the agreement, Section I contains provisions dealing with TF measures and obligations, Section II contains SDT provisions for

\textsuperscript{72} Ibid.
\textsuperscript{73} WTO, ‘9th WTO Ministerial Conference, Bali, 2013: Briefing note: Trade facilitation — Cutting “red tape” at the border’.
\textsuperscript{74} Ibid.
\textsuperscript{75} Djankov, Freund and Pham, 2.
\textsuperscript{76} Neufeld, 3.
developing and least-developed countries, Section III contains provisions on institutional arrangements and final provisions, and Annex 1 contains a format for notification regarding assistance and support for capacity building. The legal text will in the following paragraphs be described briefly. For reference to the full text of the articles, please consult the TFA, which can be found in the Appendix.

4.3.1 Section I
Section I contains the agreement’s general provisions for expediting the movement, release and clearance of goods. This is where we find the obligations laid down on members regarding measures to be taken in order to facilitate trade. The 12 articles in Section I will be grouped thematically and described briefly.

Transparency
Articles 1 to 5 of the TFA all aim to enhance transparency. The provisions originate from Article X of the GATT, since they concern publication and administration of trade regulations. The first article of the agreement contains provisions on publication and availability of information. It requires that different types of information shall be made accessible, such as procedures for importation, applied rates of duties, rules of classification, procedures for appeal or review, etc. Furthermore, it requires that members shall make certain information available through the internet, including a description of its procedures for importation, exportation and transit, forms and documents, and contact information on its enquiry point(s). Members shall, within their available resources, establish or maintain at least one enquiry point, and they are encouraged not to require the payment of a fee for answering enquires.

Article 2 obliges members to provide opportunities and an appropriate time period to traders and others to comment on the proposed introduction or amendments of laws and regulation related to the movement, release and

77 TFA, Article 1(1).
78 TFA, Article 1(2).
79 TFA, Article 1(3).
clearance of goods. Such introductions or amendments of laws and regulation shall be published or information on them made otherwise publicly available. The TFA further prescribes that members shall issue advance rulings to applicants that have submitted written request containing all necessary information. The advance ruling shall be valid for a reasonable time, and binding on the issuing member in respect of the applicant that sought it. An advance ruling concerns the good’s tariff classification and the origin of the good.

Article 4 includes a right to an administrative appeal to, or review by, a higher or independent authority, and/or a judicial appeal or review of an administrative decision issued by customs. Lastly, Article 5 concerns other measures to enhance impartiality, non-discrimination and transparency. It contains provisions on notifications for enhanced controls or inspections, detention and test procedures, in order to enhance impartiality, non-discrimination and transparency when such measures are conducted.

**Fees and formalities for import and export**

Articles 6 to 10 of the TFA originate from Article VIII of the GATT, since they concern fees and formalities connected with importation and exportation. Article 6 contains requirements on general disciplines on fees and charges imposed on or in connection with importation and exportation and penalties, such as publication of information on time periods, on fees and charges imposed on or in connection with importation and exportation, and requirements on penalty disciplines. Article 7 includes provisions aimed to fasten the release and clearance of goods.

---

80 TFA, Article 2(1.1).
81 TFA, Article 2(1.2).
82 TFA, Article 3(1).
83 TFA, Article 3(3).
84 TFA, Article 3(5).
85 TFA, Article 3(9).
86 TFA, Article 6(1) and (3).
87 They include requirements on pre-arrival processing; electronic payment; separation of release from final determination of customs duties, taxes, fees and charges; risk management; post-clearance audit; establishment and publication of average release times; TF measures for authorised operators; expedited shipments; and perishable goods.
Border agency cooperation is required in Article 8. Members shall ensure that their authorities and agencies responsible for border control cooperates, domestically\textsuperscript{88} as well as with the authorities and agencies of other members with whom they share a common border.\textsuperscript{89} Article 9 obliges members to, under certain circumstances, allow for goods intended for import to be moved within their territory.

Finally, Article 10 contains provisions on formalities connected with importation, exportation and transit. It requires that they are adopted and/or applied with a view to a rapid release and clearance of goods, in a manner that aims at reducing time and cost of compliance for traders and operators, that the least trade restrictive measure is chosen and that formalities and documentation requirements are not maintained if no longer required.\textsuperscript{90} It further contains provisions regarding acceptance of copies and use of international standards.\textsuperscript{91} Members shall endeavour to establish or maintain a single window\textsuperscript{92,93} The article also contains provisions on common border procedures and uniform documentation requirements.\textsuperscript{94}

\textit{Freedom of transit}

Article 11 of the TFA originates from Article V of the GATT concerning freedom of transit. This article provides requirements on how to treat traffic in transit in order to guarantee the freedom of transit. It includes rules on collection of fees and charges\textsuperscript{95}, separate infrastructure\textsuperscript{96}, advance filing and processing of transit documentation\textsuperscript{97}, etc.

\textsuperscript{88} TFA, Article 8(1).  
\textsuperscript{89} TFA, Article 8(2).  
\textsuperscript{90} TFA, Article 10(1).  
\textsuperscript{91} TFA, Article 10(2) and 10(3).  
\textsuperscript{92} The use of a “single window” means that traders are able to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies.  
\textsuperscript{93} TFA, Article 10(4).  
\textsuperscript{94} TFA, Article 10(7).  
\textsuperscript{95} TFA, Article 11(2).  
\textsuperscript{96} TFA, Article 11(5).  
\textsuperscript{97} TFA, Article 11(9).
Customs cooperation

The last article in Section I, Article 12, covers customs cooperation and is not derived from a specific GATT provision. It contains several provisions aimed at enhancing customs cooperation.\(^98\)

### 4.3.2 Section II – Special and differential treatment provisions for developing country members and least-developed country members

Section II contains the agreement’s SDT provisions for developing country members and least-developed country members. The provisions are organised into three different categories: A, B and C. The ten articles in Section II will be described in the following paragraphs.

**General principles**

Section II is introduced with some general principles in Article 13. The general principles shall be applied through the remaining provisions in Section II.\(^99\) Assistance and support for capacity building should be provided to help developing and least-developed country members to implement the provisions of the TFA, in accordance with their nature and scope.\(^100\) “Assistance and support for capacity building” is explained as technical, financial, or any other mutually agreed form of assistance provided.\(^101\) The extent and timing of implementation of the provisions of the TFA shall be related to the implementation capacities of developing and least-developed country members.\(^102\) Furthermore, it is emphasised that LDC 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 capacities.\(^103\)

---

\(^{98}\) These are; measures promoting compliance and cooperation; exchange of information; verification; request; protection and confidentiality; provision of information; postponement or refusal of a request; reciprocity; administrative burden; limitations; unauthorised use or disclosure; and bilateral and regional agreements.

\(^{99}\) TFA, Article 13(4).

\(^{100}\) TFA, Article 13(2).

\(^{101}\) TFA, Footnote to Article 13(2).

\(^{102}\) TFA, Article 13(2).

\(^{103}\) TFA, Article 13(3).
**Category system of provisions**

The TFA introduces a category system of provisions in Articles 14 to 19. Article 14 provides an opportunity for developing country members and LDC members to designate Articles 1 to 12 of the TFA into three different categories; A, B and C, where:

- **A** provides that implementation shall take place upon entry into force of the TFA, or, for LDCs there is a possibility for implementation within one year after entry into force.
- **B** provides that implementation shall take place on a date after a transitional period of time following the entry into force of the TFA.
- **C** provides that implementation shall take place on a date after a transitional period of time following the entry into force of the TFA and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.

Articles 15 and 16 contain detailed provisions on notification, implementation and definitive dates of implementation. The deadlines vary depending on the designated category and whether a developing country member or a LDC member is applying it. For category B and C there are no time limits on the self-assessed implementation dates, i.e., any indicated implementation date should be valid, there is only a definitive deadline on the notification of the implementation date.\(^{104}\)

Further flexibility is provided through the early warning mechanism, which is included in Article 17. It provides an opportunity for developing country members and LDC members to extend the implementation dates for provisions in categories B and C. This is made through a notification to the Committee on Trade Facilitation (Committee), within a certain time frame.\(^ {105}\) Depending on the length of the extended time, the member is entitled to additional implementation time without further action by the Committee, or the Committee shall consider whether to approve of the extension or not, taking into account the specific circumstances.\(^ {106}\)

---

\(^{104}\) TFA, Article 16.  
\(^{105}\) TFA, Article 17(1).  
\(^{106}\) TFA, Article 17(2–4).
According to Article 18, the Committee shall establish an Expert Group after notification from a developing country member or a LDC member that self-assesses that its capacity to implement a provision under category C is insufficient. The Expert Group shall be composed of five independent persons, highly qualified in the fields of TF. The Expert Group shall consider the member’s self-assessment and make a recommendation to the Committee. Article 19 provides an opportunity for developing country members and LDC members to shift provisions between categories B and C. The Committee is to be notified and certain rules apply.

Grace period

Article 20 provides a grace period for the application of the DSU. Depending on which category, A, B or C, a developing country member or a LDC member has designated certain provisions to, it is granted a grace period of two, six or eight years. During this grace period, the member shall not be subject to a dispute settlement procedure under the DSU concerning any provisions designated under the relevant category. Furthermore, a member shall not be subject to proceedings on issues related to its inability to implement a certain provision when it has followed the procedures set out in Article 18.

Assistance and support for capacity building

Article 21 stipulates that donor members agree to facilitate the provision of assistance and support for capacity building to developing country members and LDC members on mutually agreed terms, either bilaterally or through the appropriate international organisations, with the objective to assist those members to implement the provisions in Section I of the TFA. The article further stipulates that targeted assistance and support should be provided to LDC members in order to help them build sustainable capacity to implement

---

107 TFA, Article 18(1) and (2).
108 TFA, Article 18 (3).
109 TFA, Article 18(4).
110 TFA, Article 18(5).
111 TFA, Article 21 (1).
their commitments.\textsuperscript{112} Furthermore, the article provides for several principles to be applied when providing assistance and support for capacity building, among these: “take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programs”.\textsuperscript{113} Finally, the Committee shall hold at least one dedicated session per year to discuss problems regarding implementation of provisions, review progress of assistance and support for capacity building, etc.\textsuperscript{114}

Finally, Article 22 requires that donor members, assisting developing country members or LDC members with the implementation of the TFA, shall submit annually certain information on their assistance and support for capacity building to the Committee.\textsuperscript{115} The Committee shall invite relevant international and regional organisations, e.g. the OECD and the International Monetary Fund, to provide information on assistance and support for capacity building.\textsuperscript{116}

\textbf{4.3.3 Section III – Institutional arrangements and final provisions}

Section III contains two provisions, the first one on institutional arrangements, and the second one on final provisions. Article 23 establishes the Committee, which shall be open for participation by all members and it shall carry out such responsibilities as assigned to it under the TFA or by the members.\textsuperscript{117} Additional to the Committee, each member shall establish and/or maintain a national committee on TF.\textsuperscript{118} The final provisions in Article 24 concerns definitions, the binding nature of the TFA, implementation dates, regional approaches, reservations, etc.

\textsuperscript{112} TFA, Article 21(2).
\textsuperscript{113} TFA, Article 21(3)(a).
\textsuperscript{114} TFA, Article 21(4).
\textsuperscript{115} TFA, Article 22(1).
\textsuperscript{116} TFA, Article 22(5).
\textsuperscript{117} TFA, Article 23(1.1).
\textsuperscript{118} TFA, Article 23(2).
4.4 The relationship between the Trade Facilitation Agreement and the General Agreement on Tariffs and Trade

The mandate to develop an agreement on trade facilitation within the WTO stems from Annex D of the Doha Work Programme. Modalities for negotiations on trade facilitation provided that (with relevance to this subheading) “[n]egotiations 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.”

Articles V, VIII and X of the GATT concern freedom of transit for goods, fees and formalities connected with importing and exporting, and the publication and administration of trade regulations. As explained in section 4.3.1, the different articles of the TFA derive from different articles of the GATT.

Within the WTO legal system, it is common practice to specialise articles found in the general agreement, the GATT, in more specific and detailed WTO agreements. To mention a few earlier examples; the Subsidies and Countervailing Measures Agreement relates to Article XVI and VI of the GATT, the Anti-Dumping Agreement relates to Article VI of the GATT, and the Safeguards Agreement relates to Article XIX of the GATT.

It is argued that the mandate for the TFA in relation to the GATT is “a more open-ended, expansive mandate, and suggests that the scope of the TFA is meant to extend further beyond the prescriptions of the underlying GATT articles than other WTO Agreements with similar GATT-related mandates.” The description is supported with the wordings in the preamble of the TFA: “[W]ith a view to further expediting the movement, release and clearance of goods, including goods in transit.”

In the event of a conflict between a provision of the GATT and a provision of another WTO agreement, the General Interpretative Note to Annex 1A of the

---

119 WTO, Doha Work Programme, para. 1(g).
120 WTO, Doha Work Programme, Annex D, para. 1.
121 Eliason, 13.
122 TFA, 3rd para. of the preamble.
WTO Agreement, stipulates that the provision of the other agreement shall prevail to the extent of the conflict. This would mean that the provisions of the TFA shall prevail over the corresponding provisions of the GATT.

However, case law has shown that the relationship between the specific WTO agreements and the more general GATT is not that simple. The relationship between a specialised agreement and GATT provisions has been discussed in several disputes before the Appellate Body (AB).

Eliason\textsuperscript{123} has summarised the AB’s clarifications on the relationship between the GATT and specialised WTO agreements. Even though the specialised agreement’s provisions are to prevail the general GATT provisions in a certain conflict, this does not mean that the specialised agreement supersedes the GATT.\textsuperscript{124} Later on, the AB clarified that the existence of a specialised agreement should not be taken to mean that the requirements of the underlying GATT article are subsumed by the specialised agreement; rather, the underlying GATT article establishes certain prerequisites that are transferred into the more specialised agreement.\textsuperscript{125} Therefore, when applying the TFA one must also make sure that any measure taken comply both with the GATT and the TFA.

Furthermore, the TFA provides in Article 24(6) that “[n]otwithstanding the general interpretive note to Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994.”. Therefore, it can be predicted that the provisions of the TFA will be interpreted in the context of Article V, VIII and X of the GATT, and the relationship between specific provisions in the TFA and their underlying articles will need to be determined in the context of how the phrasing is used across the agreements.\textsuperscript{126}

\textsuperscript{123} Antonia Eliason, Assistant Professor of Law at the University of Mississippi School of Law.
\textsuperscript{124} Eliason, 14.
\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid., 15.
4.5 Concluding remarks and comments

TF is not a new topic in WTO law, the TFA clarifies existing articles of the GATT that relate to TF. The purpose is to make trade across borders easier, faster and cheaper. This improvement is argued to be extra beneficial to traders in developing countries since they more often face delays, complicated bureaucracy with duplication of documentation requirements, corruption, etc.

The legal text of the agreement consists of three sections. The first one is devoted to TF measures regarding transparency, fees and formalities in connection with importation and exportation, freedom of transit and customs cooperation. The second part is devoted to SDT and the third one includes institutional arrangements and final provisions. The different articles have been described briefly in order to provide an overview of the obligations that the agreement creates. Lastly the relationship to the GATT has been described, and it is predicted that the TFA will have to be applied and interpreted together with the GATT. This description is the base for moving on to an analysis of the TFA from a developing country perspective, which is presented in the following two chapters.

5 The Trade Facilitation Agreement from a developing country perspective

5.1 General legal impacts

In an economic context, trade facilitation is argued to be beneficial to developing countries since inefficiencies in areas such as customs and transport hinder their integration into the global economy. Developing-country exporters have shown increasing interest in removing these types of barriers to trade, particularly in other developing countries, since 40 per cent of their trade in manufactured goods is conducted with other developing countries.127

In a legal context, however, little is analysed or written about the impact of the TFA. Some general legal aspects of the TFA will be discussed in the following paragraphs, in order to provide an overview of the legal impact of the agreement on developing country members.

Initially, one can question the need for a TFA under the WTO regime since there are numerous other international and regional organisations already dealing with the topic. To mention a few; the World Customs Organization (WCO), the UN Centre for Trade Facilitation and Electronic Business (UN/CEFACT), the World Bank and the Organisation for Economic Co-operation and Development (OECD). One thing that these other organisations lack is an effective dispute settlement mechanism (DSM). In contrast, The WTO has a well functioning DSM covered by the DSU.

A DSM provides enforceability and jurisprudence. Obligations and recommendations under other regimes than the WTO are commitments that cannot be enforced through a specific DSM. There can sometimes be a possibility to take a dispute to the International Court of Justice (ICJ), if the ICJ has jurisdiction on the relevant case. However, this scenario seems a bit extreme; countries probably prefer to solve potential disputes in a friendlier manner. Instead, they have to rely on their signatories’ will to comply with the rules and recommendations set out, which should not be underestimated since countries generally intend to, and are expected to, comply with treaties, conventions they sign onto and other international collaborations they participate in. In addition, even though these organisations largely lack the ability to enforce their rules legally, there is always a possibility to affect countries through political, economic or diplomatic pressure, etc.

From a developing country perspective, an effective rule-based, rather than power-based, system is preferred, which has the possibility to protect small or

---

128 For further reading, see Grainger, 42, and/or the Global Facilitation Partnership for Transportation and Trade portal at www.gfptt.org.

129 ICJ Statute, Article 36.
weak countries.\textsuperscript{130} Furthermore, developing countries request predictable and enforceable rules.\textsuperscript{131} However, statistics from the WTO DSM shows that developing country members participate in disputes to a lesser extent than developed countries.\textsuperscript{132} Their participation has increased lately, especially in disputes with other developing countries.\textsuperscript{133} However, LDCs are almost completely absent from the dispute settlement processes in the WTO.\textsuperscript{134}

Developing countries, and LDCs in particular, tend to refrain from using this mechanism, due to lack of knowledge, resources and the fact that in the event they actually succeed as a complainant, the remedies that are available are constructed in such a way that it is sometimes not worth the effort.\textsuperscript{135} Conducting a process before the DSU is costly, sometimes the costs do not outweigh the losses in the affected market relevant to the dispute, and the remedies available are retaliation actions, which can be futile for countries with small market size.\textsuperscript{136}

On the other hand, it is argued that statistics from the DSM is not sufficient when assessing the usefulness of the DSM for developing countries, one must also take into account that disputes are often settled pre-trial in a friendly manner.\textsuperscript{137} The positive effects of an effective DSM is not limited to the number of cases it produces – “[i]t is thus the threat of legal condemnation, rather than a ruling per se, that induces settlement. [Emphasis in original]”\textsuperscript{138}

Consequently, even though developing countries in general, and LDCs in particular, are less likely to use the DSM, one should not jump to easily to the conclusion that they cannot benefit from the WTO system. First of all, members’ compliance with the various WTO agreements is expected. WTO agreements are usually taken seriously by member states. Secondly, the

\textsuperscript{130} Trebilcock, Eliason and Howse, 612.
\textsuperscript{131} Narlikar, 85, and Hoekman, Michalopoulos and Winters, 482.
\textsuperscript{132} Narlikar, 95.
\textsuperscript{133} Trebilcock, Eliason and Howse, 617.
\textsuperscript{134} Ibid.
\textsuperscript{135} Narlikar, 96-97.
\textsuperscript{136} Trebilcock, Eliason and Howse, 617-618.
\textsuperscript{137} Busch and Reinhardt, 196.
\textsuperscript{138} Ibid.
existence of a DSM can serve developing countries’ interests indirectly when other members, e.g. developed countries, pursue processes against each other. Thirdly, as indicated above, the very existence of a DSM is important.

Another general consideration of the legal impact of the TFA on developing country members, connected to the DSM, is that with the TFA come legal obligations to improve the trade environment (accordingly with the different articles in Section I of the TFA). This will for some countries be a costly procedure. If not implemented and complied with correctly, members face the threat of being challenged under the DSM. These concerns are addressed in Section II of the TFA, which is described in section 4.3.2, and further analysed in chapter 6.

The establishment of the Committee is another general aspect of the TFA that can be beneficial for developing country members. It provides a forum where relevant information and best practices can be shared between members. The Committee is instructed to maintain contact with other international organisations in the field of TF. Together with the instruction to review operation and implementation of the TFA, this forum has the possibility to deal with developing country concerns on early stages. It provides for cooperation and the sharing of expertise and experience between members, which should be beneficial to all members, and specifically to developing country members since they will probably face greater implementation challenges (to be discussed in section 5.3).

Finally, it must be considered beneficial to any country, either developed or developing, that there is one single international institution that regulates all relevant areas of trade under one comprehensive multilateral trading regime. For developing countries, some with more limited resources than others, turning to one international organisation rather than several, with similar

139 TFA, Article 23(1.4).
140 TFA, Article 23(1.5).
141 TFA, Article 23(1.6).
142 Eliason, 11.
topics, must generally be regarded as efficient in terms of allocation of costs and knowledge resources. Therefore, it should be welcomed that the WTO presents an agreement on TF, even though other instruments on the topic already exist.

5.2 The traders’ perspective

Turning to the traders’ perspective, especially of those in developing countries, some points of the TFA will be discussed as to assess the usefulness of the agreement. In general terms, the TFA must be considered beneficial to all international traders since its very purpose is to improve the trade environment, making it faster, easier and cheaper to trade across borders. TF is argued to be extra beneficial for businesses and traders in developing countries since trade transaction costs are especially high in developing countries, many LDCs are landlocked or otherwise remotely located with poor infrastructure, and small companies often lack the capacity to comply with complex rules and high costs. Developing country traders are usually relatively small in size, they import and export in smaller quantities. Therefore they face a trade cost that is disproportionately high, as costs for documentation etc. are often fixed and do not vary with the size of the quantity imported or exported. In the remaining part of this section, a few provisions in Section I of the TFA and their potential improvement for developing country traders, or their lack of usefulness, will be presented.

Transparency (Articles 1 to 5)

The mandatory publication and availability of information must be considered beneficial to traders in developing countries. The use of publication through the internet is beneficial since it means that information will be provided for free and is easily accessible. The establishment of enquiry points where traders can acquire documents, forms and enquire information, should

\[1^{43}\text{ITC, iii.}\]
\[1^{44}\text{Mehta and Nanda, 157-158.}\]
\[1^{45}\text{TFA, Article 1.}\]
\[1^{46}\text{Access to the internet vary of course between different countries. 32.4} % \text{of individuals in developing countries, compared to 78.3} % \text{in developed countries, are estimated to use the internet, according to UN Agency ITU, statistics available at http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx.}\]
also facilitate trade, being especially beneficial to small and medium sized enterprises.\textsuperscript{147} For this service, governments are encouraged to not require any payment. If they choose to require payment, it shall be limited to the amount of their fees and charges to the approximate cost of services rendered.

The possibility of receiving advanced rulings\textsuperscript{148} is identified by the OECD as one of the most effective measures in facilitating trade.\textsuperscript{149} Inconsistency in decisions on valuation, classifications and rules of origin leads to uncertainty. Advance rulings enhance certainty and predictability, reduce delays and disputes between traders and customs authorities and minimise the possibilities of corruption.\textsuperscript{150}

These mentioned measures, along with other articles of the TFA aiming to enhance transparency\textsuperscript{151}, should be of specific benefit to traders in developing countries. In developing countries it is usually more difficult to acquire the right information regarding laws and procedures.\textsuperscript{152} This difficulty is heavy on traders in developing countries since they already fight with other difficulties relating to a poor trade environment. Furthermore, transparency improves trust and governance.\textsuperscript{153}

\textit{Fees and formalities for import and export (Articles 6-10)}

Detailed rules on fees and penalties, how and when they can be applied etc., prevent businesses from being subjected to arbitrary imposition of fees and penalties.\textsuperscript{154} Rules on release and clearance of goods\textsuperscript{155} (such as pre-arrival processing and electronic payment), border agency cooperation\textsuperscript{156} along with rules on formalities connected with importation, exportation and transit\textsuperscript{157} (such as acceptance of copies, use of international standards and a single

\textsuperscript{147} UNCTAD, ’Trust Fund for Trade Facilitation Negotiations : Technical Note No. 6’, 2.
\textsuperscript{148} TFA, Article 3.
\textsuperscript{149} ITC, 10.
\textsuperscript{150} Ibid., 11.
\textsuperscript{151} TFA, Articles 2, 4 and 5.
\textsuperscript{152} Kommerskollegium, 14.
\textsuperscript{153} Kituyi, 2.
\textsuperscript{154} ITC, 12.
\textsuperscript{155} TFA, Article 7.
\textsuperscript{156} TFA, Article 8.
\textsuperscript{157} TFA, Article 10.
window) make import and export faster, cheaper and more efficient. However, it is argued that certain provisions, such as the provisions on “authorised operators” and “expedited shipment” are biased towards larger traders that can present financial guarantees and compliance records, i.e. perhaps not so beneficial for small traders in developing countries.  

**Freedom of transit (Article 11)**

Traders in landlocked countries, which many countries in Africa are, face severe delays in transport of goods from the factories to the ports. As described in section 4.2, it can take up to 116 days for a container to move from a factory in the landlocked Central African Republic onto the ship at the port. Ensuring and improving the freedom of transit is important for traders in landlocked countries. Measures in Article 11 of the TFA (such as the encouragement to make available physically separate infrastructure, allowance of advance filing and processing of transit documentation and the endeavour-obligation of members to cooperate) should simplify the rules and reduce delays for traders in landlocked countries.

**Customs cooperation (Article 12)**

An improvement for businesses is the encouragement of member states to develop voluntary compliance systems that allows importers to self-correct without penalty. It has been argued by traders that a strong commitment to compliance, supported with a track record, should be recognised by customs authorities.

**Institutional arrangements (Article 23)**

The establishment of a national committee provides a forum where businesses’ representatives can participate in dialogues with government agencies and discuss coordination and implementation of the agreement. However, in order to engage successfully, businesses will need to be familiar with the issues on a

---

158 South Centre, 3.
159 Djankov, Freund and Pham, 2.
161 ITC, 21.
technical level.\textsuperscript{162} Small businesses, and those entering the trade arena, will therefore probably have less use of the national committee. The national committee also provides an opportunity for businesses to bring attention of their national governments to problems they face, who in turn can raise the concerns with the Committee at the WTO.\textsuperscript{163}

### 5.3 Implementation aspects

As previously mentioned in section 5.1, implementing the TFA can be a costly procedure for developing country members and LDC members. Lack of financial possibilities as well as technical prerequisites, knowledge and human resources,\textsuperscript{164} will in some cases delay and obstruct the implementation of the obligations under Section I of the TFA. Developing countries tend to face more difficulties in implementing WTO agreements, as is probably the case with the TFA, since the agreements are usually based on existing institutional structures and procedures of the OECD countries.\textsuperscript{165} The prerequisites and possibilities for implementation vary, of course, to a great extent within the group of developing countries.

Some developing countries argue that, for some members, the cost of implementing the TFA is higher than the possible gains of TF. This would especially apply for countries that import more than they export.\textsuperscript{166} There is also a fear in developing countries, that interests of importers might take precedence over interests of exporters, leaving small producers and exporters worse off than before the existence of the TFA.\textsuperscript{167}

The foreseen difficulties for developing members to implement the obligations under the TFA are acknowledged in Section II of the TFA. The SDT provisions allow for longer implementation periods, grace period on the application of the DSU, and provides for assistance and support for capacity

\begin{itemize}
\item \textsuperscript{162} Ibid.
\item \textsuperscript{163} Ibid.
\item \textsuperscript{164} Hoekman, Michalopoulos and Winters, 492.
\item \textsuperscript{165} Hoekman, 28.
\item \textsuperscript{166} South Centre, 3.
\item \textsuperscript{167} Mehta and Nanda, 158.
\end{itemize}
building. The SDT provisions of the TFA will be discussed thoroughly in chapter 6.

5.4 Concluding remarks and comments

The analysis above provides that developing countries should benefit, legally, from an agreement on TF under the WTO regime. The WTO has a well-functioning DSM, which is appreciated by developing countries who generally seek a rule-based, rather than power-based, system. Even though developing countries participate in dispute procedures to a lesser extent, there is still great value in the mere existence of a DSM. The TFA will also be part of the largest trade regime – WTO law.

The TFA is argued to be especially beneficial for traders in developing countries, since they usually face longer delays and higher costs when conducting trade across the borders. Many LDCs are landlocked, therefore traders in these areas would benefit from improved freedom of transit.

Implementing the TFA can be costly, especially for developing countries since they usually have more work to do in this area in order to comply with the obligations set out in Section I of the TFA. The TFA addresses these implementation difficulties of developing country members in Section II of the TFA, which will be analysed in the following chapter.

6 Special and Differential Treatment provisions

The TFA includes ten articles on SDT addressing implementation concerns of developing country members and LDC members. The TFA introduces a new system of SDT provisions in the WTO with its creation of three different categories, A, B and C, to which developing country members and LDC members can designate the different articles under Section I of the TFA. The agreement further contains rules on a grace period, assistance and support

\[\text{168} \text{ TFA, Article 20.}\]
for capacity building\textsuperscript{169} and information on such assistance\textsuperscript{170}, as described in section 4.3.2.

With its ten articles on SDT provisions, almost a third of the agreement’s text is devoted to SDT provisions, the TFA differs from earlier WTO agreements regarding these provisions. The SDT provisions of the TFA will be analysed in the following sections, from the perspectives of their construction and language, and compared with SDT provisions in other WTO agreements.

\textbf{6.1 Construction}

\textit{General principles (Article 13)}

Introducing the SDT section with general principles, which are to be applied throughout the section, provides guidance on how to interpret the following provisions\textsuperscript{171}. The principles emphasise the need to assess developing country members’ individual capacities to implement the TFA.

\textit{Category system (Articles 14-19)}

The category system provides flexibility for developing country members and LDC members where they can assess their different implementation possibilities of individual articles in Section I of the TFA, resulting in a designation of them to different categories (A, B and C). The designations to different categories mean that different implementation times apply.

Furthermore, category C provisions require the acquisition of implementation capacity through the provision of assistance and support for capacity building, which is found in Article 16\textsuperscript{172}. Designating provisions to category C means that the implementation of these provisions are conditional upon the successful cooperation between developing country members and donor members\textsuperscript{173}. The TFA creates a link between implementation obligations of developing country members and the requirement of assistance and support for capacity building.

\textsuperscript{169} TFA, Article 21.
\textsuperscript{170} TFA, Article 22.
\textsuperscript{171} TFA, Article 13(4).
\textsuperscript{172} TFA, Article 14(1)(c).
\textsuperscript{173} Eliason, 34.
from donor members. Using the term “donor member” implies that not only developed countries, but also developing countries, if they have the capacity, can act as donor members. This is also encouraged in Article 21(3)(f). The incentives for donor members to provide assistance and support for capacity building might not be so strong when it concerns recipient countries with small or insignificant market shares.

The need of developing countries to demand assistance will vary. Some countries have already, via different organisations, agreements or work programmes, implemented various trade facilitation measures. This can lead to a situation where “only the laggards would be in a position to demand assistance”. Even so, this system of categories acknowledges that developing countries are different by nature and have different needs and possibilities. It means a great cut from the previous “one-size-fits-all” constructions.

The flexibility in the system corresponds to the concept, in international law, of peoples’ right to choose their own level of development, as described in section 2.2. The category system also reflects the diversity among developing countries. Furthermore, it is in line with the principle of self-designation, which is used in the WTO regarding developing country status (described in section 2.1). However, it is debated as to whether it is appropriate to use self-designation in the WTO system. The principle of self-designation, as elaborated in the TFA where developed country members choose their own implementation dates, is incompatible with the principle of reciprocity, which is fundamental to the WTO. The principle of reciprocity requires that there is a balance between members in terms of benefits and obligations. However, in the GATT, developed countries have agreed to not expect full reciprocity from less developed countries.

---

175 Neufeld, 11.
176 See for example Trebilcock, Eliason and Howse, 655 and Hoekman, Michalopoulos and Winters, 494.
177 Finger 2014, 1283.
178 Herdegen, 188.
179 GATT, Article XXXVI:8.
Another interesting aspect of the category system is that for category B and C there are no time limits for the self-assessed definitive implementation dates. A developing country member can therefore notify an implementation date that is far away in the future, and still expect full commitment from other members in terms of their obligations to implement the various provisions.\textsuperscript{180} For category C provisions, it is argued that the lack of an overall maximum time frame supports the conditional link between the obligation to implement and the assistance that is needed in order to do so.\textsuperscript{181} For category B it is harder to find such an argument.

Concerns can also be raised relating to the dispute settlement process. The introduction of a category system building on self-designation and notification will result in that different time frames will apply for each developing country member. As the categories are constructed into A, B and C, each respectively divided between developing country members and LDC members, no less than six different provisions instruct on how to notify on, and when to expect, implementation.\textsuperscript{182} This differentiation, along with the individual time frames, and the possibility to extend implementation dates, will lead to a lack of clarity. A panel or the AB will have to, in the event of a dispute, address the time aspects of claims brought against developing countries under the TFA on a case-by-case basis, since there is no overall maximum time frame.\textsuperscript{183}

Implementation concerns of developing country members and LDC members are addressed in several ways in the TFA. With the category system follows an instruction to the Committee to establish an Expert Group when a member notifies its inability to implement a provision under category C (after having fulfilled the procedures in Articles 16 and 17, or otherwise experienced unforeseen circumstances that prevent an extension being granted under Article 17).\textsuperscript{184} This step addresses implementation concerns of developing country members and LDC members in a thoughtful manner. First of all, it acknowled-

\textsuperscript{180} Finger 2014, 1283. 
\textsuperscript{181} UNCTAD 2011, 41. 
\textsuperscript{182} TFA, Articles 15 and 16. 
\textsuperscript{183} Eliason, 35. 
\textsuperscript{184} TFA, Article 18(2).
ges the technical aspects of TF as well as development aspects when it requires that the Expert Group shall be composed of persons highly qualified in these fields. Secondly, it acknowledges the procedure of self-assessment and a possibility to review implementation difficulties case by case, addressing the fact that there is a great differentiation among developing countries. Thirdly, it provides an alternative forum for acquisition of implementation capacity, rather than leaving developing members with the only possibility to seek enforcement through the DSM, since the Committee is required to consider the Expert Group’s recommendation and “[…]take action that will facilitate the acquisition of sustainable implementation capacity.”\textsuperscript{185}

\textit{Grace period (Articles 18(5) and 20)}

The TFA provides for rather extensive grace periods, ranging from two years after entry into force of the TFA for developing country members regarding category A provisions, to eight years after implementation for LDC members regarding category C provisions. The different grace periods result in that there is a lack of uniformity, which together with the variation in implementation dates mentioned above, can lead to a reduction in legal clarity and difficulty in determining the viability of claims against developing countries.\textsuperscript{186}

\textit{Assistance and support for capacity building (Articles 21 and 22)}

Flexibility is also included in the provision on assistance and support for capacity building, since it can take the form of technical, financial or any other mutually agreed form of assistance.\textsuperscript{187} Article 21 (provision of assistance and support for capacity building), as well as Article 22 (information on assistance and support for capacity building to be submitted to the Committee), includes a lengthy and detailed description on how to conduct the assistance and support for capacity building and how to inform the Committee on these activities. The provided assistance and support for capacity building is endeavoured to take into account and not compromise existing development priorities of recipient

\textsuperscript{185} TFA, Article 18(4).
\textsuperscript{186} Eliason, 36.
\textsuperscript{187} TFA, Footnote to Article 13(2).
countries.\textsuperscript{188} This instruction corresponds to the right of peoples to choose their own level of development.\textsuperscript{189}

The obligation for donor members to provide information (on the assistance and support for capacity building work they have conducted and information on their contact points for agencies responsible for providing assistance and on the process and mechanism for requesting support) enhances transparency. Clear rules on what information to provide, and how to provide it, creates possibilities to review, compare and discuss assistance and support for capacity building.

The instruction to the Committee to hold at least one dedicated session per year to discuss implementation and capacity building\textsuperscript{190} is another step to acknowledge the need to review, evaluate and discuss the progress for developing countries. This action, together with the instruction on the establishment of an Expert Group in Article 18, are argued to be “two significant high-level procedures for aiding developing and least developed countries in implementing rules under the TFA”\textsuperscript{191}.

\textbf{6.2 Language}

In order to further analyse the SDT provisions, the language used in the different provisions will be reviewed. According to Article 31(1) of the VCLT “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the term of the treaty in their context and in the light of its object and purpose”. The ordinary meaning of terms has also been an important interpretive element for the DSB, which has taken extensive recourse to the dictionary meaning of terms.\textsuperscript{192} However, it is emphasised that the interpretation must put meaning of the terms in a context, according to the VCLT.\textsuperscript{193} Established case law from the WTO on interpretation of SDT provisions provides that regard should first be had to the ordinary meaning of

\textsuperscript{188} TFA, Article 21(2) and (3).
\textsuperscript{189} Described in section 2.2.
\textsuperscript{190} TFA, Article 21(4).
\textsuperscript{191} Eliason, 34.
\textsuperscript{192} Matsushita, Schoenbaum and Mavroidis, 37.
\textsuperscript{193} Ibid., 38.
the words, taking into account their context and in the light of the object and purpose of such provisions in the general context of WTO agreements. When this basic principle does not provide an easy application, or if it would generate manifestly absurd results, recourse may be had to supplementary means of interpretation, including the negotiation history.

The analysis will mainly focus on whether the provisions in Section II of the TFA contain mandatory obligations or best endeavour obligations. Mandatory obligations are those where the obligation is described as a “shall plus verb”. The use of softening language, such as “shall endeavour”, “should”, “to the extent possible”, “as appropriate”, etc., is regarded as indicating best endeavour obligations.

The language analysis focuses on how the implementation of category C commitments are phrased, since this is where we find the conditional link between assistance and support for capacity building and implementation of obligations for developing countries. Provisions on the establishment of an Expert Group (Article 18(2) and the use of a grace period (Article 18(5) and 20) are mandatory obligations, since they use the word “shall”. The nature of these obligations require that they are mandatory, it would not be possible to apply a rule on grace period stating that the DSU “should” not apply for a certain period.

The general principles hold that assistance and support for capacity building “should be provided” – a best endeavour obligation. In Article 14, where the conditionality is first introduced, it is not explained whether assistance and support “shall” or “should” be provided, provisions in category C are merely described as “[...]requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 16. [Emphasis added]”. Turning to Article 16 we find that developing

194 Kessie, 23.
195 Ibid.
196 Hamanaka, 344.
197 Ibid.
198 TFA, Article 13(2).
country members and relevant donor members “shall” provide information to the Committee on the arrangements maintained and the progress thereof, and the Committee “shall” invite non-member donors to provide information on existing or concluded arrangements.\textsuperscript{199} Article 21, which includes provisions on how the assistance and support for capacity building should be conducted, uses a language which indicates that the obligations on donor members are of the “best endeavour” nature:

- “Donor members \textit{agree to facilitate} the provision of assistance and support for capacity building[…}\textit{on mutually agreed terms}[…] [emphasis added]”.\textsuperscript{200}
- “[…]targeted assistance and support \textit{should be provided}[…][emphasis added]”.\textsuperscript{201}
- “Members \textit{shall endeavour} to apply the following principles[…] [emphasis added]”.\textsuperscript{202}

However, Article 21 includes one mandatory obligation: “The Committee \textit{shall} hold at least one dedicated session per year to[…] [emphasis added]”.\textsuperscript{203}

Article 22, which contains provisions on information to be provided regarding the assistance and support for capacity building, mainly consists of mandatory obligations using “shall”.

The conclusion is that developing country members’ obligation to implement category C provisions is conditional upon donor members providing assistance and support for capacity building, which in turn is not a mandatory obligation – it is phrased as a best endeavour obligation. Had members sought to make this obligation mandatory, a less soft language would have been used instead of “agree to facilitate” and “on mutually agreed terms”.

\textsuperscript{199} TFA, Article 16(1)(d-e). The same applies for LDCs and donor members in Article 16(2)(e-f).
\textsuperscript{200} TFA, Article 21(1).
\textsuperscript{201} TFA, Article 21(2).
\textsuperscript{202} TFA, Article 21(3).
\textsuperscript{203} TFA, Article 21(4).
A thorough analysis on the nature, whether mandatory or best endeavour, of the provisions in Section I shows that the majority are best endeavour obligations. To summarise, the TFA mainly consists of best endeavour obligations, both in Section I as well as in Section II. Best endeavour obligations are less predictable compared to mandatory obligations, since it is unclear to what extent a member has to commit in order to fulfil the obligation. However, best endeavour obligations should not be regarded as entirely ineffective. They have been agreed upon and inserted to the legal text and cannot be ignored completely. Further analysis and future case law will be needed to clarify the different obligations.

6.3 A comparison with Special and Differential Treatment provisions in other WTO agreements

6.3.1 Provisions in other WTO agreements

The comparative material consists of WTO agreements regarding trade in goods, since this would be appropriate when the nature of the TFA is to facilitate trade in goods. I will focus on the multilateral agreements on trade in goods, inserted in Annex 1A of the WTO Agreement. When referring to SDT provisions, provisions on technical assistance are also included, since they are a part of the SDT provisions of the TFA, even though they can be separated from the SDT provisions in the relevant agreement.

SDT provisions are construed differently in different WTO agreements. Some make up a separate part of the agreement, as in the TFA, devoted to SDT provisions. However, they are much shorter in comparison with the TFA. Some have SDT provisions scattered in the various relevant provisions. Others have one or two articles devoted to SDT provisions. It is clear that Section II of the TFA with SDT provisions is far longer, and constitutes a

---

204 Hamanka, 348.
205 The GATT, Agreements on Agriculture; Technical Barriers to Trade; Trade-Related Investment Measures; Anti-dumping; Customs valuation; Preshipment Inspection; Rules of Origin; Import; Licensing; Subsidies and Countervailing Measures; and Safeguards.
206 For example the Agreement on Subsidies and Countervailing Measures, part VIII.
207 For example the Agreement on Agriculture, see reference in Article 15.
208 For example the Agreement on Sanitary and Phytosanitary Measures, Articles 9 and 10.
much larger part of its agreement (almost half of it) than its corresponding parts in the comparative material. Furthermore, to put all SDT provisions in one separate section of an agreement is argued to promote transparency.\footnote{UNCTAD 2011, 13.}

Most SDT provisions in other WTO agreements contain best endeavour obligations, using phrases such as:

- “Members agree to facilitate the provision of technical assistance[...] [emphasis added]”.\footnote{Agreement on Sanitary and Phytosanitary Measures, Article 9(1).}
- “Members shall take account of the special needs of developing country Members[...][emphasis added]”.\footnote{Agreement on Sanitary and Phytosanitary Measures, Article 10(1).}
- “It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. [Emphasis added]”.\footnote{Agreement on Anti-dumping, Article 15.}
- “Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement[...][emphasis added]”.\footnote{Agreement on Technical Barriers to Trade, Article 12(2).}

Others include a more precise language, however they must be regarded as best endeavour obligations and not mandatory since they contain phrasing which is open for interpretation, such as:

- “[...]shall grant them technical assistance on mutually agreed terms and conditions[...][emphasis added]”.\footnote{Agreement on Technical Barriers to Trade, Article 11(2).}

This construction proposes a mandatory obligation in theory, since it uses the words “shall grant”. However, it is followed by a criterion of “mutually agreed

---

\footnote{UNCTAD 2011, 13.}
\footnote{Agreement on Sanitary and Phytosanitary Measures, Article 9(1).}
\footnote{Agreement on Sanitary and Phytosanitary Measures, Article 10(1).}
\footnote{Agreement on Anti-dumping, Article 15.}
\footnote{Agreement on Technical Barriers to Trade, Article 12(2).}
\footnote{Agreement on Technical Barriers to Trade, Article 11(2).}
terms and conditions”, which in practice means that a member may block the obligation by avoiding to reach the mutual agreement.\textsuperscript{215}

There are also some mandatory rules on SDT, mainly on implementation times and SDT provisions which are not directed to other members specifically, such as:

- “The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement. [Emphasis added]”.\textsuperscript{216}
- “A developing country Member shall have the right to extend the period of application of a safeguard measure for a period of up to two years beyond the maximum period provided for in paragraph 3 of Article 7. [Emphasis added]”.\textsuperscript{217}

After comparing the language of SDT provisions of the TFA with such provisions in other WTO agreements one can notice a similarity in the language used. It is hard to find any SDT provisions that oblige developed country members to take specific action towards or provide assistance and support for capacity building towards developing country members.

However, the TFA is nevertheless different to earlier WTO agreements since it introduces a category system, the establishment of an Expert Group and a conditional link between developing country members’ implementation of obligations and donor members providing assistance and support for capacity building.

6.3.2 Doctrine
SDT provisions have been the topic for vast debate – whether they are the optimal way to improve developing countries’ participation in international

\textsuperscript{215} UNCTAD 2011, 15.
\textsuperscript{216} Agreement on Subsidies and Countervailing Measures, Article 27(3).
\textsuperscript{217} Agreement on Safeguards, Article 9(2).
trade or not, whether they are legally binding or not, etc. Whether SDT is the appropriate way to go in order to achieve economically sufficient development assistance, is not for this legal essay to discuss. Here follows a brief introduction to the academic literature on the legal aspects of SDT.

Trebilcock, Eliason and Howse, summarise that there is an extensive legal framework on SDT in WTO law.\(^\text{218}\) However, the framework is considered to be limited by the fact that most provisions are non-mandatory, and some only provide SDT in the form of extended implementation times.\(^\text{219}\) Regarding assistance and support for capacity building, many agreements call for developed countries to provide such aid to developing countries in order to support their implementations of WTO obligations, but the provisions are not legally enforceable.\(^\text{220}\)

Similarly, Micahalopoulos is arguing that many of the SDT commitments are too broad and general in nature, or of the best endeavour kind, to be legally enforceable, meaning that developed countries cannot be held strictly accountable for not implementing the commitments.\(^\text{221}\) Epps and Trebilcock propose that these vaguely worded best endeavour obligations should be strengthened so that they are enforceable.\(^\text{222}\)

On the other hand, Finger, argues that a legal obligation to provide assistance is impossible to create.\(^\text{223}\) Several assistance programmes already take place where developed countries support developing countries’ work on TF.\(^\text{224}\) Attempts to make such assistance a legal obligation only harm the existing trust and appreciation of shared benefits, rather than bring forward additional money.\(^\text{225}\) This argumentation heavily relies on Hudec’s early criticism of the GATT’s failure to serve the interests of developing countries. He argued that

---

\(^{218}\) Trebilcock, Eliason and Howse, 634.  
\(^{219}\) Ibid.  
\(^{220}\) Ibid.  
\(^{221}\) Michalopoulos, 25.  
\(^{222}\) Epps and Trebilcock, 354.  
\(^{224}\) Ibid., 102.  
\(^{225}\) Ibid., 103.
“[t]he MFN obligation is the only solid foundation on which effective legal protection of the interests of developing countries can be built.”

Either way, Kessie argues that the present situation is unsatisfactory, in which there are doubts and debate over which SDT provisions should have legal force or not. To maintain the status quo is neither in the interest of developed countries nor developing countries.

From a development perspective, and critical for the relevance of the WTO and its long-term viability, Hoekman, Michalopoulos and Winters argue that a reconstruction of SDT is necessary. They argue, among several proposals, that there is a need for strengthening mechanisms to allow for regular monitoring of implementation of SDT. SDT, in general, can also be discussed from a perspective of fairness between members. Should, e.g., China and Brazil really have the same opportunity to receive SDT as, e.g., Ghana and St Lucia? And should emerging developing countries, with growing economies and increasing market shares, actually be accorded SDT at all?

6.3.3 Case law

Case law on SDT provisions can indicate how the SDT provisions in the TFA will be interpreted and applied in the WTO DSM. A few cases that could be relevant when interpreting and assessing the degree of legal enforceability of the SDT provisions included in the TFA will be presented below.

The vague language in many SDT provisions has led to interpretations that do not call for positive obligations for developed countries. Article 15 of the Agreement on Anti-dumping has been the topic of a few disputes. It reads:

---

226 Hudec, 223.
227 Kessie, 35.
228 Ibid.
229 Hoekman, Michalopoulos and Winters, 484.
230 Ibid., 495. At the Bali Ministerial Conference in December 2013, a mechanism was established to review and analyse the implementation of SDT. The mechanism constitutes of Dedicated Sessions of the Committee on Trade and Development, see WT/MIN(13)/45.
231 Hoekman, Michalopoulos and Winters, 494.
232 Trebilcock, Eliason and Howse, 655.
“It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members. [Emphasis added]”

In *EC – Bed linen*, the Panel found that the European Communities (EC) had violated Article 15 of the Agreement on Anti-dumping, since there was an obligation to explore possibilities of constructive remedies, however there is no positive obligation to accept or provide such alternative remedies.\(^{233}\) In *US – Steel Plate*, the Panel reaffirmed that the article does not oblige members to take any action, only to explore the possibilities for constructive remedies.\(^{234}\)

Other SDT provisions are found to be legally enforceable, as Article 9(1) of the Safeguards Agreement, which provides:

> “Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned [emphasis added].”

In *US – Line Pipe*, the Appellate Body held that this provision was legally enforceable and found that the US had violated its obligation when it had failed to exempt Korea’s exports from the application of its safeguard measure, since Korea’s exports to the US were below the de minimis levels set out in Article 9(1).\(^{235}\)

In my research of case law on SDT I have not found any dispute before the DSB on a SDT provision relating to the supply of technical assistance or assistance and support for capacity building. These provisions are often vaguely phrased, therefore I assume that developing country members find it

\(^{233}\) *EC – Bed linen*, para. 6.233.
\(^{234}\) *US – Steel Plate*, para. 7.110 and para. 7.114.
\(^{235}\) *US – Line Pipe*, para. 133.
pointless to invoke a dispute process if they predict the provision’s legal enforceability is non-existent.

The overall picture is that the case law reaffirms what developing country members argue, and what scholars have pointed out – that SDT provisions often are too vague and general in the wordings to be legally enforceable.

6.4 Concluding remarks and comments

The analysis made, of the SDT provisions in the TFA, regarding their construction and language compared with other SDT provisions in WTO agreements, provides a prediction of the degree of enforceability. Different provisions will, due to their different construction and language, be accorded different degrees of enforceability in the event of a dispute procedure.

Those provisions that contain mandatory obligations, e.g. on grace period, the establishment of an Expert Group and the category system, should not invoke any questions or disputes as to whether they are enforceable or not. The provisions that raise doubts regarding their potential enforceability are, evidently, those that contain best endeavour obligations.

I argue, based on the previous sections on SDT provisions, that the provisions with less, or no, legal enforceability are the general principle regarding assistance and support for capacity building and the separate article devoted to the topic. They do not use the word shall, which indicates a mandatory obligation, instead they use a vague language; “[a]ssistance and support for capacity building should be provided[…][emphasis added]” and “[d]onor Members agree to facilitate[…][emphasis added], “targeted assistance and support should be provided[…][emphasis added]” and “[m]embers shall endeavor[…][emphasis added]”. Doctrine and case law on these types of formulations show that they do not contain any mandatory obligation on developed countries to take specific action.

236 TFA, Article 13(1).
237 TFA, Article 21.
The conditional link between developing country members’ implementation of category C provisions and donor members’ delivery of assistance is an interesting creation. However, its language indicates that developed countries are not obliged to provide assistance, rather that developing countries are obliged to implement the category C provisions if they receive the assistance required. A problem that can arise if a developing country fails to implement a category C provision, is that it can become difficult to assess whether the commitment to implement has been insufficient or if the provided assistance and support for capacity building have been insufficient.\textsuperscript{238}

It is argued that the invention of category C provisions, and their conditional link, does not make the provision on assistance legally binding – “it is another exercise in form without legal substance.”\textsuperscript{239}

In order to properly assess the legal status of the SDT provisions of the TFA we must first await the entry into force of the TFA, and thereafter observe members’ application of the provisions and the DSB’s interpretation in future case law.

\textbf{7 Conclusion}

When almost half of the total text of the TFA is devoted to SDT it is clear that developing country concerns have not been ignored. Not only is the SDT of the TFA relevant to developing country members, before valuating the SDT, the general obligations relating to TF measures in Section I of the TFA have been analysed.

From a state perspective, the TFA is legally affecting developing country members in various ways. Agreements and instruments on TF already exist within the work of other organisations, however, none with an effective DSM as in the WTO. An agreement on TF under the WTO regime is beneficial to developing countries that seek a rule-based system rather than a power-based

\textsuperscript{238} Hamanaka, 349.
\textsuperscript{239} Finger 2014, 1284.
one. This positive effect could be minimised by the fact that developing country members tend to refrain from using the DSM. However, the mere existence of a DSM is an important tool, it provides case law, a possibility to “free ride” on other members’ dispute settlements, and a potential threat in pre-trial discussions. Another beneficial aspect is that the TFA will be a part of the WTO system, which means that TF will become a part of a familiar regime.

Traders in developing countries should benefit from the TFA, as would all traders, since the TFA is all about facilitating trade, i.e., make trade faster, cheaper and more transparent. The TFA is argued to be of particular interest for traders in developing countries since they generally face worse trade environments. Traders in landlocked countries, which many LDCs are, would benefit from improving the freedom of transit. Less beneficial to traders in developing countries, who usually are smaller in size and less experienced in trade, are the rules on authorised operators and expedited shipments, since they require presentations of financial and compliance records.

The TFA creates legal obligations to improve the trade environment. This is a costly procedure, especially for many developing countries. If not implemented correctly in time, they face the potential threat of a dispute settlement procedure. Arguments have been raised that the cost of implementation exceeds the predicted income gains of increased trade due to the TF measures that are to be taken. This perspective has not been explored in this legal essay, only observed in connection with the identification of implementation difficulties. The difficulties that developing countries face when implementing WTO provisions are the base for creating SDT in WTO law.

Section II of the TFA with SDT provisions is lengthy and detailed. The TFA provides a new form of SDT when it introduces a category system, in which developing countries are to designate different provisions in Section I to three different categories. The category system provides flexibility and self-designation, which corresponds to development concepts in international law, such as the right for peoples to choose their own level of development and the
multidimensional approach to development. It also acknowledges that developing countries are different by nature, and that one size does not fit all.

Furthermore, a conditional link is created between developing country members’ obligation to implement provisions under category C, and donor members’ obligation to provide assistance and support for capacity building. However, the language in the articles concerning assistance and support provides that the obligations are of the best-effort kind. Therefore it is predicted that, it will not be possible to enforce donor members to provide assistance and support for capacity building.

In conclusion, the TFA is definitely addressing developing country concerns. Section I will lead to an improvement of the trade environment that is especially needed in developing countries, Section II provides flexibility in implementation, and some implementation obligations will be conditional upon assistance and support for capacity building from donor members. However, to provide such assistance and support has, yet again, not been made a mandatory obligation.
8 List of references

Conventions


Agreement on Technical Barriers to Trade (1994), 1868 U.N.T.S. 120.

Agreement on Trade Facilitation, WT/L/931, (15 July 2014), (under ratification) [cited TFA].


**Case law**


**Literature**


Persson, Maria, *From Trade Preferences to Trade Facilitation*, Department of Economics Lund University, Lund, 2009 [cited Persson].


**Web material**


UN Agency ITU, 'Key ICT indicators for developed and developing countries and the world (totals and penetration rates)

UNCTAD, 'Reflections On A Future Trade Facilitation Agreement’, 2011,


UNCTAD, 'Trust Fund for Trade Facilitation Negotiations : Technical Note 8’,
[cited UNCTAD, ‘Trust Fund for Trade Facilitation Negotiations: Technical Note 8’].

World Bank, ‘2014 World Development Indicators’,

WTO, ‘Briefing notes: Trade facilitation – Cutting red tape at the border’,

WTO, ‘Glossary Term – trade facilitation’,

WTO, ‘Groups in the WTO’,

WTO, ‘Least-developed countries’,

WTO, ‘Special and differential treatment provisions’,

WTO, ‘Subjects treated under the Doha Development Agenda’,
WTO, ‘The WTO… In brief…’,
http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm, visited 2014-12-21 [cited WTO, ‘The WTO… In brief…’].

WTO, ‘Trade and development’,

WTO, ‘Who are the developing countries in the WTO?’,
http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm, last visited 2014-12-21 [cited WTO, ‘Who are the developing countries in the WTO?’].

WTO, ‘WTO legal texts’,


**WTO documents**

Bali Ministerial Declaration, WT/MIN(13)/DEC.

Doha Work Programme, 2 August 2004, WT/L/579.

GATT Contracting Parties, Decision of November 28 1979, on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries, (L/4903) [cited Enabling Clause].

Singapore Ministerial Declaration, WT/MIN(96)/DEC.

(To acquire these documents, please consult WTO “Documents Online”, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx.)

**Declarations**

UN Declaration on the Right to Development (1986) [cited UNDRD].
Appendix – Trade Facilitation Agreement
Preparatory Committee on Trade Facilitation

AGREEMENT ON TRADE FACILITATION

Preamble

Members,

Having regard to the negotiations launched under the Doha Ministerial Declaration;

Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) and in Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004 (WT/L/579), as well as in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC);

Desiring 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;

Recognizing the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area;

Recognizing the need for effective cooperation among Members on trade facilitation and customs compliance issues;

Hereby agree as follows:

SECTION I

ARTICLE 1: PUBLICATION AND AVAILABILITY OF INFORMATION

1 Publication

1.1 Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them:

(a) procedures for importation, exportation, and transit (including port, airport, and other entry-point procedures), and required forms and documents;

(b) applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation;

(c) fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;

(d) rules for the classification or valuation of products for customs purposes;

(e) laws, regulations, and administrative rulings of general application relating to rules of origin;

* This document has previously been issued under the symbol WT/PCTF/W/27.
(f) import, export or transit restrictions or prohibitions;
(g) penalty provisions for breaches of import, export, or transit formalities;
(h) procedures for appeal or review;
(i) agreements or parts thereof with any country or countries relating to importation, exportation, or transit; and
(j) procedures relating to the administration of tariff quotas.

1.2 Nothing in these provisions shall be construed as requiring the publication or provision of information other than in the language of the Member except as stated in paragraph 2.2.

2 Information Available Through Internet

2.1 Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:

(a) a description\(^1\) of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit;

(b) the forms and documents required for importation into, exportation from, or transit through the territory of that Member;

(c) contact information on its enquiry point(s).

2.2 Whenever practicable, the description referred to in subparagraph 2.1(a) shall also be made available in one of the official languages of the WTO.

2.3 Members are encouraged to make available further trade-related information through the internet, including relevant trade-related legislation and other items referred to in paragraph 1.1.

3 Enquiry Points

3.1 Each Member shall, within its available resources, establish or maintain one or more enquiry points to answer reasonable enquiries of governments, traders, and other interested parties on matters covered by paragraph 1.1 and to provide the required forms and documents referred to in subparagraph 1.1(a).

3.2 Members of a customs union or involved in regional integration may establish or maintain common enquiry points at the regional level to satisfy the requirement of paragraph 3.1 for common procedures.

3.3 Members are encouraged not to require the payment of a fee for answering enquiries and providing required forms and documents. If any, Members shall limit the amount of their fees and charges to the approximate cost of services rendered.

3.4 The enquiry points shall answer enquiries and provide the forms and documents within a reasonable time period set by each Member, which may vary depending on the nature or complexity of the request.

4 Notification

Each Member shall notify the Committee on Trade Facilitation established under paragraph 1.1 of Article 23 (referred to in this Agreement as the "Committee") of:

\(^{1}\) Each Member has the discretion to state on its website the legal limitations of this description.
(a) the official place(s) where the items in subparagraphs 1.1(a) to (j) have been published;

(b) the Uniform Resource Locators of website(s) referred to in paragraph 2.1; and

(c) the contact information of the enquiry points referred to in paragraph 3.1.

**ARTICLE 2: OPPORTUNITY TO COMMENT, INFORMATION BEFORE ENTRY INTO FORCE, AND CONSULTATIONS**

1 **Opportunity to Comment and Information before Entry into Force**

1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit.

1.2 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit, are published or information on them made otherwise publicly available, as early as possible before their entry into force, in order to enable traders and other interested parties to become acquainted with them.

1.3 Changes to duty rates or tariff rates, measures that have a relieving effect, measures the effectiveness of which would be undermined as a result of compliance with paragraphs 1.1 or 1.2, measures applied in urgent circumstances, or minor changes to domestic law and legal system are each excluded from paragraphs 1.1 and 1.2.

2 **Consultations**

Each Member shall, as appropriate, provide for regular consultations between its border agencies and traders or other stakeholders located within its territory.

**ARTICLE 3: ADVANCE RULINGS**

1. Each Member shall issue an advance ruling in a reasonable, time-bound manner to the applicant that has submitted a written request containing all necessary information. If a Member declines to issue an advance ruling, it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision.

2. A Member may decline to issue an advance ruling to the applicant where the question raised in the application:
   (a) is already pending in the applicant's case before any governmental agency, appellate tribunal, or court; or
   (b) has already been decided by any appellate tribunal or court.

3. The advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts, or circumstances supporting that ruling have changed.

4. Where the Member revokes, modifies, or invalidates the advance ruling, it shall provide written notice to the applicant setting out the relevant facts and the basis for its decision. Where a Member revokes, modifies, or invalidates advance rulings with retroactive effect, it may only do so where the ruling was based on incomplete, incorrect, false, or misleading information.

5. An advance ruling issued by a Member shall be binding on that Member in respect of the applicant that sought it. The Member may provide that the advance ruling is binding on the applicant.
6. Each Member shall publish, at a minimum:
   (a) the requirements for the application for an advance ruling, including the information
to be provided and the format;
   (b) the time period by which it will issue an advance ruling; and
   (c) the length of time for which the advance ruling is valid.

7. Each Member shall provide, upon written request of an applicant, a review of the advance
ruling or the decision to revoke, modify, or invalidate the advance ruling.2

8. Each Member shall endeavour to make publicly available any information on advance rulings
which it considers to be of significant interest to other interested parties, taking into account the
need to protect commercially confidential information.

9. Definitions and scope:
   (a) An advance ruling is a written decision provided by a Member to the applicant prior to
   the importation of a good covered by the application that sets forth the treatment that
   the Member shall provide to the good at the time of importation with regard to:
      (i) the good’s tariff classification; and
      (ii) the origin of the good.3
   (b) In addition to the advance rulings defined in subparagraph (a), Members are
   encouraged to provide advance rulings on:
      (i) the appropriate method or criteria, and the application thereof, to be used
      for determining the customs value under a particular set of facts;
      (ii) the applicability of the Member’s requirements for relief or exemption from
      customs duties;
      (iii) the application of the Member’s requirements for quotas, including tariff
      quotas; and
      (iv) any additional matters for which a Member considers it appropriate to issue
      an advance ruling.
   (c) An applicant is an exporter, importer or any person with a justifiable cause or a
   representative thereof.
   (d) A Member may require that the applicant have legal representation or registration in its
   territory. To the extent possible, such requirements shall not restrict the categories of
   persons eligible to apply for advance rulings, with particular consideration for the
   specific needs of small and medium-sized enterprises. These requirements shall be clear
   and transparent and not constitute a means of arbitrary or unjustifiable discrimination.

2 Under this paragraph: (a) a review may, either before or after the ruling has been acted upon, be
   provided by the official, office, or authority that issued the ruling, a higher or independent administrative
   authority, or a judicial authority; and (b) a Member is not required to provide the applicant with recourse to
   paragraph 1 of Article 4.

3 It is understood that an advance ruling on the origin of a good may be an assessment of origin for the
   purposes of the Agreement on Rules of Origin where the ruling meets the requirements of this Agreement and
   the Agreement on Rules of Origin. Likewise, an assessment of origin under the Agreement on Rules of Origin
   may be an advance ruling on the origin of a good for the purposes of this Agreement where the ruling meets
   the requirements of both agreements. Members are not required to establish separate arrangements under this
   provision in addition to those established pursuant to the Agreement on Rules of Origin in relation to the
   assessment of origin provided that the requirements of this Article are fulfilled.
ARTICLE 4: PROCEDURES FOR APPEAL OR REVIEW

1. Each Member shall provide that any person to whom customs issues an administrative decision\(^4\) has the right, within its territory, to:

   (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;

   and/or

   (b) a judicial appeal or review of the decision.

2. The legislation of a Member may require that an administrative appeal or review be initiated prior to a judicial appeal or review.

3. Each Member shall ensure that its procedures for appeal or review are carried out in a non-discriminatory manner.

4. Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1(a) is not given either:

   (a) within set periods as specified in its laws or regulations; or

   (b) without undue delay

   the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.\(^5\)

5. Each Member shall ensure that the person referred to in paragraph 1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to procedures for appeal or review where necessary.

6. Each Member is encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs.

ARTICLE 5: OTHER MEASURES TO ENHANCE IMPARTIALITY, NON-DISCRIMINATION AND TRANSPARENCY

1. Notifications for enhanced controls or inspections

Where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages, or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination, or suspension:

   (a) the Member may, as appropriate, issue the notification or guidance based on risk;

   (b) the Member may issue the notification or guidance so that it applies uniformly only to those points of entry where the sanitary and phytosanitary conditions on which the notification or guidance are based apply;

\(^4\) An administrative decision in this Article means a decision with a legal effect that affects the rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1(a).

\(^5\) Nothing in this paragraph shall prevent a Member from recognizing administrative silence on appeal or review as a decision in favor of the petitioner in accordance with its laws and regulations.
(c) the Member shall promptly terminate or suspend the notification or guidance when circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade-restrictive manner; and

(d) when the Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

2 Detention

A Member shall promptly inform the carrier or importer in case of detention of goods declared for importation, for inspection by customs or any other competent authority.

3 Test Procedures

3.1 A Member may, upon request, grant an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding.

3.2 A Member shall either publish, in a non-discriminatory and easily accessible manner, the name and address of any laboratory where the test can be carried out or provide this information to the importer when it is granted the opportunity provided under paragraph 3.1.

3.3 A Member shall consider the result of the second test, if any, conducted under paragraph 3.1, for the release and clearance of goods and, if appropriate, may accept the results of such test.

ARTICLE 6: DISCIPLINES ON FEES AND CHARGES IMPOSED ON OR IN CONNECTION WITH IMPORTATION AND EXPORTATION AND PENALTIES

1 General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation

1.1 The provisions of paragraph 1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with the importation or exportation of goods.

1.2 Information on fees and charges shall be published in accordance with Article 1. This information shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made.

1.3 An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force, except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published.

1.4 Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.

2 Specific disciplines on Fees and Charges for Customs Processing Imposed on or in Connection with Importation and Exportation

Fees and charges for customs processing:

(i) shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and

(ii) are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.
3 Penalty Disciplines

3.1 For the purpose of paragraph 3, the term "penalties" shall mean those imposed by a Member’s customs administration for a breach of the Member’s customs laws, regulations, or procedural requirements.

3.2 Each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws.

3.3 The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.

3.4 Each Member shall ensure that it maintains measures to avoid:
   (a) conflicts of interest in the assessment and collection of penalties and duties; and
   (b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.

3.5 Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying the nature of the breach and the applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed.

3.6 When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.

3.7 The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1.

ARTICLE 7: RELEASE AND CLEARANCE OF GOODS

1 Pre-arrival Processing

1.1 Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival.

1.2 Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.

2 Electronic Payment

Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.

3 Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges

3.1 Each Member shall adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees, and charges, if such a determination is not done prior to, or upon arrival, or as rapidly as possible after arrival and provided that all other regulatory requirements have been met.

3.2 As a condition for such release, a Member may require:
(a) payment of customs duties, taxes, fees, and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations; or

(b) a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations.

3.3 Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee.

3.4 In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.

3.5 The guarantee as set out in paragraphs 3.2 and 3.4 shall be discharged when it is no longer required.

3.6 Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.

4 Risk Management

4.1 Each Member shall, to the extent possible, adopt or maintain a risk management system for customs control.

4.2 Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

4.3 Each Member shall concentrate customs control and, to the extent possible other relevant border controls, on high-risk consignments and expedite the release of low-risk consignments. A Member also may select, on a random basis, consignments for such controls as part of its risk management.

4.4 Each Member shall base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, inter alia, the Harmonized System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.

5 Post-clearance Audit

5.1 With a view to expediting the release of goods, each Member shall adopt or maintain post-clearance audit to ensure compliance with customs and other related laws and regulations.

5.2 Each Member shall select a person or a consignment for post-clearance audit in a risk-based manner, which may include appropriate selectivity criteria. Each Member shall conduct post-clearance audits in a transparent manner. Where the person is involved in the audit process and conclusive results have been achieved the Member shall, without delay, notify the person whose record is audited of the results, the person's rights and obligations, and the reasons for the results.

5.3 The information obtained in post-clearance audit may be used in further administrative or judicial proceedings.

5.4 Members shall, wherever practicable, use the result of post-clearance audit in applying risk management.
6 Establishment and Publication of Average Release Times

6.1 Members are encouraged to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, *inter alia*, the Time Release Study of the World Customs Organization (referred to in this Agreement as the "WCO").

6.2 Members are encouraged to share with the Committee their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency.

7 Trade Facilitation Measures for Authorized Operators

7.1 Each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.

7.2 The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures.

(a) Such criteria, which shall be published, may include:

   (i) an appropriate record of compliance with customs and other related laws and regulations;

   (ii) a system of managing records to allow for necessary internal controls;

   (iii) financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and

   (iv) supply chain security.

(b) Such criteria shall not:

   (i) be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and

   (ii) to the extent possible, restrict the participation of small and medium-sized enterprises.

7.3 The trade facilitation measures provided pursuant to paragraph 7.1 shall include at least three of the following measures:

(a) low documentary and data requirements, as appropriate;

(b) low rate of physical inspections and examinations, as appropriate;

(c) rapid release time, as appropriate;

(d) deferred payment of duties, taxes, fees, and charges;

6 Each Member may determine the scope and methodology of such average release time measurement in accordance with its needs and capacity.

7 A measure listed in subparagraphs 7.3 (a) to (g) will be deemed to be provided to authorized operators if it is generally available to all operators.
(e) use of comprehensive guarantees or reduced guarantees;

(f) a single customs declaration for all imports or exports in a given period; and

(g) clearance of goods at the premises of the authorized operator or another place authorized by customs.

7.4 Members are encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfilment of the legitimate objectives pursued.

7.5 In order to enhance the trade facilitation measures provided to operators, Members shall afford to other Members the possibility of negotiating mutual recognition of authorized operator schemes.

7.6 Members shall exchange relevant information within the Committee about authorized operator schemes in force.

8 Expedited Shipments

8.1 Each Member shall adopt or maintain procedures allowing for the expedited release of at least those goods entered through air cargo facilities to persons who apply for such treatment, while maintaining customs control. If a Member employs criteria limiting who may apply, the Member may, in published criteria, require that the applicant shall, as conditions for qualifying for the application of the treatment described in paragraph 8.2 to its expedited shipments:

(a) provide adequate infrastructure and payment of customs expenses related to processing of expedited shipments in cases where the applicant fulfils the Member’s requirements for such processing to be performed at a dedicated facility;

(b) submit in advance of the arrival of an expedited shipment the information necessary for the release;

(c) be assessed fees limited in amount to the approximate cost of services rendered in providing the treatment described in paragraph 8.2;

(d) maintain a high degree of control over expedited shipments through the use of internal security, logistics, and tracking technology from pick-up to delivery;

(e) provide expedited shipment from pick-up to delivery;

(f) assume liability for payment of all customs duties, taxes, fees, and charges to the customs authority for the goods;

(g) have a good record of compliance with customs and other related laws and regulations;

(h) comply with other conditions directly related to the effective enforcement of the Member’s laws, regulations, and procedural requirements, that specifically relate to providing the treatment described in paragraph 8.2.

8.2 Subject to paragraphs 8.1 and 8.3, Members shall:

(a) minimize the documentation required for the release of expedited shipments in accordance with paragraph 1 of Article 10 and, to the extent possible, provide for release based on a single submission of information on certain shipments;

8 In cases where a Member has an existing procedure that provides the treatment in paragraph 8.2, this provision does not require that Member to introduce separate expedited release procedures.

9 Such application criteria, if any, shall be in addition to the Member’s requirements for operating with respect to all goods or shipments entered through air cargo facilities.
(b) provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;

(c) endeavour to apply the treatment in subparagraphs (a) and (b) to shipments of any weight or value recognizing that a Member is permitted to require additional entry procedures, including declarations and supporting documentation and payment of duties and taxes, and to limit such treatment based on the type of good, provided the treatment is not limited to low value goods such as documents; and

(d) provide, to the extent possible, for a de minimis shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods. Internal taxes, such as value added taxes and excise taxes, applied to imports consistently with Article III of the GATT 1994 are not subject to this provision.

8.3 Nothing in paragraphs 8.1 and 8.2 shall affect the right of a Member to examine, detain, seize, confiscate or refuse entry of goods, or to carry out post-clearance audits, including in connection with the use of risk management systems. Further, nothing in paragraphs 8.1 and 8.2 shall prevent a Member from requiring, as a condition for release, the submission of additional information and the fulfilment of non-automatic licensing requirements.

9 Perishable Goods

9.1 With a view to preventing avoidable loss or deterioration of perishable goods, and provided that all regulatory requirements have been met, each Member shall provide for the release of perishable goods:

(a) under normal circumstances within the shortest possible time; and

(b) in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.

9.2 Each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required.

9.3 Each Member shall either arrange or allow an importer to arrange for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorizations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities.

9.4 In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay.

ARTICLE 8: BORDER AGENCY COOPERATION

1. Each Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.

2. Each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include:

---

10 For the purposes of this provision, perishable goods are goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions.
(a) alignment of working days and hours;
(b) alignment of procedures and formalities;
(c) development and sharing of common facilities;
(d) joint controls;
(e) establishment of one stop border post control.

ARTICLE 9: MOVEMENT OF GOODS INTENDED FOR IMPORT UNDER CUSTOMS CONTROL

Each Member shall, to the extent practicable, and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.

ARTICLE 10: FORMALITIES CONNECTED WITH IMPORTATION, EXPORTATION AND TRANSIT

1 Formalities and Documentation Requirements

1.1 With a view to minimizing the incidence and complexity of import, export, and transit formalities and to decreasing and simplifying import, export, and transit documentation requirements and taking into account the legitimate policy objectives and other factors such as changed circumstances, relevant new information, business practices, availability of techniques and technology, international best practices, and inputs from interested parties, each Member shall review such formalities and documentation requirements and, based on the results of the review, ensure, as appropriate, that such formalities and documentation requirements are:

(a) adopted and/or applied with a view to a rapid release and clearance of goods, particularly perishable goods;
(b) adopted and/or applied in a manner that aims at reducing the time and cost of compliance for traders and operators;
(c) the least trade restrictive measure chosen where two or more alternative measures are reasonably available for fulfilling the policy objective or objectives in question; and
(d) not maintained, including parts thereof, if no longer required.

1.2 The Committee shall develop procedures for the sharing by Members of relevant information and best practices, as appropriate.

2 Acceptance of Copies

2.1 Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities.

2.2 Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document.

2.3 A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.11

11 Nothing in this paragraph precludes a Member from requiring documents such as certificates, permits or licenses as a requirement for the importation of controlled or regulated goods.
3 Use of International Standards

3.1 Members are encouraged to use relevant international standards or parts thereof as a basis for their import, export, or transit formalities and procedures, except as otherwise provided for in this Agreement.

3.2 Members are encouraged to take part, within the limits of their resources, in the preparation and periodic review of relevant international standards by appropriate international organizations.

3.3 The Committee shall develop procedures for the sharing by Members of relevant information, and best practices, on the implementation of international standards, as appropriate.

The Committee may also invite relevant international organizations to discuss their work on international standards. As appropriate, the Committee may identify specific standards that are of particular value to Members.

4 Single Window

4.1 Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.

4.2 In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or data requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.

4.3 Members shall notify the Committee of the details of operation of the single window.

4.4 Members shall, to the extent possible and practicable, use information technology to support the single window.

5 Preshipment Inspection

5.1 Members shall not require the use of preshipment inspections in relation to tariff classification and customs valuation.

5.2 Without prejudice to the rights of Members to use other types of preshipment inspection not covered by paragraph 5.1, Members are encouraged not to introduce or apply new requirements regarding their use.\(^{12}\)

6 Use of Customs Brokers

6.1 Without prejudice to the important policy concerns of some Members that currently maintain a special role for customs brokers, from the entry into force of this Agreement Members shall not introduce the mandatory use of customs brokers.

6.2 Each Member shall notify the Committee and publish its measures on the use of customs brokers. Any subsequent modifications thereof shall be notified and published promptly.

6.3 With regard to the licensing of customs brokers, Members shall apply rules that are transparent and objective.

---

\(^{12}\) This paragraph refers to preshipment inspections covered by the Agreement on Preshipment Inspection, and does not preclude preshipment inspections for sanitary and phytosanitary purposes.
7 Common Border Procedures and Uniform Documentation Requirements

7.1 Each Member shall, subject to paragraph 7.2, apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout its territory.

7.2 Nothing in this Article shall prevent a Member from:
   (a) differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;
   (b) differentiating its procedures and documentation requirements for goods based on risk management;
   (c) differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;
   (d) applying electronic filing or processing; or
   (e) differentiating its procedures and documentation requirements in a manner consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.

8 Rejected Goods

8.1 Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter.

8.2 When such an option under paragraph 8.1 is given and the importer fails to exercise it within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.

9 Temporary Admission of Goods and Inward and Outward Processing

9.1 Temporary Admission of Goods
Each Member shall allow, as provided for in its laws and regulations, goods to be brought into its customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are brought into its customs territory for a specific purpose, are intended for re-exportation within a specific period, and have not undergone any change except normal depreciation and wastage due to the use made of them.

9.2 Inward and Outward Processing
   (a) Each Member shall allow, as provided for in its laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be re-imported with total or partial exemption from import duties and taxes in accordance with the Member’s laws and regulations.
   (b) For the purposes of this Article, the term “inward processing” means the customs procedure under which certain goods can be brought into a Member’s customs territory conditionally relieved, totally or partially, from payment of import duties and taxes, or eligible for duty drawback, on the basis that such goods are intended for manufacturing, processing, or repair and subsequent exportation.
   (c) For the purposes of this Article, the term “outward processing” means the customs procedure under which goods which are in free circulation in a Member’s customs territory may be temporarily exported for manufacturing, processing, or repair abroad and then re-imported.
ARTICLE 11: FREEDOM OF TRANSIT

1. Any regulations or formalities in connection with traffic in transit imposed by a Member shall not be:
   
   (a) maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner;
   
   (b) applied in a manner that would constitute a disguised restriction on traffic in transit.

2. Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

3. Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules.

4. Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.

5. Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.

6. Formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to:
   
   (a) identify the goods; and
   
   (b) ensure fulfilment of transit requirements.

7. Once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory.

8. Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit.

9. Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.

10. Once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met.

11. Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled.

---

13 Nothing in this provision shall preclude a Member from maintaining existing procedures whereby the means of transport can be used as a guarantee for traffic in transit.
12. Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.

13. Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.

14. Each Member shall make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee.

15. Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.

16. Members shall endeavour to cooperate and coordinate with one another with a view to enhancing freedom of transit. Such cooperation and coordination may include, but is not limited to, an understanding on:

(a) charges;
(b) formalities and legal requirements; and
(c) the practical operation of transit regimes.

17. Each Member shall endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

**ARTICLE 12: CUSTOMS COOPERATION**

**1 Measures Promoting Compliance and Cooperation**

1.1 Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders.14

1.2 Members are encouraged to share information on best practices in managing customs compliance, including through the Committee. Members are encouraged to cooperate in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness.

**2 Exchange of Information**

2.1 Upon request and subject to the provisions of this Article, Members shall exchange the information set out in subparagraphs 6.1(b) and/or (c) for the purpose of verifying an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy of the declaration.

2.2 Each Member shall notify the Committee of the details of its contact point for the exchange of this information.

**3 Verification**

A Member shall make a request for information only after it has conducted appropriate verification procedures of an import or export declaration and after it has inspected the available relevant documentation.

---

14 Such activity has the overall objective of lowering the frequency of non-compliance, and consequently reducing the need for exchange of information in pursuit of enforcement.
4 Request

4.1 The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, including:

(a) the matter at issue including, where appropriate and available, the number identifying the export declaration corresponding to the import declaration in question;

(b) the purpose for which the requesting Member is seeking the information or documents, along with the names and contact details of the persons to whom the request relates, if known;

(c) where required by the requested Member, confirmation\(^{15}\) of the verification where appropriate;

(d) the specific information or documents requested;

(e) the identity of the originating office making the request;

(f) reference to provisions of the requesting Member's domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information and personal data.

4.2 If the requesting Member is not in a position to comply with any of the subparagraphs of paragraph 4.1, it shall specify this in the request.

5 Protection and Confidentiality

5.1 The requesting Member shall, subject to paragraph 5.2:

(a) hold all information or documents provided by the requested Member strictly in confidence and grant at least the same level of such protection and confidentiality as that provided under the domestic law and legal system of the requested Member as described by it under subparagraphs 6.1(b) or (c);

(b) provide information or documents only to the customs authorities dealing with the matter at issue and use the information or documents solely for the purpose stated in the request unless the requested Member agrees otherwise in writing;

(c) not disclose the information or documents without the specific written permission of the requested Member;

(d) not use any unverified information or documents from the requested Member as the deciding factor towards alleviating the doubt in any given circumstance;

(e) respect any case-specific conditions set out by the requested Member regarding retention and disposal of confidential information or documents and personal data; and

(f) upon request, inform the requested Member of any decisions and actions taken on the matter as a result of the information or documents provided.

5.2 A requesting Member may be unable under its domestic law and legal system to comply with any of the subparagraphs of paragraph 5.1. If so, the requesting Member shall specify this in the request.

\(^{15}\) This may include pertinent information on the verification conducted under paragraph 3. Such information shall be subject to the level of protection and confidentiality specified by the Member conducting the verification.
5.3 The requested Member shall treat any request and verification information received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested Member to its own similar information.

6 Provision of Information

6.1 Subject to the provisions of this Article, the requested Member shall promptly:

(a) respond in writing, through paper or electronic means;

(b) provide the specific information as set out in the import or export declaration, or the declaration, to the extent it is available, along with a description of the level of protection and confidentiality required of the requesting Member;

(c) if requested, provide the specific information as set out in the following documents, or the documents, submitted in support of the import or export declaration, to the extent it is available: commercial invoice, packing list, certificate of origin and bill of lading, in the form in which these were filed, whether paper or electronic, along with a description of the level of protection and confidentiality required of the requesting Member;

(d) confirm that the documents provided are true copies;

(e) provide the information or otherwise respond to the request, to the extent possible, within 90 days from the date of the request.

6.2 The requested Member may require, under its domestic law and legal system, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings, or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position to comply with this requirement, it should specify this to the requested Member.

7 Postponement or Refusal of a Request

7.1 A requested Member may postpone or refuse part or all of a request to provide information, and shall inform the requesting Member of the reasons for doing so, where:

(a) it would be contrary to the public interest as reflected in the domestic law and legal system of the requested Member;

(b) its domestic law and legal system prevents the release of the information. In such a case it shall provide the requesting Member with a copy of the relevant, specific reference;

(c) the provision of the information would impede law enforcement or otherwise interfere with an on-going administrative or judicial investigation, prosecution or proceeding;

(d) the consent of the importer or exporter is required by its domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information or personal data and that consent is not given; or

(e) the request for information is received after the expiration of the legal requirement of the requested Member for the retention of documents.

7.2 In the circumstances of paragraphs 4.2, 5.2, or 6.2, execution of such a request shall be at the discretion of the requested Member.
8 Reciprocity

If the requesting Member is of the opinion that it would be unable to comply with a similar request if it was made by the requested Member, or if it has not yet implemented this Article, it shall state that fact in its request. Execution of such a request shall be at the discretion of the requested Member.

9 Administrative Burden

9.1 The requesting Member shall take into account the associated resource and cost implications for the requested Member in responding to requests for information. The requesting Member shall consider the proportionality between its fiscal interest in pursuing its request and the efforts to be made by the requested Member in providing the information.

9.2 If a requested Member receives an unmanageable number of requests for information or a request for information of unmanageable scope from one or more requesting Member(s) and is unable to meet such requests within a reasonable time, it may request one or more of the requesting Member(s) to prioritize with a view to agreeing on a practical limit within its resource constraints. In the absence of a mutually-agreed approach, the execution of such requests shall be at the discretion of the requested Member based on the results of its own prioritization.

10 Limitations

A requested Member shall not be required to:

(a) modify the format of its import or export declarations or procedures;
(b) call for documents other than those submitted with the import or export declaration as specified in subparagraph 6.1(c);
(c) initiate enquiries to obtain the information;
(d) modify the period of retention of such information;
(e) introduce paper documentation where electronic format has already been introduced;
(f) translate the information;
(g) verify the accuracy of the information; or
(h) provide information that would prejudice the legitimate commercial interests of particular enterprises, public or private.

11 Unauthorized Use or Disclosure

11.1 In the event of any breach of the conditions of use or disclosure of information exchanged under this Article, the requesting Member that received the information shall promptly communicate the details of such unauthorized use or disclosure to the requested Member that provided the information and:

(a) take necessary measures to remedy the breach;
(b) take necessary measures to prevent any future breach; and
(c) notify the requested Member of the measures taken under subparagraphs (a) and (b).

11.2 The requested Member may suspend its obligations to the requesting Member under this Article until the measures set out in paragraph 11.1 have been taken.
12 Bilateral and Regional Agreements

12.1 Nothing in this Article shall prevent a Member from entering into or maintaining a bilateral, plurilateral, or regional agreement for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment.

12.2 Nothing in this Article shall be construed as altering or affecting a Member’s rights or obligations under such bilateral, plurilateral, or regional agreements, or as governing the exchange of customs information and data under such other agreements.

SECTION II

SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS FOR DEVELOPING COUNTRY MEMBERS AND LEAST-DEVELOPED COUNTRY MEMBERS

ARTICLE 13: GENERAL PRINCIPLES

1. The provisions contained in Articles 1 to 12 of this Agreement shall be implemented by developing and least-developed country Members in accordance with this Section, which is based on the modalities agreed in Annex D of the July 2004 Framework Agreement (WT/L/579) and in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC).

2. Assistance and support for capacity building16 should be provided to help developing and least-developed country Members implement the provisions of this Agreement, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of this Agreement shall be related to the implementation capacities of developing and least-developed country Members. Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.

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. These principles shall be applied through the provisions set out in Section II.

ARTICLE 14: CATEGORIES OF PROVISIONS

1. There are three categories of provisions:

(a) Category A contains provisions that a developing country Member or a least-developed country Member designates for implementation upon entry into force of this Agreement, or in the case of a least-developed country Member within one year after entry into force, as provided in Article 15.

(b) Category B contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement, as provided in Article 16.

(c) Category C contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 16.

16 For the purposes of this Agreement, “assistance and support for capacity building” may take the form of technical, financial, or any other mutually agreed form of assistance provided.
2. Each developing country and least-developed country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories A, B and C.

**ARTICLE 15: NOTIFICATION AND IMPLEMENTATION OF CATEGORY A**

1. Upon entry into force of this Agreement, each developing country Member shall implement its Category A commitments. Those commitments designated under Category A will thereby be made an integral part of this Agreement.

2. A least-developed country Member may notify the Committee of the provisions it has designated in Category A for up to one year after entry into force of this Agreement. Each least-developed country Member's commitments designated under Category A will thereby be made an integral part of this Agreement.

**ARTICLE 16: NOTIFICATION OF DEFINITIVE DATES FOR IMPLEMENTATION OF CATEGORY B AND CATEGORY C**

1. With respect to the provisions that a developing country Member has not designated in Category A, the Member may delay implementation in accordance with the process set out in this Article.

Developing Country Member Category B

(a) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category B and their corresponding indicative dates for implementation.\(^\text{17}\)

(b) No later than one year after entry into force of this Agreement, each developing country Member shall notify the Committee of its definitive dates for implementation of the provisions it has designated in Category B. If a developing country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficient to notify its dates.

Developing Country Member Category C

(c) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category C and their corresponding indicative dates for implementation. For transparency purposes, notifications submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement.\(^\text{18}\)

(d) Within one year after entry into force of this Agreement, developing country Members and relevant donor Members, taking into account any existing arrangements already in place, notifications pursuant to paragraph 1 of Article 22 and information submitted pursuant to subparagraph (c) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.\(^\text{19}\) The participating developing country Member shall promptly inform the Committee of such arrangements. The Committee shall also invite non-Member donors to provide information on existing or concluded arrangements.

---

\(^{17}\) Notifications submitted may also include such further information as the notifying Member deems appropriate. Members are encouraged to provide information on the domestic agency or entity responsible for implementation.

\(^{18}\) Members may also include information on national trade facilitation implementation plans or projects, the domestic agency or entity responsible for implementation, and the donors with which the Member may have an arrangement in place to provide assistance.

\(^{19}\) Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organizations, consistent with paragraph 3 of Article 21.
Within 18 months from the date of the provision of the information stipulated in subparagraph (d), donor Members and respective developing country Members shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each developing country Member shall, at the same time, notify its list of definitive dates for implementation.

2. With respect to those provisions that a least-developed country Member has not designated under Category A, least-developed country Members may delay implementation in accordance with the process set forth in this Article.

Least-Developed Country Member Category B

(a) No later than one year after entry into force of this Agreement, a least-developed country Member shall notify the Committee of its Category B provisions and may notify their corresponding indicative dates for implementation of these provisions, taking into account maximum flexibilities for least-developed country Members.

(b) No later than two years after the notification date stipulated under subparagraph (a) above, each least-developed country Member shall notify the Committee to confirm designations of provisions and notify its dates for implementation. If a least-developed country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficiently to notify its dates.

Least-Developed Country Member Category C

(c) For transparency purposes and to facilitate arrangements with donors, one year after entry into force of this Agreement, each least-developed country Member shall notify the Committee of the provisions it has designated in Category C, taking into account maximum flexibilities for least-developed country Members.

(d) One year after the date stipulated in subparagraph (c) above, least-developed country Members shall notify information on assistance and support for capacity building that the Member requires in order to implement.20

(e) No later than two years after the notification under subparagraph (d) above, least-developed country Members and relevant donor Members, taking into account information submitted pursuant to subparagraph (d) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.21 The participating least-developed country Member shall promptly inform the Committee of such arrangements. The least-developed country Member shall, at the same time, notify indicative dates for implementation of corresponding Category C commitments covered by the assistance and support arrangements. The Committee shall also invite non-Member donors to provide information on existing and concluded arrangements.

(f) No later than 18 months from the date of the provision of the information stipulated in subparagraph (e), relevant donor Members and respective least-developed country Members shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each least-developed country Member shall, at the same time, notify the Committee of its list of definitive dates for implementation.

3. Developing country Members and least-developed country Members experiencing difficulties in submitting definitive dates for implementation within the deadlines set out in paragraphs 1 and 2 because of the lack of donor support or lack of progress in the provision of assistance and

---

20 Members may also include information on national trade facilitation implementation plans or projects, the domestic agency or entity responsible for implementation, and the donors with which the Member may have an arrangement in place to provide assistance.

21 Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organizations, consistent with paragraph 3 of Article 21.
support for capacity building should notify the Committee as early as possible prior to the expiration of those deadlines. Members agree to cooperate to assist in addressing such difficulties, taking into account the particular circumstances and special problems facing the Member concerned. The Committee shall, as appropriate, take action to address the difficulties including, where necessary, by extending the deadlines for the Member concerned to notify its definitive dates.

4. Three months before the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), the Secretariat shall remind a Member if that Member has not notified a definitive date for implementation of provisions that it has designated in Category B or C. If the Member does not invoke paragraph 3, or in the case of a developing country Member subparagraph 1(b), or in the case of a least-developed country Member subparagraph 2(b), to extend the deadline and still does not notify a definitive date for implementation, the Member shall implement the provisions within one year after the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), or extended by paragraph 3.

5. No later than 60 days after the dates for notification of definitive dates for implementation of Category B and Category C provisions in accordance with paragraphs 1, 2, or 3, the Committee shall take note of the annexes containing each Member's definitive dates for implementation of Category B and Category C provisions, including any dates set under paragraph 4, thereby making these annexes an integral part of this Agreement.

ARTICLE 17: EARLY WARNING MECHANISM: EXTENSION OF IMPLEMENTATION DATES FOR PROVISIONS IN CATEGORIES B AND C

1. (a) A developing country Member or least-developed country Member that considers itself to be experiencing difficulty in implementing a provision that it has designated in Category B or Category C by the definitive date established under subparagraphs 1(b) or (e) of Article 16, or in the case of a least-developed country Member subparagraph 2(b), should notify the Committee. Developing country Members shall notify the Committee no later than 120 days before the expiration of the implementation date. Least-developed country Members shall notify the Committee no later than 90 days before such date.

(b) The notification to the Committee shall indicate the new date by which the developing country Member or least-developed country Member expects to be able to implement the provision concerned. The notification shall also indicate the reasons for the expected delay in implementation. Such reasons may include the need for assistance and support for capacity building not earlier anticipated or additional assistance and support to help build capacity.

2. Where a developing country Member's request for additional time for implementation does not exceed 18 months or a least-developed country Member's request for additional time does not exceed 3 years, the requesting Member is entitled to such additional time without any further action by the Committee.

3. Where a developing country or least-developed country Member considers that it requires a first extension longer than that provided for in paragraph 2 or a second or any subsequent extension, it shall submit to the Committee a request for an extension containing the information described in subparagraph 1(b) no later than 120 days in respect of a developing country Member and 90 days in respect of a least-developed country Member before the expiration of the original definitive implementation date or that date as subsequently extended.

4. The Committee shall give sympathetic consideration to granting requests for extension taking into account the specific circumstances of the Member submitting the request. These circumstances may include difficulties and delays in obtaining assistance and support for capacity building.
ARTICLE 18: IMPLEMENTATION OF CATEGORY B AND CATEGORY C

1. In accordance with paragraph 2 of Article 13, if a developing country Member or a least-developed country Member, having fulfilled the procedures set forth in paragraphs 1 or 2 of Article 16 and in Article 17, and where an extension requested has not been granted or where the developing country Member or least-developed country Member otherwise experiences unforeseen circumstances that prevent an extension being granted under Article 17, self-assesses that its capacity to implement a provision under Category C continues to be lacking, that Member shall notify the Committee of its inability to implement the relevant provision.

2. The Committee shall establish an Expert Group immediately, and in any case no later than 60 days after the Committee receives the notification from the relevant developing country Member or least-developed country Member. The Expert Group will examine the issue and make a recommendation to the Committee within 120 days of its composition.

3. The Expert Group shall be composed of five independent persons that are highly qualified in the fields of trade facilitation and assistance and support for capacity building. The composition of the Expert Group shall ensure balance between nationals from developing and developed country Members. Where a least-developed country Member is involved, the Expert Group shall include at least one national from a least-developed country Member. If the Committee cannot agree on the composition of the Expert Group within 20 days of its establishment, the Director-General, in consultation with the chair of the Committee, shall determine the composition of the Expert Group in accordance with the terms of this paragraph.

4. The Expert Group shall consider the Member's self-assessment of lack of capacity and shall make a recommendation to the Committee. When considering the Expert Group's recommendation concerning a least-developed country Member, the Committee shall, as appropriate, take action that will facilitate the acquisition of sustainable implementation capacity.

5. The Member shall not be subject to proceedings under the Dispute Settlement Understanding on this issue from the time the developing country Member notifies the Committee of its inability to implement the relevant provision until the first meeting of the Committee after it receives the recommendation of the Expert Group. At that meeting, the Committee shall consider the recommendation of the Expert Group. For a least-developed country Member, the proceedings under the Dispute Settlement Understanding shall not apply to the respective provision from the date of notification to the Committee of its inability to implement the provision until the Committee makes a decision on the issue, or within 24 months after the date of the first Committee meeting set out above, whichever is earlier.

6. Where a least-developed country Member loses its ability to implement a Category C commitment, it may inform the Committee and follow the procedures set out in this Article.

ARTICLE 19: SHIFTING BETWEEN CATEGORIES B AND C

1. 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. Where a Member proposes to shift a provision from Category B to Category C, the Member shall provide information on the assistance and support required to build capacity.

2. In the event that additional time is required to implement a provision shifted from Category B to Category C, the Member may:

   (a) use the provisions of Article 17, including the opportunity for an automatic extension; or

   (b) request an examination by the Committee of the Member's request for extra time to implement the provision and, if necessary, for assistance and support for capacity building, including the possibility of a review and recommendation by the Expert Group under Article 18; or
(c) in the case of a least-developed country Member, any new implementation date of more than four years after the original date notified under Category B shall require approval by the Committee. In addition, a least-developed country Member shall continue to have recourse to Article 17. It is understood that assistance and support for capacity building is required for a least-developed country Member so shifting.

ARTICLE 20: GRACE PERIOD FOR THE APPLICATION OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

1. For a period of two years after entry into force of this Agreement, 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 a developing country Member concerning any provision that the Member has designated in Category A.

2. For a period of six years after entry into force of this Agreement, 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 a least-developed country Member concerning any provision that the Member has designated in Category A.

3. For a period of eight years after implementation of a provision under Category B or C by a least-developed country Member, 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 that least-developed country Member concerning that provision.

4. Notwithstanding the grace period for the application of the Understanding on Rules and Procedures Governing the Settlement of Disputes, before making a request for consultations pursuant to Articles XXII or XXIII of GATT 1994, and at all stages of dispute settlement procedures with regard to a measure of a least-developed country Member, a Member shall give particular consideration to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under the Understanding on Rules and Procedures Governing the Settlement of Disputes involving least-developed country Members.

5. Each Member shall, upon request, during the grace period allowed under this Article, provide adequate opportunity to other Members for discussion with respect to any issue relating to the implementation of this Agreement.

ARTICLE 21: PROVISION OF ASSISTANCE AND SUPPORT FOR CAPACITY BUILDING

1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least-developed country Members on mutually agreed terms either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least-developed country Members to implement the provisions of Section I of this Agreement.

2. Given the special needs of least-developed country Members, targeted assistance and support should be provided to the least-developed country Members so as to help them build sustainable capacity to implement their commitments. Through the relevant development cooperation mechanisms and consistent with the principles of technical assistance and support for capacity building as referred to in paragraph 3, development partners shall endeavour to provide assistance and support for capacity building in this area in a way that does not compromise existing development priorities.

3. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:
(a) take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programs;

(b) include, where relevant and appropriate, activities to address regional and sub-regional challenges and promote regional and sub-regional integration;

(c) ensure that ongoing trade facilitation reform activities of the private sector are factored into assistance activities;

(d) promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:

(i) coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors and among bilateral and multilateral donors should aim to avoid overlap and duplication in assistance programs and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;

(ii) for least-developed country Members, the Enhanced Integrated Framework for trade-related assistance for the least-developed countries should be a part of this coordination process; and

(iii) Members should also promote internal coordination between their trade and development officials, both in capitals and in Geneva, in the implementation of this Agreement and technical assistance.

(e) encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and

(f) encourage developing country Members to provide capacity building to other developing and least-developed country Members and consider supporting such activities, where possible.

4. The Committee shall hold at least one dedicated session per year to:

(a) discuss any problems regarding implementation of provisions or sub-parts of provisions of this Agreement;

(b) review progress in the provision of assistance and support for capacity building to support the implementation of the Agreement, including any developing or least-developed country Members not receiving adequate assistance and support for capacity building;

(c) share experiences and information on ongoing assistance and support for capacity building and implementation programs, including challenges and successes;

(d) review donor notifications as set forth in Article 22; and

(e) review the operation of paragraph 2.

ARTICLE 22: INFORMATION ON ASSISTANCE AND SUPPORT FOR CAPACITY BUILDING TO BE SUBMITTED TO THE COMMITTEE

1. To provide transparency to developing country Members and least-developed country Members on the provision of assistance and support for capacity building for implementation of Section 1, each donor Member assisting developing country Members and least-developed country Members with the implementation of this Agreement shall submit to the Committee, at entry into force of this Agreement and annually thereafter, the following information on its assistance and
support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:

(a) a description of the assistance and support for capacity building;
(b) the status and amount committed/disbursed;
(c) procedures for disbursement of the assistance and support;
(d) the beneficiary Member or, where necessary, the region; and
(e) the implementing agency in the Member providing assistance and support.

The information shall be provided in the format specified in Annex 1. In the case of Organisation for Economic Co-operation and Development (referred to in this Agreement as the “OECD”) Members, the information submitted can be based on relevant information from the OECD Creditor Reporting System. Developing country Members declaring themselves in a position to provide assistance and support for capacity building are encouraged to provide the information above.

2. Donor Members assisting developing country Members and least-developed country Members shall submit to the Committee:

(a) contact points of their agencies responsible for providing assistance and support for capacity building related to the implementation of Section I of this Agreement including, where practicable, information on such contact points within the country or region where the assistance and support is to be provided; and

(b) information on the process and mechanisms for requesting assistance and support for capacity building.

Developing country Members declaring themselves in a position to provide assistance and support are encouraged to provide the information above.

3. Developing country Members and least-developed country Members intending to avail themselves of trade facilitation-related assistance and support for capacity building shall submit to the Committee information on contact point(s) of the office(s) responsible for coordinating and prioritizing such assistance and support.

4. Members may provide the information referred to in paragraphs 2 and 3 through internet references and shall update the information as necessary. The Secretariat shall make all such information publicly available.

5. The Committee shall invite relevant international and regional organizations (such as the International Monetary Fund, the OECD, the United Nations Conference on Trade and Development, the WCO, United Nations Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks) and other agencies of cooperation to provide information referred to in paragraphs 1, 2, and 4.

---

22 The information provided will reflect the demand driven nature of the provision of assistance and support for capacity building.
SECTION III

INSTITUTIONAL ARRANGEMENTS AND FINAL PROVISIONS

ARTICLE 23: INSTITUTIONAL ARRANGEMENTS

1 Committee on Trade Facilitation

1.1 A Committee on Trade Facilitation is hereby established.

1.2 The Committee shall be open for participation by all Members and shall elect its own Chairperson. The Committee shall meet as needed and envisaged by the relevant provisions of this Agreement, but no less than once a year, for the purpose of affording Members the opportunity to consult on any matters related to the operation of this Agreement or the furtherance of its objectives. The Committee shall carry out such responsibilities as assigned to it under this Agreement or by the Members. The Committee shall establish its own rules of procedure.

1.3 The Committee may establish such subsidiary bodies as may be required. All such bodies shall report to the Committee.

1.4 The Committee shall develop procedures for the sharing by Members of relevant information and best practices as appropriate.

1.5 The Committee shall maintain close contact with other international organizations in the field of trade facilitation, such as the WCO, with the objective of securing the best available advice for the implementation and administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided. To this end, the Committee may invite representatives of such organizations or their subsidiary bodies to:

(a) attend meetings of the Committee; and
(b) discuss specific matters related to the implementation of this Agreement.

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

1.7 Members are encouraged to raise before the Committee questions relating to issues on the implementation and application of this Agreement.

1.8 The Committee shall encourage and facilitate ad hoc discussions among Members on specific issues under this Agreement with a view to reaching a mutually satisfactory solution promptly.

2 National Committee on Trade Facilitation

Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement.

ARTICLE 24: FINAL PROVISIONS

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

2. All provisions of this Agreement are binding on all Members.
3. Members shall implement this Agreement from the date of its entry into force. Developing country Members and least-developed country Members that choose to use the provisions of Section II shall implement this Agreement in accordance with Section II.

4. A Member which accepts this Agreement after its entry into force shall implement its Category B and C commitments counting the relevant periods from the date this Agreement enters into force.

5. Members of a customs union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under this Agreement including through the establishment and use of regional bodies.

6. Notwithstanding the general interpretative note to Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994. In addition, nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.

7. All exceptions and exemptions23 under the GATT 1994 shall apply to the provisions of this Agreement. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the World Trade Organization and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.

8. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided for in this Agreement.

9. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

10. The Category A commitments of developing country Members and least-developed country Members annexed to this Agreement in accordance with paragraphs 1 and 2 of Article 15 shall constitute an integral part of this Agreement.

11. The Category B and C commitments of developing country Members and least-developed country Members taken note of by the Committee and annexed to this Agreement pursuant to paragraph 5 of Article 16 shall constitute an integral part of this Agreement.

23 This includes Articles V:7 and X:1 of the GATT 1994 and the Ad note to Article VIII of the GATT 1994.
### ANNEX 1: FORMAT FOR NOTIFICATION UNDER PARAGRAPH 1 OF ARTICLE 22

**Donor Member:**
**Period covered by the notification:**

<table>
<thead>
<tr>
<th>Description of the technical and financial assistance and capacity building resources</th>
<th>Status and amount committed/disbursed</th>
<th>Beneficiary country/Region (where necessary)</th>
<th>The implementing agency in the Member providing assistance</th>
<th>Procedures for disbursement of the assistance</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
