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**THE LONG AND WINDING ROAD: HOW WTO MEMBERS
FINALLY REACHED A TRADE FACILITATION AGREEMENT**

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THE LONG AND WINDING ROAD: HOW WTO MEMBERS FINALLY REACHED A TRADE FACILITATION AGREEMENT

Nora Neufeld¹

Abstract

The paper chronicles the negotiating history of the recently concluded Trade Facilitation Accord. Analysing the various stages of the decade-long effort to get the Agreement off the ground, it examines what was at stake in the negotiations, how they evolved and why they finally succeeded - despite many obstacles and detours along the way.

The study also suggests ways in which the exercise has broken new ground – for Trade Facilitation rule-making at the global level, for how WTO Members negotiate agreements, and for the world trading system as a whole.

Keywords: WTO Agreement on Trade Facilitation, trade facilitation negotiations, negotiating history, multilateral trading system;

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Setting the stage

When Ministers concluded the Trade Facilitation (TF) negotiations in December 2013, they came to the end of a journey that had lasted almost a decade. In many ways, the effort can be traced back even longer. Several of the WTO – and before it, GATT – committees addressed various aspects of cutting red tape. In fact, the WTO is basically all about facilitating trade.

Concluding the Trade Facilitation Agreement – the first multilateral trade agreement successfully negotiated in 18 years and the first such accord concluded by the WTO – marked a decisive turning point in several ways. Beyond achieving the agreement itself, no small matter for an organization which has often struggled to advance its long-running Doha Round of global trade talks, the Trade Facilitation Agreement broke new ground in the decentralized, bottom-up way the negotiations were structured, in the manner the capacities and resources of developing countries were explicitly addressed, and in how the Agreement has shifted the system's focus beyond the "software" of trade – policy barriers – towards the "hardware" – process frictions. Many of these innovations were not envisaged at the beginning of the negotiations and some defied the conventional wisdom on how deals in the WTO are meant to be done. The results, in some respects, took negotiators to places they had not expected to go. As a result, what countries ended up crafting is likely to have an impact, not just on Trade Facilitation, but on the WTO and the multilateral trading system as a whole.

This study will look at how it all started, where it went from there, and, most importantly, why it succeeded. It will chronicle the long journey of the Trade Facilitation Agreement from conception to realization and analyse significant milestones along the way.

How it all began...

Targeted efforts to launch Trade Facilitation discussions began in the mid-1990s. The 1996 Singapore Ministerial Conference gave the WTO an initial and modest mandate under a separate conceptual heading. Paragraph § 21 of the Ministerial Declaration directed the Council for Trade in Goods to "*undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area.*"² This language reflected a compromise between those who already wanted to negotiate a new multilateral trade agreement and those, particularly from the developing world, who were more sceptical about prospects for negotiations and preferred a much more limited work programme. Less than two years after the end of the Uruguay Round and still occupied with implementing its results, many developing and least-developed Members felt not ready for yet another global trade accord. Concerns about not having the capacity to take on any additional commitments were widespread.

The Singapore mandate made explicit reference to these worries in two specific ways. The first related to the organization of work, requiring that "*careful attention (...) be given to minimizing the burdens on delegations, especially those with more limited resources...*"³ The second took the form of support programme. Paragraph 22 of the Singapore Ministerial Declaration tasked the WTO Secretariat to offer a "*technical cooperation programme (...) to developing and, in particular, least-developed country Members to facilitate their participation in this (TF) work.*"⁴

Supporters of a Trade Facilitation Agreement – all developed countries plus a few developing partners (such as Chile, Colombia, Costa Rica, Republic of Korea, Paraguay and Singapore) - could not yet convince the rest of the membership to embark on a multilateral negotiating exercise. There was no opposition to work on Trade Facilitation as such. Against the background of dramatically lower tariff barriers, governments agreed on the importance of addressing remaining obstacles on the non-tariff side. But most developing countries favoured a gradual approach that focussed on non-binding rules. They preferred to develop recommendations as opposed to mandatory disciplines. There was not even support for creating a separate Trade Facilitation Working Group. Of the four so-called "Singapore issues" - the other three concerned trade and competition, trade and investment and transparency in government procurement - Trade

² Singapore Ministerial Declaration, WT/MIN(96)/DEC, paragraph 21.

³ Singapore Ministerial Declaration, WT/MIN(96)/DEC, paragraph 22.

⁴ Ibidem.

Facilitation was the only one not given a dedicated committee. The subject was simply added to the agenda of the Council for Trade in Goods.

Two steps forward, one step back

TF work began directly after the Singapore summit. The initial discussions focussed on properly defining its scope. Mindful of the contributions by other organizations, Members tried to determine a niche for WTO engagement in an already populated Trade Facilitation world. In the absence of a mandate for negotiating binding rules – where the WTO's dispute settlement function would have added clear value to the work by other intergovernmental players such as the World Customs Organization, the World Bank or the UN – Members felt the need to identify a clearer role for the WTO. The first suggestions were fairly broad with delegations careful not to exclude any potential aspects of TF work. With conceptual boundaries allowing for a broad range of action, early proposals cast their web wide, including aspects such as payments, insurance and other financial requirements affecting the cross-border movement of goods.⁵ Parallel efforts by a group of countries to make the case for binding WTO rules triggered concerns among others about being subject to dispute settlement. This led to requests for a narrowing of the work programme. As a result, Members gradually limited the envisaged scope, calling for a focus on selected aspects of the GATT instead. Two areas emerged as being of particular interest in this regard: Articles VIII and X of the GATT (addressing fees and formalities connected with importation and exportation and publication and administration of trade relations, respectively.)

Attempts to upgrade the Singapore terms to a full negotiating mandate intensified in the run-up to the 1999 Seattle Ministerial. These ambitions were especially advanced by a newly formed alliance of Trade Facilitation proponents, referring to themselves as the "Colorado Group."⁶ It included all developed countries as well as a number of developing partners.⁷ There was not, however, universal support for this campaign. On the contrary, a sizeable group of the members preferred to continue the exploratory and analytical work mandated in Singapore. All draft Ministerial texts therefore proposed two very different options: a mandate for negotiations and an alternative calling for a mere continuation of study work.⁸ As far as scope was concerned, the Seattle preparatory phase also saw the mandate expand from a focus on GATT Articles VIII and X to include transit aspects (Article V) as well.⁹ This was largely the result of successful lobbying by landlocked developing community.¹⁰

The idea was to build upon these three existing GATT disciplines with a view to alleviating administrative and procedural burdens for traders, particularly small and medium-size ones. This was meant to happen by expediting the release of goods, reducing border-crossing requirements and increasing transparency.

Colorado Group Members made the case for binding Trade Facilitation rules. Other delegations questioned the need for additional disciplines, arguing that customs reforms and improvements of trade administration were not contingent upon undertaking new WTO commitments, and advocating the continuation of exploratory and analytical work instead. They also called for increased technical cooperation efforts to assist developing and least-developed countries (LDCs) with their domestic TF reforms.¹¹

Following the dramatic breakdown of the Seattle Conference, proponents of Trade Facilitation negotiations decided to take a different approach. Efforts were focussed on identifying the benefits of TF reforms, and on stressing the availability of ample implementation support.

Trial and error

⁵ For further information see WTO documents G/C/W/132, G/C/W/133 and G/C/W/153.

⁶ The name stems from the fact that the inaugural meeting of the Group took place in a room of the USTR's Geneva office which featured an image of Colorado.

⁷ Such as Chile, Colombia, Costa Rica, Republic of Korea, Paraguay and Singapore. Morocco joined later, but stopped being involved at a subsequent stage. In 2012, Mexico joined.

⁸ See, for instance, paragraphs 40 and 50 of JOB(99)5868.

⁹ This was first done in the draft Ministerial text proposed on 17 November 1999 by the General Council Chair at that time, Ambassador Ali Said Mchumo. (Paragraph 45).

¹⁰ Paraguay was most active in this regard.

¹¹ For a summary of the related discussions in the Council for Trade in Goods, see WTO document C/G/W/153.

It was not until preparations began for the 2001 Doha Ministerial that efforts to make the case for a negotiating exercise once again started to pick up steam. Colorado Group Members intensified their outreach and advocacy work. Opponents, however, were not inactive either. They strengthened their coordinated efforts to block – or at least delay – negotiations. A developing country alliance called the “Core Group¹²” was particularly active in this regard. While initially not limited to trade facilitation, this grouping took the lead in voicing widespread concerns in the developing world about the launch of a new rule-making exercise.

The final result of the Doha Ministerial Conference brought facilitation closer to the negotiating stage, without actually launching the process. In studiously ambiguous terms, Members “recogniz(ed) the case for further expediting the movement, release and clearance of goods, including goods in transit¹³” and agreed “that negotiations will take place after the Fifth Session of the Ministerial Conference”. But this agreement was qualified by stating that this would only happen “on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.¹⁴” This fuzzy language barely painted over the fact that countries’ positions still diverged. Opposition to the launch of Trade Facilitation negotiations had not disappeared, and this resistance would be clearly felt in the years that followed.

Those who had hoped for swift agreement on negotiating modalities soon realized that the process was turning into a more strenuous – and time consuming – exercise. Members continued to differ on key points, including the fundamental question of whether negotiations should be launched at all. Less than a month before the WTO’s Cancún Ministerial meeting was set to begin in September of 2003, a draft Ministerial text explicitly recognized this reality. Jointly circulated by the Director General¹⁵ and the General Council Chair,¹⁶ the documents proposed two diametrically opposed options. The first¹⁷ called for the launch of negotiations and set out related modalities.¹⁸ The second acknowledged that “*The situation does not provide a basis for the commencement of negotiations in this area*” and mandated “*further clarification of the issues (to) be undertaken in the Council for Trade in Goods.*”¹⁹

When the Cancún Ministerial finally opened a month later, consensus on the start of TF negotiations remained elusive. The Conference Chair’s Draft Ministerial text set out negotiating modalities – essentially restating the terms of the earlier Geneva draft – but the Ministerial collapsed the following day, in no small part because Members’ could not agree on what to do with the Singapore issues. Linking all four issues together in a single package clearly handicapped the advancement of the TF file, which was widely seen as one of the less – if not the least – controversial parts of the dossier. But several Members had been insisting on joint treatment ever since the Doha Ministerial Conference,²⁰ viewing potential hostage taking as a calculable variable – or even an intended bargaining chip. The fact that the overall Doha Round was launched as a Single Undertaking – that is, “nothing-is-agreed-until-everything-is-agreed” – did not make it easier, as countries were reluctant to see progress on individual issues, like trade facilitation, without parallel advances on their particular national priorities. But simply blaming the Singapore

¹² While there were some changes in membership, the Group’s regular Members included Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, the Philippines, Rwanda, Tanzania, Trinidad & Tobago, Uganda, Venezuela, Zambia and Zimbabwe.

¹³ They equally recognized the need for enhanced technical assistance and support for capacity building in this area. See paragraph 27 of the Doha Ministerial Declaration.

¹⁴ Ibidem.

¹⁵ Supachai Panitchpakdi at that time.

¹⁶ The position was held by Carlos Pérez del Castillo back then.

¹⁷ Contained in § 16 of JOB(03)/150/Rev.1.

¹⁸ “... we decide the commence negotiations on the basis of the modalities set out in Annex G to this document.”

¹⁹ Ibidem. An earlier draft (JOB(03)/150)) had equally set out two opposite choices, albeit in more sketchy terms: “*Taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate we gave at Doha, and the work on the issue of modalities carried out at the level of the General Council, we [adopt by explicit consensus the decision on modalities of negotiations set out in document ...][decide that ...].*” (§ 16)

²⁰ This can be clearly seen in the Doha Ministerial Declaration where the language for all four areas had been aligned. In some ways, such as the use of the term ‘modalities’, the terminology was not only borrowed from other files but also did not make much sense in the TF context. Nobody had ever used the word in the Trade Facilitation discussions before.

package or even the broader Round for the inability get TF negotiations launched falls short of explaining the whole problem and overlooks important additional causes of the failure. There clearly were unresolved issues within the TF dossier as well. Several delegations continued to harbour deep reservations about launching a new negotiating exercise. Some were worried that they lacked the capacity and resources to implement the results; others feared additional exposure to dispute settlement. A few Members also remained unconvinced about the “win-win” character of the exercise, fearing that their country would not be able to reap the benefits (or only in disproportionate amounts).

Rising from the ashes

The breakdown of the Cancún Conference seemed to bury all hopes of a swift launch of Facilitation negotiations. The absence of any Ministerial language cast a particularly ominous cloud over the future of the TF file since there was now no clear working mandate to move the process forward. With the Doha terms interpreted as applying only until the subsequent Ministerial, Trade Facilitation now not only no longer had specific terms of reference but also no chair and not even a dedicated forum within which these issues might be clarified or resolved. Prospects for negotiating a new WTO Agreement seemed more remote than ever.

It soon appeared, however, that Members did not want to abandon the project altogether. Discussions continued, albeit on a somewhat lower level. Rather than seeking a Ministerial accord, work took place at a technical level under the auspices of the General Council. WTO Deputy Director-General Rufus Yerxa was tasked by its chair to oversee related work. Under his skilful lead, debates on a negotiating mandate resumed and soon intensified. By the beginning of the following year, momentum was building to make another attempt at launching TF negotiations. Points of contention remained and triggered heated arguments. Not all Members were convinced of the need for binding rules, as before, and several did not want dispute settlement procedures to apply. Disagreements also continued regarding the amount of assistance required for developing and least-developed countries to assume TF obligations. In addition to these subject-specific controversies, there were broader challenges. Trade Facilitation continued to be treated as part of a bigger and delicately balanced Doha package, linked to other issues that Members wanted to see addressed as part of the Round.

To avoid the mistakes of the failed Cancún summit, the decision was made to opt for a different strategy. Rather than trying to agree on another Ministerial Declaration, Members sought to find consensus at the lower General Council level.²¹ In mid-July 2004, the WTO Director General, together with the General Council Chair, issued a draft for a Doha Work Programme. This also included proposed modalities for negotiations on Trade Facilitation. The text built upon input from the consultations conducted under DDG Yerxa's lead, but did not represent approved language. As its authors explicitly acknowledged, *“it does not pretend to represent agreement...”*²² The text nevertheless served as an important stepping stone on the way to a consensus mandate. Much of its final terms can already be found in this text, including ground-breaking language on special and differential treatment (such as the requirement that *“the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least-developed Members.”*²³).

The text triggered a counter-proposal from Core Group Members.²⁴ The Group, which had remained an active participant in the TF discussions under the leadership of the Philippines, worked to shift the focus from an ambitious negotiating mandate to one that emphasised flexibilities and implementation support for developing and least-developed countries, which were

²¹ In the words of the Director-General and the General Council Chair, *“... our task is not to prepare a Ministerial Declaration as we were doing for Cancun. Instead, we are aiming to take the action necessary at this stage, at the level of the General Council, in order to ensure the continued progress of the negotiations and the work programme as a whole.”* JOB(04)/96, page 1.

²² Ibidem.

²³ JOB(04)/96, Annex D. This went far beyond the earlier, (pre-)Cancún drafts which had merely noted that *“In the case of developing and least-developed countries, it is agreed that their implementation capacities shall be an important factor to take into account in the negotiations. The negotiations shall also take fully into account the principles of special and differential treatment for developing and least-developed countries.”* (JOB(03)150, Annex G, § 2.)

²⁴ The proposal was also supported by some non-Core Group Members. The complete list of sponsors included India, Indonesia, Jamaica, Malaysia, Nigeria (on behalf of the African Group, the Philippines, Tanzania (on behalf of LDC Group) and Trinidad and Tobago.

also meant to benefit from far-reaching exemptions. The language on special and differential treatment was expanded significantly. Least-developed countries were given a wide-ranging carve out from commitments, holding that they would *"only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."*²⁵

The proposal called for *"financial and technical assistance and capacity building, including support for infrastructure development"* as *"an a priori condition for developing and least developed countries to implement the results of the negotiations."*²⁶ This aid was meant to come from developed countries in particular, which were *"commit(ted) to ensuring adequate financial and technical assistance and support for capacity building, including for infrastructure development, before and during the negotiations, and in the implementation of any results of the negotiations."*²⁷

The proposal also questioned the applicability of the WTO's dispute settlement mechanism.²⁸ It further linked the prospective Agreement's entry into force to the completion of work on other, non TF-related, areas by requesting that the results of the Facilitation negotiations *"not (to) come into effect earlier than the date of the harmonized non-preferential rules of origin under the Agreement on Rules of Origin."*²⁹

At the same time - and significantly - the Core Group's text did not question the objective of starting negotiations as such. It even sought to expand the scope of possible negotiations in one area. At the initiative of India, the draft requested that *"... the negotiations shall provide for effective co-operation between customs administrations of Members in cases involving reasonable suspicion of violations of law governing imports and exports."*³⁰ In slightly modified form, this would become the customs cooperation segment of the future Trade Facilitation Agreement.

Discussions now focussed on finding a compromise between the Core Group language and alternative proposals from Colorado Group Members. By the end of July 2004, common ground finally seemed to be within sight. Following a few more rounds of intense late night and weekend debates, Members were able to agree on a negotiating mandate which they adopted in the General Council as part of a so-called "July package".

Building on old ideas – and breaking new ground

Looking at the terms of the agreed mandate, one finds both established components and new ideas. In some areas, traditional concepts were re-invented and approached in novel ways.

Scope and objectives built on known language. They were defined as *"clarify(ing) and improve(ing) 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."*³¹ Negotiations were also to *"aim at provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues"*³² incorporating an element of the Core Group text. Reflecting the importance attached to supporting developing and least-developed countries, *"enhancing technical assistance and support for capacity building in this area"* was given equal weight as an objective of the TF talks.

The relevance of this component is mirrored in the sheer volume of related language. By far the largest parts (paragraphs 5-9) are exclusively dedicated to technical assistance and capacity building support. And here, one begins to find the outlines of new ways of approaching old issues. While the Core Group's call for assistance to be an *a priori* condition for implementing the Agreement's results was not taken on board, the July package language did introduce an element of conditionality by linking the provision of assistance and the obligation to implement, albeit under defined terms. The scope of the required assistance was constrained by eliminating all references to "financial" (something some Members later tried to re-introduce) and by linking –

²⁵ Paragraph 6. The language was borrowed from the Marrakesh Agreement (Article XI:2).

²⁶ Paragraph 5.

²⁷ Ibidem.

²⁸ Paragraph 10.

²⁹ Paragraph 12.

³⁰ Paragraph 9.

³¹ WT/L/579, Annex D, paragraph 1.

³² Ibidem.

and thereby limiting - the obligation to provide assistance to the commitments' "nature and scope". The mandate recognizes that negotiations "*could lead to certain commitments whose implementation would require support for infrastructure*"³³, which responded to a key demand of many developing countries. At the same time, the language highlights the exceptional character of such aid by noting that it would only apply to "*limited cases*". And even when such a situation might arise, the obligation is only to "*make every effort to ensure support and assistance*" – which further has to be "*directly related to the nature and scope of the commitments in order to allow for implementation.*" Reference is further made to it being "*understood that the commitments by developed countries to provide such support are not open-ended*". In exchange, developing and least-developed countries are given the assurance that "*in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required.*"³⁴

Special and preferential (S&D) treatment for developing and least-developed countries is another crucial aspect of the mandate which dramatically breaks new ground.

S&D treatment in most WTO agreements focuses on transition periods. While grace periods are still foreseen in the TF mandate, they are but one part of a much more comprehensive flexibilities package, crucially complemented by the introduction of a conditional link between existence of implementation capacity and requirement to undertake a commitment. This novel concept was further expanded by determining that developing and least-developed countries would not be obliged to implement aspects of a TF agreement when required support for infrastructure was not forthcoming.

The assessment of existing implementation capacities was to take place on a country-by-country and measure-by-measure level, which introduced a whole new consultative and transparency dimension to the granting of S&D treatment. Just as importantly, this approach marked a major departure from the WTO's traditional practice of granting flexibilities based on whether a country belonged to either the developing or least-developed group. The new focus was on the individual situation of each and every country. In other words, a tailor-made, rather than a one-size-fits-all, approach.

There was also extensive carve-out language, reflecting a widespread wish among developing and least-developed countries to be shielded from commitments they felt unable to implement. Paragraph 2 makes clear that "*those Members would not be obliged to undertake investments in infrastructure projects beyond their means.*" The mandate also kept the Core Group text's provisions for LDCs, holding that they "*will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.*"³⁵ The significance of this protection language changed over time. Initially a key demand of many developing and least-developed countries, exemptions from obligations became less of an issue once these countries had a better sense of what TF commitments were actually going to be involved. The focus shifted from seeking exemption from an obligation to seeking the necessary support for its implementation.

Overall, the mandate represented a new way of negotiating a multilateral trade agreement. The novel S&D terms clearly broke new ground and created new confidence in the negotiation. However, they also raised countries' expectations – expectations that were not always easy to manage, as it soon turned out. Indeed, the reason why the negotiations eventually took so long to conclude can often be traced back to the expectations problem. Of the almost 10 years of negotiations, at least half were spent trying to finding a commonly acceptable way of making the S&D segment work.

Finally getting started...

Agreeing on these terms was a giant leap forward in the TF world. More than three years after the Doha Round had been launched, it made Trade Facilitation an additional – and, as it turns out, the last – issue to be added to the agenda.

³³ Paragraph 6.

³⁴ Ibidem.

³⁵ Paragraph 3.

What initially seemed like a handicap turned out to be a blessing in disguise. Having started the negotiations after considerable³⁶ delay – combined with knowledge that, because of the Single Undertaking, the TF negotiations could not fall behind the pace of the rest of the Doha Round – there was a clear sense that negotiators literally had no time to waste.

This had a noticeable impact on the first negotiating phase. The initial steps – establishing a Negotiating Group, appointing a Chair, adopting a work programme and schedule of meetings – were accomplished very quickly. Ambassador Muhamad Noor of Malaysia was given the first presidency³⁷ – a testimony to his constructive role in the run-up to the launch of the negotiations. This was particularly remarkable since his previous role as chairman of the Core Group could have been seen as a handicap. The opposite turned out to be the case. Members were appreciative of how he had steered the Group through the pre-negotiating phase and were keenly aware of his bridge-building skills. And they made an excellent choice. Much of what the Trade Facilitation Negotiating Group was able to achieve over the first two years was due to his thoughtful lead.

He stood for a transparent and Member-driven mode of operation whereby the Chair would act merely as a facilitator and where the main input would come bottom-up, from the delegations themselves. He was also a keen supporter of an inclusive approach. Conventional wisdom in the WTO at that time held that negotiations could only succeed if conducted in small group, such as the infamous Green Room meetings. Finding consensus among almost 160 Members were deemed a mission impossible. The TF talks proved the conventional wisdom wrong. The Noor approach to the TF talks became a fundamental principle not deviated from throughout its almost decade-long journey. Occasional attempts to discontinue it in favour of small, by-invitation-only Groups were consistently rejected. While there was sometimes work in smaller groups towards the end of the negotiating process, open-ended meeting continued to be the norm.

Members quickly started to present negotiating proposals – and in great numbers. More than 50 written proposals were received within the first year. The first ones related to GATT Article X, which was largely considered the relatively “easiest” of the three mandated scope provisions as everybody was in agreement of the importance of transparency. Proposals on GATT VIII followed a few months later. Last to be addressed was the transit domain. It took almost a year for first Article V-related suggestions to come. (This is also the reason while the final Agreement starts with the transparency area before turning import and export-related fees and formalities and, finally, transit, reversing the order in which those aspects are treated in the GATT. First compilations of Members' proposals, which were started to be prepared by the WTO Secretariat soon after they were presented, uses this order out of necessity, and it was kept ever since, all the way up to the final Agreement.)

An especially encouraging aspect of the proposals was that their sponsorship had a very wide range. Unlike the pre-July package years, submissions now came from a great number of delegations – already more than a hundred in the first twelve months.

... but still a long way to go

The 2005 Ministerial in Hong Kong marked a first reference point. Unlike at the previous Ministerial, the Trade Facilitation text had already been agreed upon in Geneva and was merely rubberstamped by Ministers in Hong Kong. It reflected progress made while at the same time highlighting the areas that required further work. A key concern of all Members with an interest in a speedy conclusion of the negotiations was the absence of real drafting. Exchanges resembled discussions more than actual negotiations. In response to this worry, the Hong Kong Ministerial Declaration called on Members to *“be mindful of the overall deadline for finishing the negotiations and the resulting need to move into focussed drafting mode early enough after the Sixth Ministerial Conference so as to allow for a timely conclusion of text-based negotiations on all aspects of the mandate.”*³⁸

The other key concern – harboured mostly by developing and least-developed members – was a perceived lack of an effective, concrete implementation mechanism. Proposals on S&D and technical assistance had largely been general with agreement on the specifics not yet being within

³⁶ This delay seemed even more significant at that time, given that the entire Doha Round was initially meant to conclude no later than three years after its start.

³⁷ He was succeeded by Tony Miller from Hong Kong China and Eduardo Sperisen-Yurt from Guatemala.

³⁸ Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, Annex E, paragraph 4.

sight. Members even held different views on some of the underlying principles. To address this worry, the Ministerial Declaration called for the related commitments in the negotiating mandate to be *"re-affirmed, reinforced and made operational in a timely manner."*³⁹ It also recommended that *"Members, in particular developed ones, continue to intensify their support in a comprehensive manner and on a long-term and sustainable basis, backed by secure funding."*⁴⁰ Furthermore, it was recommended that the Negotiating Group *"deepen and intensify its negotiations on the issue of S&DT, with a view to arriving at S&DT provisions that are precise, effective and operational and that allow for necessary flexibility in implementing the results of the negotiations."*⁴¹

Overall, the impact of the Hong Kong Ministerial was mixed. While the fact that the TF segment had already been agreed upon ahead of time, and by the people doing the actual negotiating, marked a clear plus, the Hong Kong text did not really advance the substantive process. It could even be argued that it had the opposite effect, tying up valuable resources – and several months of time – in negotiating politically palatable Ministerial language, rather than advancing substantive work on the TF Agreement as such.

The acceleration many had hoped to see from the Hong Kong meeting for did not materialize. If anything, work seemed to slow down a little in its wake. To some extent, this was the result of difficulties in other parts of the Round. The Hong Kong Ministerial had called for the conclusion of the Doha Round within a year. When it became clear shortly thereafter that this would be yet another deadline missed, the situation got so dire that DG Lamy suspended negotiations on all aspects of the Doha Round – halting work on issues where progress was being made as well as on deadlocked subjects.

When work resumed half a year later, Members were far from concluding the talks. The TF negotiations had still not reached actual drafting stage. Members kept submitting proposals that the WTO Secretariat compiled in a regularly updated document, which became the basis for work in the Negotiating Group and the key reference point.⁴² While suggestions gradually became more refined, this compilation only listed the language as advocated by their proponents without taking alternative views into account. It took four years until Members were finally ready issue an actual draft of a prospective Trade Facilitation Agreement.

The first version of this "Draft Consolidated Negotiating Text" was circulated in December 2009.⁴³ It contained around 1700 square brackets, reflecting the many areas of disagreement. This number even increased during the Negotiating Group's first run through the text. Faced with the acceleration of the overall process, Members wanted to be sure that all of their views were fully reflected. It was only after a 2200 bracket peak was reached that the trend was reversed and the numbers started to come down. To speed up this procedure, the Chair appointed several facilitators – all technical-level experts from various delegations – and tasked them with looking after specific parts of the text. This led to a noticeable intensification of work. At some point, there were no less than 14 facilitator groups carrying out parallel negotiations. The brackets began to disappear rapidly.

The process of combined Chair- and facilitator-led negotiations (complemented by activities organized by proponents of a given textual area) continued until the beginning of 2013. By then, the text had seen a significant clean up with more than two thirds of all brackets gone. The remaining ones, however, were the hardest nuts to crack. Some areas, such as customs cooperation and S&D remained gridlocked with progress lagging behind.

By March 2013, it became clear that there was need for higher-level involvement. The NGTF Chair appointed 4 Ambassador "Friends" and entrusted each of them each with a segment of the Draft Consolidated Negotiating Text. Ambassador Mario Matus from Chile was tasked with overseeing work on the transparency component (Articles 1-5⁴⁴) as well as on customs cooperation (Article 12). Ambassador Remigi Winzap from Switzerland was mandated to look after articles 6 – 9bis

³⁹ Paragraph 6.

⁴⁰ Ibidem.

⁴¹ Hong Kong Ministerial Declaration, WT/MIN(05)/DEC, paragraph 7.

⁴² See the TN/TF/W/43 series.

⁴³ TN/TF/W/165.

⁴⁴ References to article numbers relate to the numbering used in the Draft Consolidated Negotiating Text as it stood when the Friends of the Chair started their work. This slightly differs from the numbering used in the Bali TF Agreement.

(relating to GATT Article VIII) and 11 (transit). Ambassador Fred Agah⁴⁵ from Nigeria was put in charge of Article 10 (formalities connected with importation and exportation). Permanent Representative Michael Stone from Hong Kong, China looked after the section II, dealing with S&D. Under their lead, most of the remaining brackets started to melt away.

Soon after taking up his responsibilities in September 2013, the WTO's new Director-General offered his services as well. He personally chaired a series of negotiating sessions in a variety of configurations – and an inclusive overall setting. His skilful handling of complex situations and the unflinching commitment to keep everybody involved⁴⁶ unblocked many controversies.

With the involvement of the Director-General, the process had become a multi-layered, parallel undertaking of complementary work in the Negotiating Group, the Friends' framework and the so-called "room W" setting led by the Director-General. Proponents continued to reach out to other Members as well. Some of the areas where disagreement was limited to just a handful of countries were resolved in a bilateral setting before then being brought back to the membership as a whole. The negotiating marathon of the final phase – meetings were not only held during the day, but also late into the night and over weekends – made it possible to arrive at an almost clean text. At a General Council meeting a few days before the Bali Ministerial Conference – which was largely viewed as the last opportunity to finally conclude the negotiating exercise as part of a co-called "Bali package"⁴⁷ – DG Azevêdo presented a draft TF Agreement which only had around 70 brackets left.⁴⁸ Crucial parts such as S&D and customs cooperation were already bracket-free. While the DG had hoped to have a completely agreed TF Agreement by time of the MC9, the text was in good enough shape to allow for the finishing touches to be done in Bali. After hectic last rounds of exchanges at that Conference, it was finally possible to agree on a text for a Trade Facilitation Agreement – almost a decade after negotiations had started.

Path-breaking – and path-making...

There are several aspects of the TF negotiating history that invite further reflection. Some of them defied conventional ways of doing things and challenged traditional thinking on how to approach a multilateral negotiating exercise.

This already became clear when Members launched the process since they did so under terms that explored new avenues. Implementation was no longer an afterthought but an upfront consideration – indeed, it was integral to the entire undertaking. Rather than continuing the traditional practice of largely equating S&D treatment with transition periods and granting flexibilities on the basis of a country's association to either the developing or least-developed group, the TF mandate called for an individual, country-by-country and measure-by-measure approach. It explicitly eschewed a one-size-fits-all model.

For the first time, it was also recognized that improving the way that trade takes place can be at least as important as reforming explicit trade barriers. In other words, emphasis was placed on reforming the "hardware" of trade – procedural and process frictions – as opposed to the "software" side – the overarching trade policies.

New ground was also broken in the way the negotiations were conducted. Going against conventional wisdom, the Trade Facilitation negotiations were predominately carried out in an open-ended, inclusive setting – and this despite an increase in WTO Membership, even during the course of the decade-long discussions. Novel philosophies were also applied to the way the negotiations were lead. Delegations remained in the driving seat throughout the entire process.

⁴⁵ He stepped down from this function when he assumed his new responsibility as a Deputy of Director-General Roberto Azevêdo who entered into office in September 2013.

⁴⁶ When presenting the draft Ministerial text to the TNC just a few days before the Bali Conference, DG Azevêdo made explicit reference to his commitment to inclusiveness with the following words: "*I had often heard that truly productive meetings could only happen with a small number of delegations, behind closed doors. I never accepted that. I always felt that all delegations had to take part in the decision-making process...*" Report by the Chairman of the Trade Negotiations Committee, 26 November 2013, JOB/GC/59.

⁴⁷ The other components of the package included (for the DDA segment) elements of Agriculture, Cotton and Development and LDC issues.

⁴⁸ JOB/TNC/35 of 25 November 2013.

Work was carried out in a bottom-up, Member-driven manner with the Chair functioning primarily as a facilitator, there to broker a compromise based on delegations' wishes.

The success of the Trade Facilitation undertaking makes it likely that it will serve as a benchmark for other negotiating exercises. It will be difficult, for instance, to define S&D treatment in future WTO Agreements without at least considering the TF model. The inclusive, de-centralized way of conducting the talks is also likely to set new standards in the trade negotiating business.

In doing so, the new Trade Facilitation Agreement is going to have an impact not only on the Trade Facilitation universe but the WTO and the multilateral trading system as a whole.

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