

**COMMUNICATION FROM, GUATEMALA, HONDURAS, HONG KONG CHINA,
NORWAY, THE SEPARATE CUSTOMS TERRITORY OF TAIWAN,
PENGHU, KINMEN AND MATSU AND, SWITZERLAND**

The following communication, dated 26 November 2008, is being circulated at the request of the Delegations of Guatemala, Honduras, Hong Kong China, Norway, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Switzerland.

DISCUSSION PAPER REGARDING A TRADE FACILITATION COMMITTEE

1. The need to have a Committee to supervise the functioning of a new Trade Facilitation Agreement has been recognized in a number of previous submissions to the Negotiating Group on Trade Facilitation (NGTF).¹ The comments below thus assumes that there is agreement on the need for a Trade Facilitation Committee.

2. This paper explores the elements that need to be taken into account when drafting a provision for a Trade Facilitation Committee ("Committee"), and suggests a simple provision based on examples from existing WTO Agreements.

I. INTRODUCTION

3. Committees under the various WTO Agreements have certain shared functions, and certain functions that are specifically mandated by the respective agreements.

4. The general functions include:

- Overseeing the functioning of the Agreement, including the progressive implementation of commitments²;
- Overseeing the work under the Agreement, including overseeing work of subsidiary bodies;
- Forum for consultations;
- Receiving notifications from Members³;
- Establishing contacts with other international organizations relevant to the Agreement.

¹ See, in particular, the proposal for the establishment of a Committee on Trade Facilitation (TN/TF/W/141 submitted by Chinese Taipei). See also a number of proposals that make reference to notifications or competencies administered by the Committee.

² See, e.g., Article 18.1 of the Agreement on Agriculture.

³ See, e.g., Article 12 of the Safeguards Agreement.

5. More specific functions may be set forth in each Agreement, but often in specific articles and not in the article on the Committee itself, such as:

- Recommendations regarding waiver of obligations;
- Agreeing to time-limited derogations from specified obligations⁴;
- Setting up of subsidiary bodies⁵;
- Approval of suspension of benefits by one Member towards another Member⁶;
- Annual⁷, biannual⁸ or triannual⁹ reviews of the Agreement;
- Review particular measures of a Member.¹⁰

6. We propose to follow the general scheme employed by the various Agreements under the WTO, that is to have a simple, short provision regarding the Committee, and to let the substantive provisions of the agreement deal with which areas should be within the Committee's competence.

7. This practice can already be seen from quite a few of the proposals that have been tabled in the Trade Facilitation negotiations, and which make reference to the Committee. This means that the more sensitive issues regarding the work of the Committee will have to be tackled within the relevant substantive articles.

II. REMARKS ON SOME ASPECTS OF THE PROPOSAL

8. On para 2: *Composition and elections* are not strictly necessary, but are, nevertheless, very often found included in other agreements, and it is therefore also suggested to include them here. Apart from the Committee on Budget, Finance and Administration, the general norm is that committee membership is open to each and every Member. Note that election of officers is done formally by the committee itself, but the chairmanship is part of the overall "slate" decided by the relevant Council.

9. On para 3: The *frequency of meetings* depends on the tasks provided in the substantive provisions of the new agreement. There is a general requirement for each committee to present an annual report to the General Council on its work, so one yearly meeting is normally the minimum. We suggest to specify a minimum, coupled with a proviso stating it should meet as needed and envisaged by the relevant substantive provisions of the agreement.¹¹

10. On para 5 – *Subsidiary bodies*: Whether there is a concrete need for subsidiary bodies will depend on the outcome of the negotiations. Irrespective of the outcome, there is merit in having a general provision enabling the Committee to set up such subsidiary bodies as may be required. All such bodies will necessarily have to report to the Committee. Where subsidiary bodies are established jointly with, e.g., the World Customs Organization (WCO), there may be merit in special

⁴ See, e.g., SPS Article 10.3; SCM Art. 27.4.

⁵ See, e.g., the "Permanent Group of Experts", established according to Article 24.3 of the SCM Agreement.

⁶ See e.g., Article 8.2 of the Safeguards Agreement; Article 22.6 of the Dispute Settlement Understanding.

⁷ See, e.g., Article 32.7 of the SCM Agreement.

⁸ See, e.g., Article 7.1 of the Import Licensing Agreement.

⁹ See e.g., Article 15.4 of the TBT Agreement; and Article 12.7 of the SPS Agreement.

¹⁰ See, e.g., Article 27.14 of the SCM Agreement.

¹¹ This is the solution found for the SCM Committee, see Article 24.1 of the SCM Agreement.

rules of procedure and reporting requirements as is the case for the technical groups under the Customs Valuation Agreement¹² and the Rules of Origin Agreement.¹³

11. On para 6 – *International organizations*: The mandate for the negotiations makes reference to other relevant international organizations, in particular the WCO. Close contact, and the possibility to invite representatives of those organizations to the meetings of the Committee, or to perform jointly certain tasks, are some of the functions that may be included here. The minimum required would seem to be to provide for close contacts and invitations to meetings, and this is included below. Further jointly operated tasks (e.g., joint technical committee work as under the Customs Valuation Agreement) will depend on the outcome of the negotiations and may require a stand-alone provision. It is suggested in this paper that the decision to invite representatives of other international organizations be taken by the Committee, which, following normal committee rules of procedure, will take such a decision upon suggestion from one or more Members.

12. On para 7 – *Review of the Agreement*: Whether there is to be annual, biannual or triannual review of the Agreement is something that remains to be seen. Such review provisions are often included in separate articles within the agreement, although the relevant committee is normally tasked with such a review. We have, therefore, for the time being suggested to place such a review in this paragraph.

III. REMARKS ON SOME ELEMENTS THAT ARE NOT (YET) IN THE PROPOSAL

(Rules of procedure and decision making)

13. Most committees apply the rules of procedure of the General Council. There does not seem to be a need for special rules of procedure for the Committee, but final decision in this regard may have to wait the final outcome of the negotiations. Establishing these rules of procedure to the new Committee is a task that does not require a reference in the Trade Facilitation Agreement itself.

14. WTO works by consensus, but with the possibility to resort to voting - except as otherwise provided. As long as the general rule, set forth in Article IX:1 of the WTO Agreement, is considered applicable, there is no need to refer to voting in an Article on the Committee. Only where there is an exception to Article IX:1 of the WTO Agreement will there be a need to specify it in the Trade Facilitation Agreement. It is, therefore, at least for the time being, suggested to not have a reference to decision making procedures in the Article establishing the Committee.

(Relationship to the Council for Trade in Goods)

15. Committees do not live in isolation. The general system is that all committees report to one of the three Councils – Council for Trade in Goods, Council for Trade in Services and the TRIPS Council. These councils are established in accordance with Article IV:5 of the WTO Agreement, and may set up such subsidiary bodies as required. The committees report to one of the three.

16. For a Trade Facilitation Committee, which has its basis in three GATT provisions, it is logical that the Council for Trade in Goods has the overseeing function, as also stipulated in Article IV:5 of the WTO Agreement for all Multilateral Trade Agreements in Annex 1A to the WTO Agreement. The inclusion of this new Agreement on Trade Facilitation into Annex 1A of the WTO Agreement

¹² Agreement on the implementation of Article VII of the GATT 1994 (the Customs Valuation Agreement), Annex II.

¹³ Agreement on Rules of Origin, Annex I.

thus ensures the relationship of the Committee in respect of the Council for Trade in Goods.¹⁴ There are agreements where the relationship between the committee and the Council for Trade in Goods is specifically set out in the agreement, but this is not strictly necessary if the agreement has been placed into Annex 1A of the WTO Agreement.¹⁵

17. It is, therefore, not suggested to retain a specific provision regulating the general relationship between the Committee and the Council for Trade in Goods in the Trade Facilitation Agreement.

18. Some WTO Agreements provide that notifications shall be made to one of the three councils, or that decisions are to be taken by one of the councils. In such cases, the preparatory work is handled by the committee, and notifications are made through the committee. Should the negotiations lead to such solutions, then appropriate provisions will have to be made in the Trade Facilitation Agreement.

(Specific tasks for the WTO Secretariat)

19. Some WTO Agreements make reference to specific tasks of the Secretariat, in particular the task to draw up annual factual reports to the Committee based on the notifications to it.¹⁶ Such a provision is not strictly necessary, as the Secretariat can be tasked to do this by the Committee in any case. It is not excluded that there may be specific tasks of the Secretariat worth mentioning in the Agreement, but until the negotiations make this clear it is suggested not to have such a provision in this Trade Facilitation Agreement.

¹⁴ We are not yet sure how the outcome of the Trade Facilitation negotiations will be presented to WTO Members. It is assumed here that there will be a "Final Act" of the Doha Round Negotiations, and that such a Final Act will set out the placement of this new Agreement within the normal structure.

¹⁵ See, e.g., Article 13.1 of the Safeguards Agreement.

¹⁶ See, e.g., Article 13.2 of the Safeguards Agreement, which stipulates that:

"To assist the Committee in carrying out its surveillance function, the Secretariat shall prepare annually a factual report on the operation of this Agreement based on notifications and other reliable information available to it".

**TEXTUAL PROPOSAL FOR A PROVISION ESTABLISHING
A COMMITTEE ON TRADE FACILITATION**

[Article X]

1. A Committee on Trade Facilitation is hereby established.
 2. The Committee shall be open for participation by all Members. The Committee shall elect its own Chairman.
 3. The Committee shall meet as needed and envisaged by the relevant provisions of the Agreement, but no less than once a year, for the purpose of affording Members the opportunity to consult on any matters related to the operation of this Agreement or the furtherance of its objectives.
 4. The Committee shall carry out such responsibilities as assigned to it under this Agreement or by the Members.
 5. The Committee may set up such subsidiary bodies as may be required. All such bodies shall report to the Committee.
 6. The Committee shall maintain close contact with other international organizations in the field of trade facilitation. Representatives of such organizations may be invited to meetings of the Committee.
 7. The Committee shall review the operation and implementation of this Agreement [X] years after the date of entry into force of the WTO Agreement, and thereafter as the need arises.
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