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Trade Facilitation: The Role of a WTO Agreement

J. Michael Finger

J. Michael Finger (michael.finger@comcast.net) is the former Lead Economist and Chief of the Trade Policy research Group at the World Bank and was the World Bank initial coordinator for the Integrated Framework. Currently a trade policy consultant, Dr. Finger holds a PhD in Economics and has been working for the UNCTAD, the US Treasury Department, and the American Enterprise Institute.

ABSTRACT

THE TRADE FACILITATION negotiations have been one of the more active topics in the Doha negotiations. At the same time, extensive reforms have been put in place among WTO members, including a number of developing Members. This paper focuses on how a WTO agreement might support the process of reform and capacity-building in developing countries. A number of proposals for improved performance have been tabled, as well as how to ensure that sufficient assistance is provided to enable developing Members to meet the new performance standards. This paper reviews and evaluates the various proposals. Overall, experience provides a sound knowledge basis for international co-operation on trade facilitation, with basic reforms within the capacities of even the poorest countries. However, while a WTO agreement could be a useful guide to productive reforms in developing countries, the mechanics for an extended WTO role in the management of assistance – particularly in making provision of that assistance a WTO obligation of developed countries – would be problematic. To superpose a process that presents the issue as a mercantilist bargain of assistance in exchange for trade reform “concessions” would be to introduce conflict into a relationship that is already productively propelled by a perception of mutual benefit. A possible alternative could be to consider a plurilateral agreement under the WTO umbrella.



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www.ecipe.org

info@ecipe.org Rue Belliard 4-6, 1040 Brussels, Belgium

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1. INTRODUCTION*

THE WTO NEGOTIATIONS on trade facilitation respond to the general concern that many countries have not been able to use the trading system as an effective vehicle for development. For those countries to exploit the development opportunities that international trade offers, more is needed than better access to developed country markets or liberalization of their own trade restrictions. While this concern suggests broad needs for “aid-for-trade” that might include the building up of enterprise capacities and physical infrastructure – and the WTO Hong Kong Ministerial Declaration did call for a working group to look into ways to make “aid-for-trade” operational – the Doha negotiating mandate is limited to “trade facilitation” in the specific sense of negotiations aimed “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.” (These articles concern “freedom of transit,” “fees and formalities connected with importation and exportation,” and “publication and administration of trade regulations.”) The mandate recognizes also that the relevant improvements will sometimes require significant expenditures and thus provides that “negotiations shall also aim at enhancing technical assistance and support for capacity-building in this area.” (July 2004 Annex D, paragraph 1)

While there may be issues that relate to reforms in developed countries, this paper focuses on how a WTO agreement might support the process of reform and capacity-building in developing countries.

1.1. *Issues taken up*

AS THE ABOVE suggests, the negotiations have tended to separate proposals into two groups,

- Specifics of obligations: e.g., to publish all regulations, to introduce and apply risk management techniques to the selection of shipments that will be subject to physical inspection;
- Managing assistance: how the WTO might be involved, possibly to introduce an obligation on developed Members to provide assistance, to link the acceptance of new obligations by developing Members with the provision of assistance by developed Members and other Members who see themselves in a position to do so.

This paper thus takes up two issues:

1. What does experience tell us about which improvements of such facilities would pay off – advance the development of the countries that implemented such reforms; and
2. How might a WTO agreement help developing country governments to make such improvements?

WITH REGARD TO the first, the paper reviews several expert assessments of which improvements would have the highest payoff in developing countries. With regard to the second, it compares the proposals for how the WTO might be involved with the provision of assistance with the working procedures of development institutions. A major point of controversy in current negotiations – the introduction of a WTO legal obligation for developed Members to provide developing Members with implementation assistance – receives particular attention.¹ With regard to the controversy over the application of the WTO dispute settlement process to an agreement on trade facilitation, the paper examines the experience of the WTO in the application of other technical standards such as those of the SPS (sanitary and phyto-sanitary standards) and TBT (technical barriers to trade) agreements.

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1.2. Structure of the paper

A READER, WHO might be already familiar with some of the material in the paper (e.g., the content of the proposals), might want to turn immediately to the conclusions. In Section 6 I provide a digest of my conclusions and with each of these I provide a reference to the section of the paper that provides information and analysis most directly relevant to that conclusion. Recommendations follow these conclusions in Section 7.

Section 2 reviews the provisions for new substantive rules and brings together the efforts of several experts groups to rank these according to their potential contribution to development. The issue here is: Which trade facilitation arrangements would best support development? – putting aside the question of how it is financed.

Section 3 explains proposals for mechanisms to support the implementation of new measures and to bring forward assistance for this implementation. The section analyses the proposals for WTO mechanisms for managing assistance in the light of procedures employed by bilateral and multilateral development institutions. A key issue here is the matter of trust versus legal obligation in the donor–recipient relationship.

Section 4 continues the analysis of how such arrangements might work – or not work. I explain there that a stand-alone WTO agreement on trade facilitation – one not part of a Doha single undertaking – might provide a more workable arrangement for coordinating the provision of assistance with the acceptance of WTO legal obligation.

Section 5 looks into the pluses and minuses of a WTO agreement on trade facilitation that would not be part of a Doha single undertaking.

Section 6 tabulates the major conclusions of the analysis and keys each to the section of the paper in which it is developed. A reader might use this section as a short-cut to topics of particular interest.

Section 7 takes up recommendations that follow from the analysis.

The annexes present detailed analysis of some of the points taken up in the text.

2. TRADE FACILITATION MEASURES – WHAT WILL HELP DEVELOPMENT?

THIS SECTION IS about good practice and how a WTO agreement might support good practices among its members – it deals only with the “performance standards” part of an agreement. How a WTO agreement might help to ensure the provision of financial and technical support for the installation of new practices by developing Members will be taken up in later sections.

2.1. Underlying factors

THE POSITIVE SIDE of the issue builds on several underlying factors.

There is tested knowledge as to what works, in developing countries as well as in developed.

A number of international agreements and conventions identify practices that have proven effective in many applications, as well as guidelines for putting such measures in place. For example, the WCO (World Customs Organization) website lists sixteen conventions related to customs matters. The International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention) is perhaps the best known of these; others take up, for example, temporary admission, international transit, containers and packaging.

International agencies such as the WCO, the AYSECUDA Unit of UNCTAD, the UN Economic Commission for Europe provide pools of expertise. Moreover, the border agencies of many WTO

Members – developing as well as developed – often provide assistance to other Members.

Trade facilitation is a subject area in which there is minimal disagreement as to the usefulness of reforms. Differences that have surfaced at the Doha negotiations are almost entirely about how to link new obligations to the provision of assistance by developed Members, not about the substance of what constitutes good trade facilitation practice.

Good performance is within the range of even the poorest countries. Table 1 reports that import costs in the seven least developed countries are among the lowest of all countries in a 175 country sample for which the World Bank Doing Business Data Base provides information. More least developed countries are among the poorer performers, but the point is that a substantial number are not. Providing effective facilities is within the reach of poorer countries. The Kyoto Convention includes 22 developing and 10 transition economies among its Contracting Parties. (The total number is 56.)²

ACTIVE REFORM PROGRAMMES are under way in many developing countries. Many developing countries have in place active programmes to improve trade facilitation – often financed from their own resources, and with contributions from their own businesses. OECD/DAC (2006) reports that a number of developing countries, including least developed countries, have “become champions of reform by introducing far-reaching reforms” such as single windows, risk management and post-clearance audit. Senegal, Ghana, Mauritius and Mozambique are examples of countries that “have today highly performing Customs and other border controls.” Because improved facilities mean better business for local companies, reforms in developing countries are often driven and financed by local private/public partnerships. Complementary to this dynamic, the volume of assistance provided for trade facilitation measures has been increasing. Table 2 reports a 65 percent increase in trade facilitation assistance for 2004 over 2001.

TABLE 1: TRADE FACILITATION INDICATORS – NUMBER OF LEAST DEVELOPED COUNTRIES WITH GOOD PERFORMANCE AMONG 175 COUNTRIES AND CUSTOMS TERRITORIES.

CRITERION → NUMBER OF LEAST DEVELOPED COUNTRIES WHEN COUNTRIES RANKED BY THAT CRITERION ↓	NUMBER OF DOCUMENTS FOR IMPORT	TIME FOR IMPORT	COST TO IMPORT	NUMBER OF DOCUMENTS FOR EXPORT	TIME FOR EXPORT (DAYS)	COST TO EXPORT
In best quartile	3	4	7	3	3	6
At or better than median	16	11	8	15	10	13
Worse than Median	28	33	36	29	34	31
Memo items: Number of LDCs in the data base 44; total number of countries 175.						

Source: Tabulated from World Bank Doing Business database at <www.doingbusiness.org/>. Accessed February 14th 2007.

Note: In the database, cost is measured by \$US per container, time by number of days between arrival and release, documents by the number of separate documents required. All measures were averages over responses from traders. The sample for 2006 covered 5,000 responses worldwide.

TABLE 2: TRADE AND BUSINESS DEVELOPMENT AID FROM ALL DONORS, 2001-2004.

CATEGORY ↓	AMOUNT (US\$ MILLIONS)			
	YEAR →	2001	2002	2003
TRADE AND BUSINESS DEVELOPMENT				
Trade facilitation procedures, customs valuation and tariff reform	105	15151	283	372
Technical, sanitary and phyto-sanitary standards	127	61	122	66
Business support services and institutions	497	342	417	389
Public-private sector networking	27	51	117	67
E-commerce	2	37	31	54
Trade finance	413	336	384	461
Trade promotion strategy and implementation	230	315	752	653
Export market analysis and development	187	251	346	561
TOTALS	1,587	1,544	2,453	2,622

Source: OECD-WTO Trade Capacity-Building database.

2.2. What should be the shape of a trade facilitation programme relevant to developing countries?

THE QUESTION OF what a WTO trade facilitation agreement should contain is viewed here as a matter of identifying priorities based on returns/costs, and of how the various measures that make up such a programme should be ranked and sequenced. Moreover, the considerable differences among countries in their current level of efficiency in providing trade facilitation services means that unless the specification of standards is minimal, meeting it will require different levels of effort from different countries.

At the first level of sorting, more elementary measures would be the establishment of enquiry points, adoption of simplified documents, more accountable border agencies and more transparency in the formulation and application of regulations and procedures. Other measures would be farther reaching, e.g. single windows, risk management, and post-clearance audit. While many of the measures are within the technical capacities of the poorer countries, others might require more extensive telecommunications and financial architecture than exist in some.

2.2.1. Sortings by three exports groups

THREE DIFFERENT GROUPS of exports have provided sortings. I will summarize and compare them here. The comparison will be meaningful but, as the different studies apply similar but not identical criteria to similar but not identical categorizations of trade facilitation measures, the comparison will not be exact. The reports I will summarize are those of the OECD/DAC (2006), the World Bank, IMF and WCO (World Bank International Trade Dept 2006) and the Asia-Pacific Research and Training Network on Trade (Duval, 2006 and Jean Christophe Maur, 2006).

The criteria the studies use for their sortings are the following:

WB-IMF-WCO

Group 1: Simple, inexpensive but offering significant benefits to traders;

Group 2: More complex, many developing countries would need assistance;

Group 3: Significantly more difficult, expensive, sometimes requiring improvements of broad financial and communications infrastructure.

The study also provided a list of measures that might be problematic because they would reduce revenues from fees and charges.

OECD/DAC

Level 1: Transparent and accountable border agencies;

Level 2: More efficient border clearance;

Level 3: Best practice in trade facilitation.

The study also provided a list of over-arching matters that would tie some facilitation reforms to broader developments such as upgrading of the country's ICT system or the provision by the financial system of financial products such as bonds and guarantees.

ASIA-PACIFIC NETWORK

THE STUDY BY the Asia-Pacific Research and Training Network on Trade asked twelve experts to draw on their experiences for indicative numbers for each of several types of costs (or cost components) for each of twelve categories of trade facilitation measures – as tabulated below. (The cost elements and trade facilitation categories are listed in Annex 1.) The experts were also asked to note where vested interests were likely to offer significant resistance to change, either traders or government agencies.

The experts were then asked to rank the twelve categories based on their judgments as to costs-returns, and the relevant capacities of developing countries.³

Jean Christophe Maur (2006), drawing on these studies and other information has devised a matrix classification of trade facilitation measures across two dimensions: (a) Affordable versus Costly and (b) Short term versus Long term. His findings are summarized in Annex 2.

Though the rankings provided by these studies are based on different criteria, each presents an expert view on how a trade facilitation agreement should assign priorities, by cost/return or by sequencing of adoption of measures. The rankings are compared in Table 3, a more detailed side-by-side comparison is provided in Annex 3.

TABLE 3: COMPARISON OF PRIORITIES AS JUDGED BY DIFFERENT EXPERTS GROUPS

TRADE FACILITATION MEASURE	ASIA-PACIFIC		WB-IMF-WCO°	OECD/DAC°	MAUR	
	NETWORK°					
	RANK	SEQUENCE			COST*	TERM#
Document alignment: the HS nomenclature, the UN layout key and internationally agreed standard data elements for trade documents.	A	A	A	A	M	S
Establishment of enquiry points and single national focal points for trade regulations and other trade facilitation issues.	A	A	B	A	M	L
Online publication of trade regulations, fees and procedures in local language and English.	A	A or B	A	A	M	S
Implementation of modern risk management systems for release and clearance of goods.	A	B or A	Customs A Other B	Customs A Other C	E	L
Establishment of a national trade facilitation committee to comment on new and amended rules prior to their entry into force, as well as to conduct periodic reviews of trade procedures.	A	A	A	A	M	S
Provision of advanced, binding rulings on tariff classification, valuation, and origin.	B	B	B	B	M	S, L
Establishment of an effective appeal procedure for Customs and other agencies rulings.	B	B or A	A	A	E	L
Establishment of single window system.	B	C or B	C	C	E	L
Establishment and systematic use of pre-arrival clearance mechanisms (processing of goods declarations received in advance of goods arrivals and pre-arrival clearance).	B	B	B	B	E	L
Establishment and wider use of audit-based customs (post-clearance audits).	C	C	C	B	E	L
Expedited clearance of goods (subject to post-clearance audit) based on a bond, guarantee, or deposit arrangement.	C	C	B or C	A	M	L
Expedited procedures for express shipments and specially-qualified traders/companies .	C	C or A or B	B	C	E	S

Notes: °Measures divided into three categories: A for highest priority, B for intermediate and C for lowest.

* M indicates "affordable" (Maur's term) or moderate cost, E indicates "costly" (Maur's term) or more expensive.

S indicates shorter term, L indicates longer term.

2.2.2. Conclusions from the sortings

THE STUDIES SHOW broad agreement as to how measures should be ranked.

All the canvassed assessments assign high priority to aligning documents with international standards, publication of regulations/procedures, and the organization of a national committee of private-sector interests to counsel and guide the reform and operations of border agencies and processes.

Measures that are ranked as more difficult often depend on the availability of certain types of economy-wide infrastructure. Expedited clearance systems and post-clearance audits (including special procedures for express shipments and specially-qualified traders) involve advanced risk management systems and must be imbedded in a relatively sophisticated national ICT system. The bonds, or guarantees that are critical to such a system depend on a relatively advanced financial system, or on sufficient liberalization of the financial sector so that foreign vendors can be involved.

Broad agreement exists, but there are differences among experts.

In the Asia-Pacific network, for example, the twelve experts did not produce identical rankings

among the twelve categories. The rankings reported in Table 1 are based on the averages of the scores given by individual experts. (The experts were unanimous as to the five categories that deserved the top five rankings – though they did not agree on the rankings among the five.)

TO A DEGREE, differences in rankings might be attributed to differences in what exactly the different groups of experts had in mind during the process of ranking. First level applications of risk management can be applied in a paper-based system, and provide some efficiencies in determining which shipments should be subject to different levels of inspection. Expedited clearance systems depend, however, on more sophisticated risk management systems. Thus an expert who assigned lower priority to risk management system may have had in mind a more sophisticated system than envisaged by an expert who assigned a higher priority to it.

It is difficult to identify measures that are wholly administrative – can be undertaken without changes of regulations/legislation.

Vinod Rege and Isabella Kataric (2006), in a handbook that provides valuable operational detail as to what is involved with trade facilitation measures, have sorted among measures that require policy or regulatory change and those that are more or less a matter of day-to-day- operations for border agencies. An attempt to include the Rege-Kataric breakdown into the comparison of priorities in Table 3 was however unfruitful. The detail of each of the twelve categories in the table turns out to involve regulatory/legislative matters as well as administrative. Moreover, the list of administration adjustments that would require prior regulatory/legislative change can vary considerably from country to country.

At a level of generality that allows comparisons, it is difficult to move past “notional” on an evaluation of returns/costs or technical challenge.

The Asia-Pacific network study reported considerable variation in the estimates provided by their twelve experts, the WB-IMF-WCO claims to provide no more than “indicative data” for costs. These and the other studies reviewed in Table 3 offer qualitative sortings of priorities, but no numerical estimates of returns.

Studies that identify econometrically the trade or efficiency impact of trade facilitation measures have utilized general indicators such as port efficiency, customs environment, regulatory environment, and e-commerce use by business (as a proxy for service sector infrastructure) that cannot be tied precisely to particular reform measures.⁴

At a level of generality that allows comparisons, it is difficult to move past “notional” on a specification of the measures that would be required.

This conclusion is more or less the mirror image of the previous one. The detail to which one must go in order to reach operational specification of what would be required is more readily illustrated by example than argued by generality. To illustrate the point, I offer an example drawn for actual proposals, proposals to expand GATT requirements for publication of trade regulations.

The example sorts the issue into three parts; what must be published, how information must be made available, and to whom information must be available.

What must be published

GATT Article X provides a 70-word list of what must be published. While other items might be inferred from that article’s text, I have underlined in the following listing – taken from the Secretariat tabulation of proposals⁵ – items that appear to go beyond what is explicit in Article X.

- Procedures of border agencies (including port, airport, and other entry-point procedures and relevant forms and documents, fees and charges for process);
- Rate of duties and taxes imposed on or in connection with importation or exportation (including applied tariff rates);

- Decisions and examples of customs classification;
- Import and export restrictions;
- Fees and charges imposed on, or in connection with, importation or exportation;
- Penalty provisions against breaches of import and export formalities;
- Appeal procedures;
- Agreements with any country or countries relating to customs administration;
- Management plans for implementation of reforms;
- Average processing periods;
- Standard processing periods;
- Reasons for delay beyond standard processing periods;
- Source of information on “legitimate purpose and objective” of trade-related restrictions.

How information must be made available

GATT Article X specifies only “promptly in such a manner as to enable governments and traders to become acquainted with them.” Proposals offer the following detail.

- widely available;
- officially designated medium;
- establish mechanisms to ensure publication;
- establish inquiry points;
- non-discriminatory practicability in availability of information, (GATT X specifies non-discriminatory application.);
- government gazettes;
- internet publication on an official website;
- in the official language of the Member;
- in at least one official WTO language on the website – for some or all information, e.g. of the elements set out in Article X of GATT;
- available at no cost – or at a charge commensurate with the cost of services rendered (GATT Article VIII states that “all fees [be] limited [to] approximate cost of services.”)
- contact person for additional information;

To whom information should be available

- all Members;
- all interested parties – specification of interested parties is the next step.

2.3. A “consensus” sorting

A GENERAL SORTING based on development impact – on a notional weighting of return/costs re

existing technical capacity might go as follows:

Yes: transparency, objectivity, accountability:

- application of international nomenclature;
- publication of regulations, processes, fees;
- consultation mechanisms for stakeholders;
- comment periods before application of changes;
- periodic performance review;
- publication of actual processing times, clearance times;
- removing protectionist or arbitrary transit policies.

Not yet: measures dependent on national infrastructure – such as ITC systems, bond and guarantee instruments from financial institutions.

- advanced risk management;
- advanced rulings on valuation;
- goods released against guarantee or bond;
- post-clearance audits;
- arrangements for authorized traders.

Much remains in the middle: for example

- advanced rulings on classification, origin;
- pre-arrival document review;
- elementary levels of risk management.

Complicating factors:

- Starting-points differ considerably from country-to-country. (There has been considerable progress even among least developed countries.)
- Successful trade facilitation programmes are often associated with general programmes of sector or legislative reforms.
- Restricting public sector management reforms to border agencies will be politically difficult, may not make development sense. Reforms involving better pay scales for border agency staff often create frictions with other agencies and such frictions have led to setbacks for reform programmes.

3. PROPOSALS RELATED TO PROMOTING AND MANAGING ASSISTANCE

SEVERAL URUGUAY ROUND Agreements involved bound obligations on developing Members to implement, accompanied by unbound promises of assistance from developed Members.⁶ This imbalance fostered a discussion of how the legal obligation to implement might be linked to a legal obligation or other concrete commitment to provide assistance, and prompted Rubens Ricupero (1999), then Secretary General of UNCTAD, to suggest that in future negotiations each proposal

should include an “implementation audit.” The audit would identify the specific investments needed to meet the proposed obligation – so that any agreement could include bound commitments to provide the needed support.

As the Doha negotiations moved along, proposals came forward for “platforms” that might conduct such audits. The 2004 Work Programme⁷ did not attempt to sort among the proposals for platforms, but it did state that for “commitments whose implementation would require support for infrastructure development,” “developed-country Members will make every effort to ensure support.” It went farther to state that “where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required.”

3.1. African Group communication

IN MAY 2006 the African Group submitted a communication that elaborated, from a development perspective, the elements and principles that a WTO trade facilitation agreement should embody.⁸ (The communication is summarized in Annex 4, below.) Among these were the following:

- Respect the circumstances of individual Members.
- Obligations and assistance should be tailored to the circumstances of individual Members, due allowance should be given for alternative approaches and for the level of development of individual Members. A positive list approach would allow Members to take on different lists of obligations.
- National development objectives would have priority.
- New rules would be implemented only when implementation conforms with or supports the attainment of national development objectives.
- Obligations and assistance should be linked and equally obligated:
- The taking-on of obligations would be related to capacity acquisition. By developing Member, there should be established benchmarks for obligations and for assistance. A developing Member would enter into a commitment only after achieving a certain benchmark indicating (a) its ability to implement that commitment and (b) that the assistance obligations by developed Members have been met.
- The TFA would not be part of the Doha Work Programme single undertaking and would be outside the WTO dispute settlement process.

3.2. Latin American Communication

A PARALLEL COMMUNICATION from a group of Latin American countries⁹ put forward an outline for a mechanism to manage the assistance-obligation linkage for developing Members. The process would include four phases: (i) capacity self-assessment; (ii) notification; (iii) capacity development; and (iv) confirmation of capacity acquisition and compliance with the obligation. A Trade Facilitation Register within the WTO Secretariat would handle notifications sent by Members and publish them on the Members’ web site of the WTO Internet portal. The communication also sorts the provision of a TFA into three categories:

- obligations accepted on the entry-into-force date of the agreement;
- obligations accepted after a specified extra interval (six year maximum), without assistance;

- obligations for which assistance is needed.

The textual proposals discussed below build on the suggestions in the Latin American and African Group communications.

The African Group and Latin American communications were followed in July 2006 by two textual proposals. One of these was sponsored by the “Core Group” of developing Members,¹⁰ the other by a group that included both developing and developed Members.¹¹ Following their document symbols in the WTO archives, I will designate the Core Group proposal as W142, the other as W137. Annex 5 provides a side-by-side comparison of their components. The basics of the two proposals are similar. The following outlines the procedure provided by W137, following that I will explain how W142 differs.¹²

3.3. W137: *The Mechanics*

1. Performance standards: Under both W137 and W142, a trade facilitation agreement would include a list of trade facilitation provisions or requirements, e.g., publication of customs rules, application of risk-management techniques, application of procedures for audit after release of goods. Assistance would be managed as follows:
2. Self-assessment: After the signing of a trade facilitation agreement, each developing Member (including transition economies) could choose to undertake a self-assessment; i.e., to assess its own needs and capacities in regard to the agreement’s performance standards. (At its own discretion, a developing Member might request assistance from other Members or international organizations such as the WCO.)
3. Capacity-building plans: Following from the self-assessments each developing Member could prepare a plan for acquiring the capacity needed to meet the pending obligations of the agreement.
4. Notification: before the entry-into-force date of the agreement:¹³
 - A. Each developing Member will notify the WTO of the provisions for which it needs additional time and assistance before accepting these provisions as obligations.
 - B. That period is limited to [N] years.
 - C. All provisions not so notified become obligations at the entry in force date of the trade facilitation agreement.
5. Developed Members provide assistance: Developed Members are obligated to provide assistance, on request and under mutually agreed terms, with the needs assessments and with the preparation of capacity-building plans.
6. A provision becomes an obligation after:
 - the Developing Member notifies that it has acquired the necessary capacity, or
 - six months after expiration of the extended implementation period (notified as per item 4, above).

3.4. W142

W142 PROVIDES THE same general outline for implementing performance standards: self-assessment, preparation of capacity-building (CB) plans, notification, etc. W142 differs, however: it divides the provisions into three categories.

Category 1, mandatory provisions: For these provisions, the mechanics, obligations, etc are similar to those of W137.

Category 2, optional provisions: Accepting any of these provisions as an obligation requires the Developing Member to notify a CB Plan. Not doing so means that the provision would not become an obligation for this Developing Member. The mechanics are discussed below.

Class B, best endeavour provisions: W142 also includes a third group of provisions, labelled as Class B in the document. Even if a developing Member requests and receives assistance for the relevant capacities, such provisions do not become obligations.

3.5. W142: Mechanics for Category 2 (optional) provisions

1. On signing of a trade facilitation agreement (TFA), each Developing Member will undertake a self-assessment.
2. After conducting its self-assessment, a developing Member may choose to prepare and to notify a CB Plan to cover some or all of these provisions.
 - The notified plan would include specified capacity-building periods; $\leq [N]$ in length.
3. Developed Members are obligated to provide assistance, on request, with the assessments, with preparation and implementation of the CB Plans.
4. If a Developing Member prepares and notifies a CB Plan, the provisions covered by that CB Plan become obligations:
 - when the Developing Member notifies acquisition of capacity and acceptance of the provision as an obligation, but no later than
 - six months after expiration of the relevant notified capacity-building period.
5. A CB Plan may include capacity to implement Category 1 mandatory provisions. All provisions covered by notified CB Plans become obligations:
 - when the Developing Member notifies acquisition of capacity and acceptance of the provision as an obligation, but no later than
 - six months after expiration of the relevant notified capacity-building period.

As to the mechanics for Class B, best endeavour provisions, a developing Member might include such provisions in its CB Plans, and developed Members would then be expected to provide support. But such inclusion would not require that the provisions become obligations; i.e., step 5, above, would not apply.

3.6. Obligations of developed Members relating to assistance

W142 WOULD OBLIGATE developed Members to provide assistance, on request, with the self-assessments, with the preparation and with the implementation of the capacity-building plans. W137 would obligate assistance only for self-assessments and for the preparation – but not the implementation – of capacity-building plans. Moreover, W137 qualifies the obligation with the phrase “under mutually agreed terms.”

W142 would obligate developed Members to establish appropriate mechanisms or modalities for the provision of assistance. By obligation, the mechanisms would provide for simple and time-bound procedures to access such assistance; e.g., “developed Members shall provide the requested [assistance] no later than [X] months from the date of receipt of the request from a developing Member.” Developed Members would also be obligated to notify these mechanisms to the WTO Secretariat, also to notify the financial and technical assistance resources that they are going to make available.

On a related matter, W142 provides for creation within the WTO of a Trade Facilitation Technical Assistance and Capacity-Building Support Unit that would intermediate between developing Members and potential donors. The Support Unit would report annually on compliance by developed Members with their obligations to provide support, and on the usefulness of that support. W147 (the later document that elaborates on some of W142’s provisions) repeats in its section on the Support Unit that the trade facilitation agreement should contain clear and operational commitments by developed Members to provide support.

3.7. Applying the WTO dispute settlement process

W137 PROVIDES NO explicit statement on the applicability of the WTO dispute settlement process, while W142 provides two paragraphs. (W147 includes similar paragraphs.) W142 paragraph 30 makes explicit instructions that provisions not yet obligations (as the agreement specifies the acceptance of obligations) could not be addressed by dispute settlement proceedings.

Paragraph 31 states that Members shall give priority to use of consultations, good offices, conciliation or mediation as mechanisms to deal with issues that might arise, including issues in regard to provision of assistance and implementation. Only “as the last resort, the Dispute Settlement Understanding may be resorted to in order to settle disputes in this regard.”

These paragraphs relate primarily to the performance standards (publication of regulations, etc) that an agreement would provide. The following section takes up (among other issues) a matter that the proposals have not addressed: how the dispute settlement process might be applied to the obligation W142 in order to impose on developed Members to provide assistance to developing Members for the conduct of their needs assessments and the capacity-building that those assessments identified.

4. ANALYSIS OF PROPOSALS RELATED TO PROMOTING AND MANAGING ASSISTANCE

THIS SECTION EXAMINES how the system W142 might function in practice. It examines the possible application of the dispute settlement process to the obligation to provide assistance. It also contrasts the processes W142 would provide with the way in which development institutions have typically operated.

4.1. Applying dispute settlement to the provision of assistance

I WILL REVIEW below two possible situations in which there may be disagreement that relates to the provision of assistance:

1. Preparation of a CB Plan – disagreement between a developing Member and potential donors over what form of support is needed/appropriate.
2. Implementation of CB Plan – disagreement between a developing Member and donors designated in a CB Plan over the provision of the assistance specified in the CB Plan.

4.1.1. What happens if a developing Member is unable to agree with potential donors on an implementation/assistance plan for a particular provision?

The proposals provide for the following process:

W137	W142 MANDATORY PROVISIONS	W142 OPTIONAL PROVISIONS
The developing Member can inform the WTO Joint Platform for Cooperation and Coordination, which shall take the necessary steps to facilitate interaction with donors. (Paragraph 30)	The developing Member can inform the WTO TFTACBSU, which shall take the necessary steps to facilitate interaction with developed Members and other donors. (Paragraph 25)	Same as for mandatory provisions.
On request and within mutually agreed terms and conditions, relevant international organizations should assist developing Members in formulating capacity-building plans. (Paragraph 2)	On request, developed Members and other donors, including relevant international ... shall assist developing Members in formulating capacity-building plans. (Paragraph 2)	Same as for mandatory provisions.

Legal alternatives. What is the bottom line? If the developing Member and donors cannot agree on an implementation – assistance plan, does the provision become an obligation? If so, when? The legal options are as follows:

W137	W142 MANDATORY PROVISIONS	W142 OPTIONAL PROVISIONS
The developing Member has two choices: Not notify a plan: The provision becomes an obligation as of the entry into force of the TFA. Notify an implementation plan but never notify the acquisition of capacity: The provision would become an obligation 6 months after expiration of the notified transition period. (Paragraph 22) The transition period that may be notified is capped at [N] years. (Paragraph 3)	The developing Member has the same alternatives as are available under W137.	Alternatives available for the developing Member: Not notify a CB Plan: The provision never becomes an obligation. Notify a CB Plan (re Paragraph 7) but never notify the acquisition of capacity: The provision would become an obligation 6 months after expiration of the notified transition period. (Paragraph 18) There is however no length maximum specified for the transition period that may be notified.

Economic alternatives. Failure to agree with potential donors on an adequate/necessary package of implementation support would leave a developing Member with the following economic alternatives:

MANDATORY PROVISIONS: UNDER W137, ALL PROVISIONS, UNDER W142, ALL CATEGORY 1 PROVISIONS.	OPTIONAL PROVISIONS: UNDER W142, ALL CATEGORY 2 PROVISIONS.
(a) implement: accept the offer of (inadequate) assistance, cover the remainder of implementation costs from own resources, thereby:	(a) implement: accept the offer of (inadequate) assistance, cover the remainder of implementation costs from own resources, thereby:
• using own resources, but	• using own resources, but
• enjoying the benefits that its own traders would gain from improved facilities, and	• enjoying the benefits that its own traders would gain from improved facilities, and
• reducing the risk of complaints through the WTO dispute settlement process that its practices did not satisfy the requirements of the TFA.	• take on the reduced risk of complaints through the WTO dispute settlement process that its practices did not satisfy the requirements of the TFA.
(b) not implement the provision, thereby:	(b) not implement – not include the provision in its CB Plan, thereby:
• saving own resources, but	• saving own resources, but
• sacrificing benefits that its traders would gain from improved facilities, and	• sacrificing benefits that its traders would gain from improved facilities, and
• risking the possibility of complaints through the WTO dispute settlement process that its practices did not satisfy the requirements of the TFA.	• avoiding the risk of complaints through the WTO dispute settlement process that its practices did not satisfy the requirements of the TFA.
Implement: Expenditure of own resources: • buys the benefits to own traders and • reduces the risk of DSU complaints about practices.	Implement: Expenditure of own resources: • buy the benefits to own traders but • take on a (small) risk of DSU complaints about practices.

4.1.2. *Applying the dispute settlement process to the failure of developed Members to offer the requested assistance*

IT IS DIFFICULT to see how the WTO dispute settlement process could be brought to bear on such a disagreement. The provision of assistance would not have behind it the force of a WTO notification by *donors*, possibly not even identification in the developing Member assessment of need of which potential donors bear the obligation.

If legal interpretation was that the notification of a “need” by a developing Member imposed a legal obligation on named developed Members – one that would create an obligation for the developed Member to provide the assistance or face dispute settlement process measures including possible trade retaliation – there is little chance that the proposal would be accepted. In the United States, for example, accepting such an obligation is not included in the authority the US Congress has given to US negotiators. Moreover, it is unlikely that the US Congress or any other government would accept an international agreement that gave other governments such a right to draw on its treasury.

The “shall” language of the agreement would have the force of moral suasion behind it. However, the needed assistance – as specified by the developing Member – would not have behind it the force of a WTO notification by potential donors, or even identification of which potential donors bear the obligation.

4.1.3. *What happens if a developing Member has notified a CB Plan, but disputes arise with donor members about provision of assistance?*

SITUATIONS HERE MIGHT INVOLVE implementing a developing Member with:

- a donor Member;
- a donor international organization such as the World Bank or a regional development bank;
- an implementing agency such as the ASYCUDA Programme of UNCTAD or the WCO.

NOTIFICATION OF A CB Plan indicates that the developing Member has agreements with donors and implementing agencies. The first level of recourse would be those agreements.

As to WTO procedures, under both W137 and W142 these agreements would be a part of the implementing Member’s notified CB Plan. Both W137 and W142 provide that, at the end of each CB Plan implementation period, the provision of assistance (according to the agreed terms) and of capacity acquisition will be assessed. The assessment would be by the implementing Member and if agreed, donors (Members and organizations) and the implementing agency.

If the *implementing Member* concludes that capacity has not been acquired:

- W137 provides that this Member and the donor Members involved shall so report and make recommendations to the WTO Committee on TF;
- W142 provides for two steps.

First, the implementing Member shall notify the TFTACBSU, which is part of the WTO Secretariat. The TFTACBSU will then assist the Member to satisfactorily acquire capacity.

Second, if the implementing Member still concludes that it has not acquired capacity, the TFTACBSU¹⁴ makes recommendations to the Committee on TF.

Both specify that when the issue reaches the WTO Committee on TF, the Committee will review the matter and decide on a case-by-case basis on the appropriate action to take.

W142 would require the TFTACBSU to monitor and annually report on the compliance by developed Members with their obligations to provide assistance; also to monitor and annually report on the extent, efficacy, and usefulness for the beneficiaries of the TF-related assistance that Members provide.

Again the applicability of the WTO dispute settlement process would seem to be problematic. W137 and W142 call for notification of CB Plans by Implementing Members. For donor Members to accept WTO dispute settlement process authority over their bilateral aid projects would be problematic. Likewise problematic would be WTO dispute settlement process authority over project agreements between implementing Members and international organizations. Developing Members have long expressed concern about cross-conditionality – the application of World Bank or IMF lending leverage to the implementation of WTO obligations.

The paramount level of recourse would be the agreements the Implementing Member has with donors and implementing agencies.

4.1.4. Would the Member providing assistance assume responsibility for the developing Member meeting performance standards?

SUPPOSE THAT AFTER notification by a developing Member of capacity acquisition a trading partner brings a DSU complaint that the Member's practice is not consistent with its obligations under the TFA. The matter of who is responsible could be complicated, involving the developing Member, donor Members who supported the self-assessment, the preparation and execution of the CB Plan (these possibly different from those who supported the self-assessment), and implementing agencies. Could a capacity-building agreement between an Implementing Member and a donor Member or organization provide that the implementing Member's obligations under the TFA were transferred to the other party?

4.2. Rationing assistance (Saying No!) – the proposals offer no mechanisms

THE REALITY OF economics is that there must be some means for rationing the amount demanded to the amount available. Bilateral agencies have criteria for gauging eligibility; the development banks likewise have procedures that allocate among possible uses the resources they have available. Established and long-used processes – accepted by donors and receivers – help to prevent the decisions that have to be made from becoming rancorous. In this context the recent OECD/DAC report notes that the WTO definition of “developing countries” includes many countries that do not receive assistance from either bilateral or international donors. Furthermore, self-assessment – as a process for bringing forward requests for assistance – may increase the size of each country's request and increase the attractiveness of such requests as an alternative to using own resources.

The problem of “Saying ‘No!’” would be intensified by the fact that some of the poorer countries have already made significant investments of their own money (including money from local businesses) in improved border facilities. The OECD/DAC report describes such improvements in Ghana, Malaysia, Mauritius, Mozambique, Senegal, and Thailand. A development agency might provide support in other areas, but such countries would be outside the ambit of WTO-related support.

The OECD/DAC report identifies several approaches that WTO Members might take to the rationing problem that would exist if the sum of the needs identified by the self-assessments summed to more than the resources available from WTO donor Members.

- International development banks might guarantee that one of them would substitute for bilateral donors, if donor Members do not come forward with the amount of assistance that a developing Member's needs assessment brings forward. The report explains in a footnote that this would have to be an informal arrangement – formal legalities would be difficult.

- Existing international funds could be used, as for example the Commonwealth Fund for Trade Cooperation or the Integrated Framework Window 2.
- A subsidiary international fund could be established that might be alimeted particularly by bilateral and private sources, e.g, small donors, international companies, foundations.
- Countries not now receiving assistance under donor procedures unilaterally exclude themselves from the force of the TFA to compel donor Members to provide assistance.
- Countries that do not receive the support they request (identify through their self-assessments) should be granted extended implementation periods.

Only the penultimate of these would reduce the demand for resources. The others would only ameliorate the WTO situation by passing the excess demand to other institutions.

The OECD/DAC report also identifies possible approaches to the related possibility that the WTO process would lead to less use of own resources.

- Follow normal aid eligibility practice. Countries “in a position to help themselves” would receive market-based loans or no funding
- Impose on WTO procedures a “need for aid” test. The developing Member would have to demonstrate that all possibilities to fund the trade facilitation reform process without grant support have been explored and that ongoing self-help programmes are not discontinued.
- Exempt countries that decide not to use TA/CB funding from the notification and review the process of capacity-building plans. (Do the proposals create a requirement that developing Members conduct a self-assessment, submit a CB Plan, even if they do not intend to ask for assistance?)

As this section demonstrates, and as Integrated Framework experience verifies, notification of “needs” to the TFTA/CBU will create an expectation that resources will be forthcoming, but the TFTA/CBU does not have the authority to raise money – nor a process to ration available funds among developing Member claimants.

The hope of many who propose that the WTO within its ambit to “coordinate” the provision of trade facilitation assistance is to have the opportunity to say Yes! to developing country requests. The reality is that they would be in a position in which they would often have to say No!

4.3. Trust versus legal obligation: the donor – recipient relationship

THE RELATIONSHIP BETWEEN a donor and a recipient country is a continuing one that involves the acceptance of legal obligation on the part of both parties. For the relationship to be productive depends on the two parties developing a sense of trust and a shared view of how the donor will help the country toward its development targets. The legal documents ultimately define what the donor will provide and what the borrowing country will do with these resources, but the process of developing trust and a shared view requires considerably more time and effort than the preparation and execution of these documents.

In rough outline the steps in the relationship between a bilateral or multilateral agency and the borrower government are as follows:

4.3.1. Steps in the relationship

Strategy preparation:

1. Preparation of a country's development – poverty reduction strategy. The strategy is prepared by the country's government, in consultation with stakeholders in the country; it sets out the country's development priorities and targets.

Project identification:

2. Donors become involved here. They prepare in co-operation with the government and interested stakeholders their own lending or assistance strategies. A donor's assistance strategy accepts the country's determination of priorities and targets and outlines where the donor will be involved.

3. Donor teams then work with the government to identify projects, which can be funded as part of the agreed development objectives.

4. Public information. At this stage the borrower and the donor publish statements of project information that outline basic elements: objective, likely risks, alternative scenarios for conducting the project. Such documents serve to alert potential bidders for the project's components. Parallel information documents inform stakeholders and other interested parties of social, environmental and other assessments that will be part of the preparation and assessment of the project's potential and impact.

Project preparation :

5. Project preparation is driven by the country; donors where requested provide supporting analysis and advice on technical, institutional, economic, environmental, social and financial issues.

Project appraisal:

6. Donor staff review the work done during identification and preparation, often in close contact with officials in the client country. Donor staff prepare appraisal and proposal documents for the donors' decision-makers; update the public information releases for the project.

Project negotiation and approval:

7. Donor and borrower negotiate the project's final shape, and come to an agreement on the terms and conditions of the loan or grant.

8. As per the donor's procedures; documents – including the relevant legal instruments – are presented to its decision-makers for approval.

9. The documents are likewise submitted for final clearance by the borrowing government, which may involve ratification by a council of ministers or a country's legislature.

10. Following approval by both parties, the loan agreement is formally signed by their representatives. Donor and borrower rules for publication of information, procurement, monitoring, etc will apply.

4.3.2. *Needs assessment in the relationship*

NEEDS ASSESSMENT FOR the country begins at step 1. The process of refining from this needs assessment to a bankable specification of project content and financing is a mutual effort that ten steps later results in a contract between the borrower and the development bank. To jump from a self-assessment of needs to a legally binding specification of what the borrower and the donor will do omits the intervening nine steps. It would transform a process that has been in some instances excessively supply-driven to one that would be excessively demand-driven.

A better alternative might be to augment the role of recipient country commercial constituencies in the existing process. It is not clear if commercial constituencies in the developed Members, who support their trade facilitation assistance programmes, would see a legal obligation (as these proposals would bring it forward) as enhancing their partnership with commercial constituencies in beneficiary countries or as compromising that partnership – by tipping authority in beneficiary members towards government and away from commercial enterprises.

4.3.3. *Can the WTO help us to avoid the process/bureaucracy?*

IT IS TEMPTING to suggest that the complexity of such procedures is irrelevant, that WTO-related assistance would eliminate many of these steps, that if “good people” were in charge, all this “bureaucracy” would be avoided.

Tempting, but hardly realistic. Poverty assessments, social assessments, publication of project development plans sufficiently in advance to allow inputs from a wide range of interested parties (“stakeholders” is the warmer synonym), are in place because development agencies shareholders demand them. A WTO process that eliminated them would reopen the WTO to criticism that it is an institution dedicated to trade for trade’s sake – and the sake of big trading corporations.¹⁵

We cannot respect all the comforting assurances of social and environmental responsibility, mainstreaming, ownership, transparency and widespread participation, while simultaneously discarding as “bureaucracy” all the process that application of such virtues demands. Moreover, if we are serious about “mainstreaming” we must accept the possibility that aid-for-trade will lose priority relative to public health, education for women, etc. Mainstreaming might not ensure a set-aside for trade, of old money nor of new.

4.3.4. *An example of international cooperation based on mutual interest, the STDF*

THE STANDARDS AND Trade Development Facility (STDF) is a useful example of cooperation to help developing countries to implement international standards. It is a programme set up by five organizations (the World Trade Organization, the World Health Organization, the World Bank, the World Organization for Animal Health, and the Food and Agriculture Organization) and funded by contributions from the Members of these organizations. Its purpose is to help developing countries to implement international standards on food safety and animal and plant health, with a particular focus on situations in which a lack of capacity to certify food products as meeting international standards has prevented international market opportunities from being exploited. Since its inception in 2002, the STDF has built a portfolio of 24 projects and is financing a further 22 project-preparation grants. The experience of the STDF should not be overlooked when the international community explores ways to support trade facilitation in developing countries.

4.4. *Needs assessments: they cannot deliver what the proposals ask*

BOTH W137 AND W142 posit a critical role for needs assessments – and both of them emphasize that these will be self-assessments by potential beneficiary countries. On the basis of these assessments both developing Member and developed Members would enter into legally-binding obliga-

tions; to meet in practice the standards that a WTO TF agreement would prescribe, to deliver the assistance that these assessments identified as necessary. Developing Members would be confident that with the specified assistance they would be able to perform up to the standards. Donor Members would be confident that they were not being asked for too much, not being asked to support the waste of scarce resources.

This considerably overestimates the work that needs assessments can deliver. This point can be made in two ways: analytically and empirically. Analytically, as explained in the section above, a needs assessment is an initial step in the eventual agreement between borrower and lender. It is an instrument a participant in the relationship has in her tool kit, it is not the contract that results from the negotiation.¹⁶ Empirically, the “case studies” below are my argument.

The initial design of the Integrated Framework was that it would support needs assessments by potential beneficiary countries, bring these to potential donors; possibly integrate the response to these trade-related needs into donor- beneficiaries’ round-tables.

It failed. The fault, however, was not with performance; it was with the instrument. An instrument that proposed to jump from step 1 above, to step 10, without the intervening steps, could not meet its promises.

RECOGNIZING ITS LACK of success, the Integrated Framework backed off and settled for helping potential donors to “mainstream” trade into their general development strategies. The Integrated Framework would support the preparation of diagnostic studies – a trade-focused version or part of a PRSP – and in ensuring that trade officials had seats at meetings that take up the management of foreign assistance. A report and a list of meeting invitations would be the operation output of the Integrated Framework.¹⁷

The WB-IMF-WCO needs assessment study,¹⁸ stated as it began that “The Cost of implementation studies,” did add a modicum of reality to the trade facilitation assistance discussion, but hardly the precision on which a government would want to accept the legal obligation that a WTO agreement would involve – or a donor would want to commit to providing assistance. This report, like the Integrated Framework, passes that responsibility to the as-yet unspecified persons who would conduct the self-assessments on the basis of which developing Member would notify the obligations they accepted, and donor Members would accept the obligation to provide the assistance specified in those motivations.

As professional work, the flaw of the paper is not the imprecision of its estimates. It is the suggestion that further work would refine them to the level that the proposals demand.

Finally, Rubens Ricupero, when he made his suggestion for “implementation audits,” did not do so on the presumption that they could be done – could support a legal contract between implementation and assistance. It was part of his argument that such matters not come into the WTO – matters where implementation required real resources and where what was needed to implement depended critically on individual country circumstances.

The needs assessment discussion has been in large part an exercise in passing-the-buck. Designing a “platform” has become a way of avoiding needs assessments, not a way of doing them.

4.5. Imposing an obligation on developed Members to provide assistance is not workable

AMONG THE APPARENT differences between W137 and W142 is that the latter would obligate developing Members to provide assistance for the capacity-building needs that developing Members identified as well as for the conduct of developing Members’ needs assessments and the preparation of their capacity-building plans. The obligation that W137 would impose is limited to assistance for needs assessments and the preparation of capacity-building plans; moreover, it is qualified by the phrase “under mutually agreed terms.”

W142 however does not provide the mechanics that would make operational the obligation it

states. Unless a developed Member comes forward and in some way (unspecified in the proposal) notifies an assistance commitment, the needs identified by each developing Member remain a collective obligation of “developed Members.” This provides no basis for action against any one developed Member.

Viewed mercantilistically (disciplines as “concessions” that benefit exporters), the import of the proposal is that in the interval between signing and entry into force each developing Member would have the opportunity to take bids from developed Members on its acceptance of the agreement. Commercially speaking, the sum relevant to determining how much to “bid” is the benefit that a developed Member’s export interests will gain – not the amount that implementation would cost the developing Member.

Moreover, the motivation for the considerable international cooperation on trade facilitation that we have seen in the recent past is that both parties see mutual interest in such reform and in such assistance. To superpose a process that presents the issue as a mercantilist bargain of assistance in exchange for trade reform “concessions” would be to introduce conflict into a relationship that is already productively propelled by cooperation and mutual interest.

4.6. *Mandatory or optional standards?*

W137 PROPOSES ONLY obligatory standards. All standards included in the agreement become obligations to all members after a specified period of time – whether or not the assistance that comes forward is judged sufficient by developing Members.

W142 proposes three categories of standards:

1. Obligatory:

Standards in this category become obligations to all members after a specified period of time – whether or not the assistance that comes forward is judged sufficient by developing Members (as with W137).

2. Assistance-conditioned:

A developing Member may decide, after offers of assistance come forward, which of these standards it will accept as obligations.

3. Best endeavour:

A developing Member may request assistance for capacity to meet standards in this category, but accepting such assistance does not trigger the standard becoming an obligation for that developing Member.

4.6.1. *Best endeavour standards are superfluous.*

THE THIRD CATEGORY is superfluous. There hardly need be a listing of such standards in a WTO agreement. The trading community does not depend on WTO negotiations to develop appropriate guidelines; those are developed and managed in other international conventions and organizations. “Voluntary” cooperation can be arranged through such conventions and organizations.

Another possible reason to list such standards in a WTO agreement is to assure that a project covering capacities relevant to WTO obligations might also cover capacities *not* relevant to WTO obligations. There seems, however, to be no need for such legal clearance. In practice, trade facilitation improvements that affect capacities to meet obligations under GATT Articles V, VIII and X; or under the WTO customs valuation agreement, are often parts of larger projects such as general reforms of public administration, transportation infrastructure, airport and port facilities. In effect,

the category amounts to the WTO giving the international community “permission” to do what that community already does.

4.6.2. If some standards are obligatory, then all are obligatory.

DONORS CAN HOLD back assistance for capacities to meet obligatory standards unless a developing Member accepts as obligations the standards in the second category. (Of course, each developing Member would have the opportunity to shop for – and to compete against other developing Members for – the least-demanding donor.)

Making all TFA standards assistance-conditioned would delay, but not prevent, the opportunity for donors to make them mandatory. After signing of a TFA – in which all standards are assistance-conditioned – potential donors will be in a position to hold back acceptance of the Doha package (single undertaking) on acceptance of the TFA standards as obligations. Regarding this leverage, developing Members would not have the option to shop for the least-demanding member. It is not the assistance that is held hostage, it is the entire package; and by the WTO practice of consensus decisions, any one Member can block the single undertaking.

The decision as to which trade facilitation standards will be obligatory would be in the hands of the most-demanding Member. This could produce a more demanding agreement than W137 would produce – by the procedure of W137, the decision on which standards would be obligatory is a collective decision.

5. A WTO TRADE FACILITATION AGREEMENT NOT TIED TO THE DOHA PACKAGE?

TO AVOID THE “second bite at the apple” that the single undertaking format allows, WTO Members might consider a trade facilitation agreement that is incorporated into the WTO on its own; not tied to other Doha Agenda matters.

There are other reasons to consider negotiating a free trade agreement into the WTO on its own. Trade facilitation is a positive-sum game. Trade facilitation measures should not be thought of as “concessions” that provide benefits to concession “receivers,” but as costs to givers. The basis for developed Member support is that their traders will enjoy benefits. The basis for developing Members’ consideration is likewise that their enterprises will enjoy benefits. The degree of support from developed Members does not reduce the benefits that developing Members will enjoy as a result of implementing such measures.

5.1. Avoid single undertaking mercantilism

AS TRADE FACILITATION is a positive sum game, reciprocity – benefits to all Members – can be attained within a trade facilitation agreement. (Indeed, each improvement will deliver benefits on both sides of the border – buyer and seller.) There need not be agreements in other areas to even up for “losers” in the trade facilitation agreement. Indeed, negotiating a trade facilitation agreement under the premise that it must be of benefit to all members might promote a constructive attitude.

Consider the alternative, a trade facilitation agreement as part of the Doha single undertaking. First, the other negotiations are not advancing. The seriousness of trade facilitation assistance negotiations would be compromised by the pace of these negotiations, delay and perhaps ultimately failure of the other negotiations would reduce or eliminate the benefits of a trade facilitation agreement.

A second concern relates to the inexactness of needs assessments and the value of other parts of agreement in other areas of the Doha work programme. If the trade facilitation agreement were to be part of a single undertaking, self-assessment and bargaining over assistance would take place between signing of a trade facilitation agreement and entry-into-force of the total package. That

means during the negotiation of the other parts. It will be difficult to be precise about what is the cost of the capacities needed to meet the performance obligations of the trade facilitation standards. In this environment – that includes the 60-year mercantilist tradition that GATT/WTO bargaining brings to market access negotiations – trade facilitation assistance might indeed become part of the “price” that developing Members ask for the entire package of “concessions” in the Doha Agreement – in effect, cash payments for market access “concessions.” To potential donor Members, the mercantilist value of the market access package will map poorly on the actual need for assistance on trade facilitation.

5.2. An agreement would provide a shakedown experiment for making assistance obligatory

THE UNPROVEN NATURE of key elements in the obligations-assistance linkage suggests that an initial WTOTFA be limited to the standards already sorted into the highest priority group by the different experts groups – where we have the greatest confidence that they will contribute to development. (These are, in general, standards for transparent and accountable border agencies.) The operation of the agreement could then provide a shake-down period for the mechanisms related to assistance – needs assessments done with a view to their being the basis for (a) developing Members to accept the standards of the agreements, and (b) donor Members to accept the obligation to provide the assistance that the assessments identified. Success with the initial agreement would encourage extension to additional, more complex and perhaps more expensive matters.

6. CONCLUSIONS

6.1. There is a solid basis for international cooperation on trade facilitation. (2 and 4)

1. There is extensive knowledge of what works – and experience applying that knowledge productively in developing countries. (2.1)
2. Good performance is within the capabilities of the poorest countries. (2.1)
3. Bilateral and multilateral agencies have been active and have made many positive contributions. (2.1)
4. The record shows solid support among developed Members for trade facilitation in developing countries, and solid support for such from commercial constituencies in developed Members. (2.1)
5. The Standards and Trade Development Facility (to help developing countries to upgrade to international SPS standards) is an example of international cooperation built on mutual interest. (4.3)
6. The values that WTO Members respect – response to developing Member priorities, etc – are equally respected in the aid community. (4.3)
7. The solid support that already exists among developed Member constituencies for trade facilitation assistance should not be undervalued, nor should it be compromised. (4.5)

6.2. This knowledge provides the basis for general assignment of priorities regarding their support for development. (2.2 and 2.3)

8. Expert opinion would assign priority to measures that enhance transparency, objectivity and accountability in border processes – publication of laws/regulations, processes, results; organizing stakeholder input into oversight of regulations and processes, the performance of agencies. (2.3)

9. That listing cannot be exact because:

- expert opinion differs to some degree on the costs and returns of measures; (2.2)
- initial conditions differ widely among countries, even among the poorer countries. (2.1)

6.3. Proposals that deal with assistance go too far towards replacing trust and realized mutual interest with legal obligation. (4)

10. Needs assessments are over-sold. Judged by practices of development institutions, they will provide neither a shared view of mutual interest between donor and recipient nor the precision that project documents (that define the legal relationship between donor and recipient) normally require. (4.3)

11. The proposals would create pressure on the WTO to provide assistance, but no process for (a) determining what assistance an individual developed Member is obliged to provide nor (b) rationing available assistance among competing demands. The proposed mechanisms will generate the necessity of saying No but provide no process for doing so. (4.2)¹⁹

12. Creating a legal obligation within the WTO for WTO developed Members to provide assistance would not be workable. (4.5)

13. It is not possible to make some standards of an agreement mandatory, others optional. (Donors can condition assistance for mandatory standards on acceptance of “optional” ones.) i.e., if some standards in the agreement are obligatory, then all are obligatory. (4.6)

14. While the W142 alternative – with optional standards – sounds more sympathetic to developing Members’ interests, in practice it would not be. Moreover, that sympathy is more towards the country’s WTO negotiators than towards its commercial interests. (4.6)

6.4. In the single-undertaking format of the Doha Round, W137 and W142 are minimally different.

15. While the W142 alternative sounds more sympathetic to developing countries, it also sounds more mercantilist. It poses acceptance of trade facilitation standards as “concessions” that developing Members give in exchange for money.²⁰ Moreover, that sympathy is more towards the country’s negotiators than towards its commercial interests.

16. The contribution to development of a WTO trade facilitation agreement depends much more on how effectively its standards promote the mutual interests of all members than on how it imposes legal obligation on donors. (The WTO is most effective where one-size-fits-all is sensible.)

(a) Trade facilitation has broad potential to be a positive-sum matter.

(b) Legal obligation in a WTO agreement to provide assistance will add minimally to the commercial motivation that already exists.

(c) For WTO developing Members, the critical factor in deciding the content of a WTO agreement on trade facilitation would be the agreement’s role in helping their own governments and commercial stakeholders to manage the installation and operation of efficient border processes.

7. RECOMMENDATIONS – NEXT STEPS

- Focus on the trade facilitation standards that the agreement will prescribe – what is good trade facilitation?

This initial agreement might best be limited to the transparency-objectivity elements in the experts' assessments (in OECD/DAC nomenclature, "Level 1"), plus what we have learned from SPS and TBT for linking WTO legalities to the relevant facilities and performance standards.

Accept that a WTO obligation to provide assistance is not workable.

A trade facilitation agreement incorporated on-its-own into the WTO – not part of a Doha Work Programme package – should be considered.

Otherwise self-assessments would be conducted and assistance negotiated during the completion of the mercantilist market access negotiations. Given the imprecision of needs assessments these negotiations could readily become political. Trade facilitation assistance would lose its win-win character and become a pay-off or compensation for market access. A trade facilitation agreement incorporated on-it-own into the WTO would provide a way to prevent trade facilitation from becoming the stepchild of market access mercantilism. There is no need to introduce mercantilism into a process already advancing on the basis of mutual interest.

- A plurilateral agreement as an alternative

The international community should consider a plurilateral agreement under the WTO umbrella. Such an approach would allow the timing of any developing Member's accession and acceptance of its standards to be accommodated to the circumstances and pace of its own development. It would also allow the process of accession to be supported by negotiations for assistance. Free-trade agreements involving developed and developing countries have frequently included the provision of this sort of assistance; the obligation to provide assistance is more easily managed on a country-to-country basis than on a multilateral basis. (As explained above, the obligation in a multilateral agreement lacks the specificity of "who to whom.") Making this part of a free trade agreement a matter of accession to a plurilateral agreement on trade facilitation would be a way to multilateralize this part of the free trade agreement. Already ongoing international cooperation on trade facilitation might in this way be given a further boost.

- Go to work.

Work out – in the field, not in Geneva – how to undertake needs assessments under the pressure to deliver results that donors and implementers will accept as the basis for accepting WTO-legal obligations.

After we learn how to do such things, negotiate to expand coverage of the agreement.

Most important:

Negotiating attention should now be on identifying a specification of trade facilitation standards that support development.

For WTO developing Members, the critical factor in deciding the content of a WTO agreement on trade facilitation would be the agreement's role in helping their own governments and commercial stakeholders to manage the installation and operation of efficient border processes.

Be explicit that the objective is development and poverty reduction in poorer countries. A role for the WTO is a matter of possible means, not of objective.

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9. ANNEXES

9.1. Annex 1: Cost elements and trade facilitation categories in the Asia-Pacific Network Study

COST ELEMENTS	TRADE FACILITATION CATEGORIES
Infrastructure/facilities Human resources including training Revision of legislation/regulation Reduced revenue from fees and charges	Document Alignment with international standards. Publication of trade regulations, fees and procedures. Enquiry points and single national focal points. A national trade facilitation committee. Advanced rulings on tariff classification, valuation, and origin. An appeal procedure for customs and other agencies rulings. A single window system. Pre-arrival clearance mechanism. Risk management system. Audit-based customs (post-clearance audits). Expedited clearance of goods based on a bond, guarantee, or deposit arrangement. Expedited procedures for express shipments and qualified traders.

Source: Duval (2006).

9.2. Annex 2: Maur Sorting or trade facilitation reform measures by cost and time required

TRANSIT (GATT ART V)

	SHORT TERM	LONG TERM
Affordable	Disciplines on fees and charges Simplification of procedures Alignment with international standards	Bilateral transit agreements National guarantees for transit goods Mutual recognition of customs procedures
Costly	Automation for transit Secure vehicles Special procedures	International guarantees TIR-type convention corridors Joint border posts

FEES AND FORMALITIES (GATT ART VIII)

	SHORT TERM	LONG TERM
Affordable	Disciplines on fees and charges Simplification and alignment of procedures Advance ruling on classification	Release-clearance separation Security for duties and taxes Advance ruling on valuation
Costly	Pre-arrival and expedited clearance Automated systems Use of international standards Special procedures, e.g authorized traders	Advance lodgement and processing Risk assessment, audits Single window

PUBLICATION AND ADMINISTRATION OF TRADE REGULATIONS (GATT ART X)

	SHORT TERM	LONG TERM
Affordable	Publication of laws Advance ruling on origin Domestic consultation	Enquiry points Advance ruling on classification Advance ruling on valuation Publication of regulation motives and procedures
Costly	Website Translation Value added information	Appeals procedures

Source: Maur (2006).

9.3. Annex 3: Comparison OECD/DAC and WB-IMF-WCO and Asia-Pacific Network sortings of trade facilitation measures

WB IMF WCO CATEGORIZATION OF MEASURES BY COST AND IMPLEMENTATION DIFFICULTY	OECD/DAC SORTING OF TRADE FACILITATION FUNCTIONS	ASIA-PACIFIC NETWORK EXPERTS GROUP
<p>GROUP 1 Simple, inexpensive to implement; Offer significant benefits to traders and government even when implemented to the basic level considered necessary to meet WTO obligations. 1 to 2 years for implementation</p>	<p>LEVEL 1: Transparent and accountable border agencies.</p>	<p>Consensus top 5 (of 12) Measures</p>
<p>Transparency Internet <i>publication</i> of regulations, penalty provisions and procedural requirements. Time between publication of regulations and entry into force. Period for consultation on new/ amended regulations. Advance rulings on tariff classification. Right of <i>appeal</i>. Release of goods subject to appeal. Integrity – Code of conduct.</p> <p>Fees and Formalities Calculate fees and charges on the basis of costs of services provided. Use of relevant international standards. Automation of Customs clearance processes. Adoption of uniform/standardized forms across Customs Unions.</p> <p>Risk management in Customs. Objective criteria for Tariff Classification. Publication of average clearance times. Expedited procedures for express carriers.</p> <p>Transit Periodic review and rationalization of fees and charges for import/ export/transit operations. Publication of transit related information and fees preferably on the Internet. Limitation of inspection on transit goods. Coordination and harmonization of documentary requirements</p>	<p>Publish border regulations and create enquiry points. Simplify trade documents and align them to international standards. Provide advance rulings on the origin and classification of goods. Consult national stakeholders. Establish and enforce the right to appeal border decisions. Release of goods against guarantee and publication of the reasoning behind decisions are important corollaries. (Some experts consider these more complex – Level 2). Coordinate border agencies. Simplify the transit of goods. Reforms that do not require major investments; examples:</p> <p>simplifying transit procedures and documents (taking for instance the Revised Kyoto Convention of WCO and the United Nations Lay-Out Key as reference), Establishing a simple guarantee system to avoid the need for transit convoys. Removing protectionist or arbitrary transport policies.</p>	<p>Document Alignment: the HS nomenclature, the UN Layout Key and internationally agreed standard data elements for trade documents (A). Establishment of enquiry points and single national focal points for trade regulations and other trade facilitation issues (A). Online publication of trade regulations, fees and procedures in local language and English (A or B). Implementation of modern risk management systems for release and clearance of goods (B or A). Establishment of a national trade facilitation committee to comment on new and amended rules prior to their entry into force as well as to conduct periodic reviews of trade procedures (A).</p>

WB IMF WCO CATEGORIZATION OF MEASURES BY COST AND IMPLEMENTATION DIFFICULTY	OECD/DAC SORTING OF TRADE FACILITATION FUNCTIONS	ASIA-PACIFIC NETWORK EXPERTS GROUP
<p>Group 2 More complex or difficult to implement. Assistance will be needed. 3 to four years for implementation.</p>	<p>Level 2: more efficient border clearance</p>	<p>Measures ranked 6, 7, 8 and 9</p>
<p>Transparency Establishment of single enquiry points. Advance rulings on Valuation. Appeal mechanisms in a Customs Union. Development and implementation of national anti-corruption strategy and enforcement programme. Fees and Formalities Uniform Customs Code. Pre-arrival clearance. Authorized trader regimes. One time submission of all import/export/transit documentation to government authorities. Coordination of domestic border agencies including joint inspections. Risk management in non-Customs agencies. Transit 1. Elimination of prescribed transit routes.</p>	<p>Enhance transparency by using automated tools. Introduction of e-tools, achieving "state of the art" border management will take time, have considerable equipment and training costs. Automation can be a driver of reform. Rule on the value of a trade in advance. Important for buyers in contracting with sellers. Linked to automation and introduction of risk-management techniques. Verify and approve documents before border clearance. Linked to introduction or risk management techniques, cooperation among border agencies. Automation; requires at least electronic packing of documents. Release goods against a guarantee, separating release from clearance. <ul style="list-style-type: none"> • Counter to the tradition of releasing goods only after all controls are completed, duties and taxes paid. • Possible only when local banks establish guarantees and when traders are well established. • Tied to the practice of audit-based controls and adequate risk assessment techniques. Apply risk assessment and audit after clearance. <ul style="list-style-type: none"> • Probably the single most important step to accelerate the release of goods and rationalize the border process. • Risk profiling is mainly based on past experience both in the country and elsewhere in the world. • Relies on a mass of data – requires an automated Customs environment. • Closely tied to post-clearance audits at the point of destination of the shipment. Coordinate border controls with your neighbours. </p>	<p>Provision of advanced, binding rulings on tariff classification, valuation, and origin. Establishment of an effective appeal procedure for Customs and other agencies rulings. Establishment of single window system. Establishment and systematic use of pre-arrival clearance mechanisms (processing of goods declarations received in advance of goods arrivals and pre-arrival clearance)</p>

WB IMF WCO CATEGORIZATION OF MEASURES BY COST AND IMPLEMENTATION DIFFICULTY	OECD/DAC SORTING OF TRADE FACILITATION FUNCTIONS	ASIA-PACIFIC NETWORK EXPERTS GROUP
<p>Group 3 Significantly more difficult to implement. Require large amounts of assistance. In some cases involves financing for infrastructure and equipment. Four or more years for implementation.</p>	<p>Level 3: best practice in trade facilitation</p>	<p>Measures ranked 10, 11 and 12</p>
<p>Transparency Establishment of single enquiry point for all trade related information. Fees and Formalities Electronic single window. Post clearance audit. Elimination of mandatory use of Customs brokers. Transit Juxtaposed/One stop border stations. Implementation of regional transit guarantee schemes.</p>	<p>Create and gradually integrate trade facilitation processes in a single window.</p> <ul style="list-style-type: none"> In its simplest form, a single window can be paper-based, but in the real world, single windows are associated with a high degree of automation. <p>Expedite procedures for authorized traders. Advanced risk management. A carefully selected group (or their local representatives or warehouse operators) benefits from accelerated, and separate clearance procedures (e.g. self-assessment, simplified declaration, examination at approved premises or at separate inspection lanes). The traders selected on track record, frequency of trading, type of shipment, e.g. multinational express carriers.</p>	<p>Establishment and wider use of audit-based customs (post-clearance audits) (C).</p> <ul style="list-style-type: none"> Part of an ICT-based system. Should be in parallel with risk management. <p>Expedited clearance of goods (subject to post-clearance audit) based on a bond, guarantee, or deposit arrangement (C).</p> <ul style="list-style-type: none"> Involves posting of security by traders - requires capable financial intermediaries. Inappropriate in countries with high inflation rates, high level of non-compliant trade and informal sector trade. <p>Expedited procedures for express shipments and qualified traders/companies (C or A or B).</p> <ul style="list-style-type: none"> Extremely difficult in a paper based system. <p>Express carriers should provide the infrastructure.</p>
<p>Problematic because of revenue loss implications.</p>	<p>Overarching matters.</p>	
<p>Elimination of high revenue yielding fees and charges. Elimination of consularization (where revenue impact is significant). Pre-arrival clearance where major IT upgrade is required. Elimination of Pre Shipment Inspection.</p>	<p>Public management problems; e.g. attracting skilled staff, establishing work ethics in a corruption-prone environment. Difficult to isolate trade facilitation processes from overall public service conditions. Hence, trade facilitation reform is management reform. Automation has often been a useful guiding and sustaining mechanism. Other parts of the overall process for traders are transport, banking, insurance, exchange controls, handling and security processes for goods in ports, airports, railway stations and warehouses.</p>	

9.4. Annex 4: Summary of the content of the African Group communication

IMPLEMENTING THE TECHNICAL Assistance and Capacity-Building and Special and Differential Treatment (SDT) Mandates of Annex D of the July 2004 Framework (TN/TF/W/95, 9 May 2006).

Trade facilitation negotiations objectives:

As expressed in the July 2004 Work Programme (Annex D) and the Hong Kong Declaration (Annex E).

- Identify trade facilitation needs and priorities of individual Members; the cost implications;
- Find ways to make operational the provision of assistance during the negotiations and for the implementation of new commitments after the negotiations;
- Integrate SDT into the trade facilitation negotiations.

Key elements for assistance

- Assistance during negotiations for developing Members;
- Identify needs and capacities in each Member;
- Assistance to be tailored to these needs;

- Set benchmarks, steps, to facilitate ongoing monitoring – of assistance as well as of capacity-building;
- Implementation assistance – particular attention to the needs of SMEs;
- Programmes to promote investment, build domestic capacities;
- Assistance aimed at sub-regional issues;
- Build better cooperation among border agencies of Members;
- Avoid inconsistencies in assistance for different parts of the trade facilitation process – e.g., valuation, rules of origin, licensing, sanitary controls;
- Post implementation support;
- Provide training and support for short and long-term in-country advisors;
- Sustained, long-term funding;
- Co-ordination, co-operation and coherence among donor Members and international organizations such as the World Bank, IMF, WCO, UNECE, UNECA, ITC.

Elements of flexibility:

- Commitments to fit the specific circumstances of individual Members;
- Due respect for alternative approaches and for the level of development of individual Members;
- Progressivity; a developing Member should enter into a commitment only after a benchmark is achieved indicating its ability to implement and that the assistance obligations by developed Members have been met.

National development objectives have priority:

- Priority of national development objectives – new rules would be implemented only when implementation conforms with or supports the attainment of national development objectives;
- An agreement should establish long-term but non-binding objectives for capacity-building and rule setting.

Outside the WTO dispute settlement process:

- Future commitments should not be part of the Doha Work Programme single undertaking and be kept outside the WTO dispute settlement mechanism.

9.5. Annex 5: Comparisons of elements in proposals W137 and W142

	W137	W142
Sponsors	<p><u>LAC</u>: Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay (12 countries).</p> <p><u>Asia</u>: China, Japan, the Kyrgyz Republic, Pakistan, Sri Lanka (6 countries).</p> <p><u>Europe</u>: Armenia, the European Communities, Georgia, Moldova, Switzerland. Canada.</p>	<p><u>Core group</u>.</p> <p><u>LAC</u>: Cuba, Jamaica, Trinidad & Tobago, Venezuela.</p> <p><u>Asia</u>: Bangladesh, India, Malaysia, Nepal, the Philippines, Indonesia.</p> <p><u>Africa</u>: Botswana, Egypt, Kenya, Mauritius, Namibia, Nigeria, Rwanda, Tanzania, Uganda, Zambia and Zimbabwe.</p>
Members eligible for SDT designated "DgMs" in this table.	Each developing and least-developed Member, Armenia, Georgia, the Kyrgyz Republic and the Republic of Moldova enjoy the same rights and obligations as developing countries.	Developing and least-developed Members, including low-income economies in transition.
Self-assessment		
Assistance	On request: donors, including relevant international organizations as referred to in Annex D of the July framework, including the IMF, OECD, UNCTAD, WCO and the World Bank.	On request: DgMs and other donors, including relevant international organizations.
Begins	After the signing of the single undertaking including the trade facilitation agreement.	Commence, after the signing of the TF Agreement.
Notify at the beginning of self-assessment period.	For which obligations it needs: (i) technical assistance and capacity-building, and (ii) additional time, which shall not exceed [N] years, to implement. <i>The categories, of course, can overlap</i>	
Notify as a result of self-assessment.	<p>(a) the obligations for which the need for technical assistance and capacity-building has been signalled in the Notification;</p> <p>(b) intermediary steps as necessary;</p> <p>(c) the implementation periods;</p> <p>(d) the donors; and</p> <p>(e) the implementation agency if appropriate.</p>	<p>The Class A provisions for which the DgM will need additional time to implement – not to exceed [N] years.</p> <p>(i) the obligations for which technical assistance and capacity-building will be required;</p> <p>(ii) intermediary steps as necessary;</p> <p>(iii) the capacity-building implementation periods that may be needed for the provision of such technical assistance and capacity-building for each specific obligation;</p> <p>(iv) the potential or identified donors, if any;</p> <p>(v) the implementation agency if appropriate;</p> <p>(vi) "benchmarks" that the technical assistance and capacity-building support being provided must meet in order to ensure that such support delivers on developing the implementation capacity of the recipient country; and</p> <p>(vii) other relevant data.</p>
Assessment process, consultation, dialog; DdMs and DgMs.		Commence the preparation of their respective capacity-building plans no later than [X] months from the start of receipt of support for such preparation from developed Members and other donors.
	Members shall, on request, be provided with the opportunity to engage in consultations with the notifying Member. Members shall engage in a multilateral dialogue on the notifications [...] months before the entry into force of the Agreement at the latest.	Members shall, on request, be provided with the opportunity to engage in consultations with the notifying Member.
	Notifications shall be made one month before the multilateral dialogue takes place.	<i>Notify the CB plans</i> no later than [X] months from the date of their finalization.

	Members may modify their Notification until the entry into force of the TFA.	Members may modify their Notification at any time prior to the entry into force of the TFA.
	Members shall finalize their Notification before the entry into force of the trade facilitation agreement.	Members shall finalize their Notification before the entry into force of the TFA.
Status of Notifications as of entry into force of the agreement.	The Notifications are hereby made an integral part of this Agreement.	The Notifications are hereby made integral parts of this Agreement.
Date of entry-into-force of the TFA.	Date of entry-into-force of the Single Undertaking of the Doha Work Programme.	Date of entry-into-force of the Single Undertaking of the Doha Work Programme.
Provisions that become obligations on date of entry-into-force of the TFA.	For DdMs, all provisions; For DgMs, all provisions except those Notified.	For DdMs, all provisions; For DgMs, Class B (not mandatory) – None; Class A (mandatory) – all provisions except those notified for extended implementation (some or all of which may be covered by notified CB plans).
Verification of capacity acquisition.		
Who is involved.	The implementing DgM and, if so agreed, donor Members and the implementing agency.	The implementing DgM and, if so agreed, donor Members and the implementing agency shall assess.
Who decides if capacity is acquired.	The implementing DgM.	The implementing DgM.
If the DgM concludes that capacity has not been acquired.	DgM and donor Members report, make recommendations to the TF Committee. TF Committee reviews, decides on a case-by-case basis.	DgM notifies the TFTA CBSU. TFTA CBSU assists concerning necessary steps to acquire capacity.
		If the DgM still concludes negatively on capacity acquisition: DgM reports, makes recommendations to the TF Committee. TF Committee reviews, decides on a case-by-case basis.

Administrative entities

W137 (Paragraph 27)	W142 (Paragraph 1 bis)
Creation of an administrative entity.	
Joint platform for cooperation and coordination. Members, as part of the work of the WTO Committee on Trade Facilitation shall operate, without the creation of a new body outside the WTO, a joint platform on technical assistance and capacity-building to facilitate the implementation of this Agreement.	Trade Facilitation Technical Assistance and Capacity-Building Support Unit (TFTA CBSU). Within three months from the date of the signing of the Trade Facilitation Agreement, the WTO Secretariat shall establish the TFTA CBSU within its structure and reporting to the WTO Committee on Trade Facilitation.
Administrative entity's functions.	
Promote international transparency, cooperation and coordination of technical assistance.	Monitor and annually report on the compliance by developed Members with their obligations to provide ... assistance ... under this Agreement; Monitor and annually report on the extent, efficacy, and usefulness for the beneficiaries of the bilateral provision of ... assistance ... among Members;
Ensure, where necessary, coordination of assistance between donors and recipients so that potential gaps are filled.	Monitor and inform Members of the various ... assistance ... facilities being provided by other relevant international organizations; Work with other relevant international organizations to establish and/or expand TF-related ... resources for [developing Members]; Serve as the focal point for coordinating the provision of ... assistance ... by establishing a Trade Facilitation Register for the entry of notifications and requests for ... assistance ... provided by Members. The Register of notifications and ... requests shall be published on the WTO Members' Internet portal.
A role may be provided for the private sector in such transparency and coordination efforts.	
What happens if a DgM is unable to agree with donors on an implementation/assistance plan for a particular provision?	

Process		
W137	W142 Mandatory provisions. A DgM can however notify an extended implementation period and a CB plan.	W142 Not mandatory provisions. A DgM can however notify a CB plan that includes the capacity-building implementation periods.
A Member that has not managed to finalize the capacity-building plan.	A developing-country Member that has not managed to finalize the capacity-building plan.	A developing-country Member that has not managed to finalize the capacity-building plan.
<ul style="list-style-type: none"> Inform the Joint Platform for Cooperation and Coordination, which shall take the necessary steps to facilitate interaction with donors. 	<ul style="list-style-type: none"> shall so inform the TFTACBSU which shall take the necessary steps to facilitate interaction with DdMs and other donors. 	Same.
<ul style="list-style-type: none"> On request and within mutually agreed terms and conditions, relevant international organizations should assist DgMs in formulating capacity-building plans. 	<ul style="list-style-type: none"> On request, developed Members and other donors, including relevant international organisations ... shall assist developing country Members in formulating capacity-building plans. 	Same.
Process is provided, but what is the bottom line? If the DgM and donors cannot agree an implementation – assistance plan, does the provision become an obligation? If so, when?		
W137	W142 Mandatory provisions	W142 Not mandatory provisions
<p>The DgM has two choices:</p> <ul style="list-style-type: none"> Not notify a plan, The provision becomes an obligation as of the entry into force of the TFA. Notify an implementation plan but never notify the acquisition of capacity; <p>Re line 16 above, the provision would become an obligation 6 months after expiration of the notified transition period (W137, § 22). The transition period that may be notified is capped at [N] years (W137, § 3). N years + 6 months maximum delay before the provision becomes an obligation.</p>	<p>The DgM has the same alternatives as are available under W137.</p>	<p>Alternatives available for the DgM:</p> <ul style="list-style-type: none"> Not notify a CB plan; The provision never becomes an obligation. Notify a CB plan (re W142 Paragraph 7) but never notify the acquisition of capacity; The provision would become an obligation 6 months after expiration of the notified transition period (W142, § 18). There is no length maximum specified for the transition period that may be notified.

Regarding the pressure each proposal’s mechanics would apply to DgM to accept the assistance that donors offered versus to donors to provide the assistance the DgM requested:

W137 pushes the DgM towards accepting less. Not to accept the assistance package donors offered would not prevent the provision from becoming an obligation.

W142 Class A, The mechanism for these (mandatory) provisions has the same impact as W137.

W142 Class B, (not mandatory) provisions: Here the pressure is more on donors to offer an attractive implementation package. If the DgM does notify a CB plan, it never incurs the obligation to implement the provision.

We must avoid framing such issues since for the DgM implementation is unequivocally a net burden, to be undertaken only if sufficient assistance is offered to cover the excess of cost over benefit.

Obligations of Developed Members relating to assistance

W137	W142
On request, donors, including relevant international organizations ... shall assist Members in this exercise [self-assessment] on mutually agreed terms and conditions (Paragraph 2).	On request, developed Members, and other donors (including relevant international ...), shall assist Members in this exercise [self-assessment] (Paragraph 2).
On request, donors, including relevant international organizations, shall assist Members in this exercise [preparing CB plans] on mutually agreed terms and conditions (Paragraph 4).	On request, developed Members and ... shall assist Members in this exercise of preparing capacity-building plans (Paragraph 6).
The capacity-building plans ... notified ... shall contain: (a) the obligations for which ... ; (b) intermediary steps as necessary; (c) the implementation periods; (d) the donors; and ... (Paragraph 12).	The capacity-building plans ... notified shall contain.: (i) the obligations for ... (ii) intermediary steps as necessary; (...) (iv) the potential or identified donors, if any; (v) the implementation agency if appropriate (Paragraph 7).

W142 also includes the following:

- Developed Members ... shall assist Members in this exercise of preparing and implementing capacity-building plans Paragraph 11(iv);
- Developed Members ... shall assist [DgMs] ... in implementing their capacity-building plans Paragraph 12.
- Developed Members ... shall:
- establish appropriate mechanisms or modalities for the provision of [assistance] ... to [DgMs] that lack the necessary ... capacity to adopt and implement such mechanisms or modalities;
- provide for simple and time-bound procedures to be followed for such assistance ... to be accessed;
- identify the financial and technical assistance resources that they are going to make available ...; and
- notify the WTO Secretariat’s TFTA CBSU of [these] mechanisms or modalities and of the resources to be made available ... Paragraph 20.
- Developed Members shall provide the requested [assistance] no later than [X] months from the date of receipt of the request from a [DgM] for such assistance ... Paragraph 21;
- Paragraph 26 provides a twelve sub-paragraph list of “principles and elements” for providing assistance e g, demand-driven, reflecting the beneficiary Member’s over-all development programme;
- The TFTA CBSU (within the WTO Secretariat and reporting to the WTO Committee on Trade Facilitation) shall:
 - » monitor and annually report on the compliance by developed Members with their obligations to provide ... assistance ...;
 - » monitor and annually report on the extent, efficacy, and usefulness for the beneficiaries of the bilateral provision of ... assistance ... (Paragraph 1bis).

Dispute settlement

<p>W137</p> <p>No section on dispute settlement.</p>	<p>W142</p> <p>No [DgM] shall be brought by any other Member to dispute settlement proceedings under the Dispute Settlement Understanding in order to enforce compliance with obligations that such [DgM] is not yet obliged to implement (Paragraph 30).</p>
	<p>Members shall prioritize the use of consultations, good offices, conciliation or mediation as mechanisms for ensuring compliance with the obligations, including the obligations relating to the provision of technical assistance and capacity-building support under paragraphs 20 and 21, which they are implementing.</p> <p>As the last resort, the Dispute Settlement Understanding may be resorted to in order to settle disputes in this regard (Paragraph 31).</p>

9.6. Annex 6: Dispute settlement experience; SPS and TBT Agreements

ANOTHER OF THE points of controversy is whether or not the WTO dispute settlement process should or could be applied to a WTO trade facilitation agreement. There have been eight WTO dispute settlement process cases based on the TBT or the SPS agreement. They involved the following Members.

TBT AGREEMENT	Complainant	Respondent
EC – Asbestos	Canada	European Communities
EC - Sardines	Peru	European Communities
SPS AGREEMENT		
Japan – agricultural products II	United States	Japan
Japan – apples	United States	Japan
Japan apples – Art 21.5	United States	Japan
EC – hormones	United States, Canada	European Communities
Australia – salmon	Canada	Australia
Australia – salmon Art 21.5	Canada	Australia

9.6.1. Summaries of cases²¹

EC ASBESTOS

THE CASE INVOLVED a complaint by Canada against the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods. While the complaint was based in part on provisions of the SPS agreement, the key points in the Appellate Body’s upholding the ban were that it was allowed under GATT Article XX(b) as “necessary to protect human ... life or health” and that it did not violate GATT Article III’s requirements for national treatment. Canada did not appeal the finding.

EC SARDINES²²

THIS IS THE only case of the eight in which a developing Member was involved.

In Europe Peru had developed a market for “Pacific sardines;” but the relevant EU regulation (previously not enforced against Peru) barred marketing fish as “sardines” unless they were a species common to the Atlantic Ocean and the Mediterranean Sea. Otherwise they must be labelled “pilchards” or “sprats.”

A key element in the case was the relevant international code, the Codex Alimentarius. The

Codex lists the Peruvian species among the species it defines as sardines, but prescribes that only the European species can be labelled simply “sardines.” Others should be labelled with the country, region, species or common name prefixed.

The Appellate body found in favour of certain elements in Peru’s complaint; in time the EC and Peru reached a mutually agreed solution that involved a revised EC regulation. The new EU sardines regulation allows the use of the name “sardines” but required that it be preceded by the scientific name of the species.²³

The new regulation meets the Codex standard and while the outcome allowed by the Codex is not the one that would have been most favourable to Peruvian interests, it is better for these interests than the rule that it supersedes.

JAPAN APPLES AND JAPAN APPLES – ARTICLE 21.5.

THESE CASES INVOLVED Japanese restrictions on imports of apples on the basis of concerns about the risk of transmission of fire blight bacterium. (The second case, Japan – apples Article 21.5, was a follow-up complaint against the changes Japan made to its regulations in response to the first case.) Both complaints questioned Japan’s application of risk assessment techniques and the sufficiency of evidence on which Japan based its restrictions. In each, the WTO Panel and Appellate Body drew on extensive assistance from scientific personnel, experts on modern scientific standards and on assessment techniques applied in state-of-the-art application. In question were technical matters such as the frequency of inspection of growing facilities, the necessary buffer zone between “clean” areas and areas in which the pest had been detected, the necessity to disinfect crates before use.

JAPAN AGRICULTURE PRODUCTS II.

THE CASE INVOLVED a complaint by the United States about Japan’s requirement (Japan’s Plant Protection Law) for testing, under which the import of certain plants was prohibited because of the possibility of their becoming hosts of the codling moth. This case too turned on a matter of risk assessment and sufficiency of evidence; in particular, the need for quarantine treatment of one variety of a product, even if the treatment applied to it has proved to be effective for other varieties of the same product.

The Appellate Body upheld the Panel’s basic finding that Japan’s varietal testing of apples, cherries, nectarines and walnuts was inconsistent with the requirements of the SPS Agreement. The US and Japan consequently entered into consultations regarding a new quarantine methodology, which brought them eventually to a mutually agreed solution.

EC HORMONES

THIS CASE STEMMED from complaints from the United States and Canada about an EC prohibition on the marketing and the importation of meat and meat products treated with certain hormones. Again scientific issues were prominent, the application of risk assessment and the sufficiency of evidence. Though the initial complaint was brought forward in January 1996, the parties have not been able to reach an agreement on appropriate scientific standards or on whether available scientific evidence demonstrates that the hormones in question are or are not harmful in human consumption. This dispute has moved through the entire scope of the WTO dispute settlement process, including the determination of appropriate compensation as a result of the EU not bringing its regulations into compliance. Subsequent to this determination the EU challenged the continuing application of retaliatory measures by the US on grounds that the EU had removed the measures found to be WTO-inconsistent. At the request of the EU, a Panel was appointed to review this matter; it began its substantive work in September 2005. Due among other things to the complexity of the scientific issues involved, that panel has not been able to complete its work. The WTO webpage reports (November 7th 2007) that the Panel expected to issue its final report to the parties in the course of

October 2007. (WTO webpage, at <www.wto.org/english/tratop_e/dispu_e/cases_e/ds320_e.htm>, accessed November 7th 2007.)

AUSTRALIA SALMON AND AUSTRALIA SALMON – ARTICLE 21.5.²⁴

As in several of the cases above, the WTO Appellate Body found (in October 1998) that Australia had restricted imports without a sufficient risk assessment and without sufficient scientific evidence. The case involved protecting the Australian salmon fishery from introduction of diseases and pests that existed in other fisheries. Australia published its “1999 Import Risk Analysis”, which included additional analyses that considered the health risks associated with importation, and also modified its legislation on the quarantine of imports.

Canada requested a determination by the original panel of whether Australia’s new measures were WTO-consistent; the Panel and Appellate Body found, and the DSB (WTO Dispute Settlement Body) adopted that certain of Australia’s regulations were again not based on appropriate risk assessment or sufficient scientific evidence. Canada eventually requested arbitration, to determine the reasonable period of time for implementation of the recommendations of the DSB.

The Arbitrator decided that 8 months was appropriate, Canada requested authorization to retaliate, Australia requested arbitration on the level of nullification suffered by Canada (i.e., the amount of retaliation justified).

In May 2000 Australia and Canada announced a mutually agreed solution.

9.6.2. *Conclusions from these cases*

1. Seven of eight cases produced outcomes acceptable to all parties. EC hormones is the only exception.
2. A developing Member was involved in only one of the eight cases – Peru-EC sardines. In this case reference to the relevant international technical agreement supported the case of the developing Member.
3. No case involved an attempt to press a developing Member to install or to improve a standards system.
4. All cases involved WTO Panels and the AB going deeply into scientific matters:
 - drawing on scientific expertise in reaching their decisions;
 - appropriate risk assessment and the sufficiency of evidence were frequently involved;
 - consultations involving technical staffs from both sides were often involved in reaching a final agreement.
5. All the cases have involved existing systems in developed Members; thus they provide minimal guidance on how the dispute settlement process would guide construction of a system. The perspective I take in this paper reflects twenty plus years working at the World Bank. My instinct is to think of developing countries as the ‘client’ whose interests I would like to see advanced. I generally share the ‘pro-trade’ conclusions associated with the Bank, but was one of the first to call attention to the ‘implementation problem’ of the Uruguay Round agreements (e.g., Finger, 2001). While we were at UNCTAD in the 1970s Alexander Yeats and I were among the first to point out that transport costs were as significant a trade barrier as tariffs (Finger & Yeats, 1976).

10. FOOTNOTES

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2. Source: WCO website, 07 November 2007.
3. In the summary below (Table 3) I have condensed the overall ranking into three groups: (A) the five categories that the 12 experts agreed were the top five; (B) the four categories that by average score ranked 6th, 7th, 8th and 9th; (C) the three categories that by average score ranked 10th, 11th and 12th.
4. Soloaga, Wilson & Mejía (2006) and Wilson, Mann & Otsuki (2005) are examples.
5. TN/TF/W/43/Rev 10.
6. Of course, implementation was also an obligation for developed Members. However in the agreements in question such as the SPS and TBT agreements, the required standards were to a large extent already in place among developed Members, hence no implementation cost was implied for them. Many of the measures under consideration in the trade facilitation negotiations are likewise already in place among developed Members.
7. WT/L/579, 2 August 2004.
8. TN/TF/W/95.
9. Chile, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay and Uruguay; TN/TF/W/81, 3 April 2006.
10. Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, the Philippines, Rwanda, Tanzania, Trinidad & Tobago, Uganda, Venezuela, Zambia and Zimbabwe; TN/TF/W/142, 31 July 2006.
11. A later document (TN/TF/W/147, 18 July 2007) provided additional explanation for the Core Group proposal, but offered no additional textual detail. Its sponsors were the Core Group of Developing Countries, the African, Caribbean and Pacific Group of States, the African Group, and the Least-Developed Countries Group.
12. Annex 5 includes a tabulated, side-by-side comparison of W142 and W137.
13. As to the time that might apply, the Uruguay Round negotiations were completed on December 15th, 1993, the Agreements entered into force on January 1st, 1995.
14. A “Trade Facilitation Technical Assistance and Capacity Building Support Unit” would be created within the WTO Secretariat to administer the WTO’s role in trade facilitation.
15. Sebastian Mallaby, in his excellent book, *The World’s Banker*, deals at length with how pressures from its shareholders mould the World Bank – both its identification of targets and its approach.

16. Rhetorically, the popularity of needs assessment is part of the expression of a commitment to move away from “supply-driven” assistance, to “demand-driven.” In economics, of course, the result is the intersection of the two.
17. A second window, supported by a trust fund, is funding reforms. The results of the second window demonstrate that the first window is not needed. Finger (2006) elaborates.
18. World Bank International Trade Department (2006).
19. Rubens Ricupero, when he made his suggestion for “implementation audits,” did not do so on the presumption that they could be done – could support a legal contract between implementation and assistance. It was part of his argument that such matters not come into the WTO – matters where implementation required real resources and where what was needed to implement depended critically on individual country circumstances.
20. To carry such an approach to the extreme, we might envisage domestic importers and foreign exporters offering sums of money to a government to eliminate its import barriers.
21. These summaries draw from information on the WTO website, (particularly the WTO Analytical Index and WTO Dispute Settlement: One-page case summaries) and on sources cited for particular cases.
22. This description draws on Davis (2006) as well as WTO webpage information.
23. This paralleled the outcome of a previous complaint from Canada involving the marketing of scallops. The new regulation allows the marketing of scallops in the EU under the name “noix de coquille Saint Jacques,” (the familiar name for scallops in France) as long as the label also provides the species and country of origin.
24. Atik (2003) provides an analysis of the case on which these paragraphs draw.