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Negotiating Group on Trade Facilitation

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COMMUNICATION FROM THE CORE GROUP OF DEVELOPING COUNTRIES, THE AFRICAN, CARIBBEAN AND PACIFIC GROUP OF STATES, THE AFRICAN GROUP, AND THE LEAST-DEVELOPED COUNTRIES GROUP

The following communication, dated 16 July 2007, is being circulated at the request of the Core Group of Developing Countries, the African, Caribbean and Pacific Group of States, the African Group, and the Least-Developed Countries Group.

TECHNICAL ASSISTANCE AND CAPACITY BUILDING

I. INTRODUCTION

1. This communication builds on earlier submissions to the Negotiating Group on Trade Facilitation (NGTF) in relation to the issue of technical assistance and capacity-building (TACB) and new trade facilitation obligations.¹

2. Through this communication, the submitting Members seek to substantively contribute to the negotiations on Trade Facilitation (TF), to ensure that the principle of special and differential treatment is fully reflected in the negotiated outcome, to link the implementation of trade facilitation obligations by developing and least-developed Members to the provision of TACB support in a mutual spirit of partnership.

3. This communication does not prejudice the position of individual Members, and is without prejudice to any amendments, revisions, or clarifications that the proponents may later wish to make.

II. INTRODUCTION AND GENERAL CONCEPTS – DEVELOPMENT-FRIENDLY APPROACHES TO TRADE FACILITATION

A. DEVELOPING A TF PARTNERSHIP: LINKING TACB TO TF COMMITMENTS

4. To ensure a win-win and development-friendly outcome that mutually benefits all Members, especially developing and least-developed Members, in the Trade Facilitation (TF) negotiations, there is a need for balance between the contributions of developed and developing Members in terms of mutually beneficial commitments. In this regard, the submitting Members recall that Annex D of the July 2004 Framework (WT/L/579) and Annex E of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC) stress the importance and necessity of providing precise, effective, and operational TACB to developing Members during the negotiations and for the implementation of the results thereof by such Members.

¹ TN/TF/W/73, TN/TF/W/81, TN/TF/W/82, TN/TF/W/95, TN/TF/W/137, and TN/TF/W/142.

5. This means that there must be clearly defined operational mechanisms established to ensure that TACB is actually provided to those Members that need them. A mutually beneficial win-win outcome of the TF negotiations requires that Members engage in a partnership in which TACB is provided by developed Members to assist developing Members in the implementation of new TF commitments. Such TACB should be tailored to the specific needs, circumstances and priorities of the recipients in order for it to be effective, precise and operational. TACB should be equitably provided to all those that require it. The importance of TACB also necessarily implies the equal importance of ensuring that any new TF agreement incorporates a strong role for the WTO in coordinating and facilitating the provision of such TACB from donors, and for the donor community, including developed Members, to commit to providing adequate modalities and mechanisms through which such TACB could be accessed by those who need it. Developing countries should not be required to implement TF commitments for which TACB is needed if such TACB is absent.

B. PROPOSED MEASURES ON TF

6. The various proposals submitted by Members reflect valuable and useful ideas on improving TF in Members and thereby enhance cross-border trade in goods. The proponents of this communication believe that these proposals have to be studied and agreed upon on their individual merits, in order to ensure that their inclusion in any negotiated outcome provides development benefits to developing Members, and so that the appropriate S&D treatment can be incorporated in such proposals.

7. The assessment of the proposals submitted reveals that there will be implementation difficulties faced by developing members either individually or collectively.

8. These implementation issues will need to be considered and addressed. New TF commitments should therefore be approached in a way that would enable developing Members to commit to a specified minimal level or standard of implementation of commitments, with appropriate flexibility for least-developed Members, and subject to the provision of TACB where needed. Developing Members could then, at their discretion, progressively go into higher levels or standards of implementation as and when capacity exists to do so taking into account their development context. For example, developing Members could agree to a commitment requiring mandatory publication in government gazettes of relevant existing customs procedures in the local or national language, but Internet publication of such procedures would be at their discretion as and when capacity arises to enable them to do so.

9. All developed Members should undertake all commitments upon entry into force of the any TF agreement. There should be two categories of commitments to be implemented by developing Members, subject to the provision of TACB where needed. These categories would be:

- (a) A minimal set of commitments which would be determined individually by developing Members to be implemented after entry into force; and
- (b) A set of commitments that would be implemented after the conclusion of a transition period of X years determined on the basis of Paragraph 13 below after the entry into force of the TF agreement.

10. Other commitments that do not fall under either category above would be implemented by developing and least developed Members as and when appropriate in their development context.

III. NEEDS ASSESSMENT AND TACB BEFORE SIGNING

11. The proponents recall Paragraph 5 of Annex D of the 2004 July Framework and Paragraph 6 of Annex E of the Hong Kong Ministerial Declaration that stress the importance of the provision of TACB to assist developing Members in fully participating in the negotiations. Such commitments have yet to be made operational. Full and effective participation by developing Members in the TF negotiations is an essential prerequisite towards ensuring that the negotiated outcomes reflect their issues and concerns. In this regard, TACB must be provided to support effective involvement of developing Members' experts in the negotiations, provide for policy research and analysis (especially with respect to specific proposals), and identify individual country-specific TF needs and priorities.

12. The other area of focus for TACB is to assist developing members to undertake capacity self-assessment to determine the commitments for which domestic implementation capacity already exists and where technical assistance is required.

IV. NEEDS ASSESSMENT AND TACB POST-ENTRY INTO FORCE AND THE ROLE OF THE WTO TF TACB SUPPORT UNIT

A. NEEDS ASSESSMENT AND TRANSITION PERIODS FOR IMPLEMENTATION

13. In addition to the conduct of TACB-supported capacity self-assessment prior to the signing of the TF Agreement, the transition period referred to in Paragraph 9(ii) above should be of sufficient duration after the entry into force of the TF agreement within which to: (a) develop a plan for the implementation of commitments; and (b) undertake the domestic measures that may be needed to enable developing Members to implement these mandatory commitments. The determination of acquisition of implementation capacity should be at the discretion of the individual LDC concerned.

14. For both sets of commitments under Paragraph 9(i) and (ii) above, implementation by developing Members should be deferred if they continue to lack implementation capacity.

B. PROVISION OF TACB

15. In the spirit of mutual partnership, donors and developed Members should provide TACB support to those developing Members that require and request such support in connection with: (i) the conduct of the negotiations; (ii) the conduct of the self-assessment for the determination of commitments for which implementation capacity already exists; and (iii) the building of implementation capacity for the other commitments referred to in Paragraphs 12 and 13 above.

16. Requests for TACB support for implementation of commitments identified by individual developing countries should be submitted to the WTO TF TACB Support Unit. The procedures for requesting TACB should be simple, transparent and not unduly burdensome for developing Members, especially for LDCs, given their financial means and other constraints.

17. The TACB to be provided should be on the basis of the request and specifications of the requesting Member. Developing Members requesting TACB could also consult with donors to determine the TACB projects or activities that will be required to build implementation capacity for specific commitments. The developing Member who is a TACB recipient should be the one to determine to its satisfaction when such implementation capacity has been acquired, or it may also choose to work out a mutual arrangement with the donor concerned for joint determination of the acquisition of implementation capacity.

18. Such support shall be on the basis of the requesting Member's needs and capacity-building plan and shall be provided in coordination with donors and developed Members. It should also be

without prejudice to supplemental TACB requests as further TACB needs may arise. TACB should be provided, with the assistance of the WTO TF TACB Support Unit, to least-developed Members to enable them to prepare their TACB requests.

19. The implementation of mandatory commitments shall be undertaken by developing Members after X months after they have concluded that individual implementation capacity has been acquired pursuant to the provision of the necessary TACB support. Verification of capacity acquisition shall be self-determined or, if agreed by the developing Member concerned, in consultation with the donor or developed Member that provided the relevant TACB support.

C. THE ROLE OF THE WTO TF TACB SUPPORT UNIT

1. Providing adequate, effective, precise and operational TACB is a question of mutual partnership between the donors and the recipients. The WTO should assist Members in coordinating and facilitating TACB resources that must be provided by developed Members with the TACB needs that may be identified by developing Members. A TF TACB Support Unit could be created within the WTO Secretariat to handle this function.
2. Furthermore, the TF agreement should contain clear and operational commitments by developed Members to provide TACB support to developing Members. Operational modalities that facilitate and improve the delivery of such TACB to the recipients, and which are appropriate to the requirements and resource constraints of developing Members, should also be incorporated in a TF agreement.

V. FLEXIBILITY AND SPECIAL AND DIFFERENTIAL TREATMENT IN LEVELS OF COMMITMENTS

20. Appropriate special and differential treatment should be provided to developing Members under which they can identify the specified minimal level of implementation of a measure to which they will commit to be bound. Any further progressive implementation of such measure beyond the bound level would be undertaken at the discretion of the developing Member as appropriate and necessary for their domestic needs and capacity. Developed Members, as appropriate and to the maximum extent possible, may wish to support such progressive implementation of measures beyond the minimum bound levels by providing additional TACB support as needed.

21. Previous proposals from developing Members (such as the African Group in TN/TF/W/95) have stressed that GATS-rules type provisions could be used as the possible template for making binding commitments in a new TF agreement. This means that for each specific obligation, developing Members could also indicate the limitations or restrictions that they wish to place on their commitment to implement such obligation. This would provide for effective, precise and operational special and differential treatment that goes beyond transition periods, as provided for in Annex D of the 2004 July Framework.

22. Such special and differential treatment is necessary because of the varied development and economic conditions and circumstances that developing Members face. Domestic regulatory flexibility continues to be required as a key element of national economic policymaking so as to allow them to take into account and respond to country-specific circumstances and situations. One other way of ensuring special and differential treatment is to include a specific provision that safeguards domestic regulatory flexibility for developing Members when required for reasons of national development policy.

VI. EXCEPTIONS TO COMMITMENTS

23. GATT Articles XX and XXI will apply to any TF agreement.

VII. LDC PROVISIONS

24. Least-developed Members would not be required to implement any commitments unless their requests for the provision of the necessary TACB support have been adequately responded to in a timely manner by developed Members on a demand-driven, need-based, and sustainable basis, specifically tailored to the needs and requirements of each individual recipient country.

25. When an LDC Member has acquired capacity to implement any Trade Facilitation commitments, the implementation of these commitments shall be determined by the Least Developed Member concerned.

VIII. EARLY WARNING MECHANISM

26. Consideration could be given to an early warning mechanism under which developing and LDC Members can inform the WTO that there is going to be a delay in implementing a commitment.

IX. DISPUTE SETTLEMENT

27. Members should first exhaust the use of Consultations, Good Offices, Conciliation or Mediation as mechanisms for ensuring compliance with commitments, including commitments on the part of developed Members to provide both TACB modalities and TACB support itself, which they are implementing. As the last resort, the Dispute Settlement Understanding may be resorted to in order to settle disputes in this regard.

28. Finally, no developing or least-developed Member should be brought by any other Member to dispute settlement proceedings under the Dispute Settlement Understanding in order to enforce compliance with commitments that such developing or least-developed Member is not yet implementing.
