



REFLECTIONS ON A FUTURE TRADE FACILITATION AGREEMENT

Implementation of WTO Obligations.
A Comparison of Existing WTO Provisions



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NOTE

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EXECUTIVE SUMMARY

The WTO negotiations on trade facilitation are part of the Doha Development Agenda, which grants central importance to developing countries objectives and implementation concerns. In the view of many, multilateral rules on trade facilitation stand a chance to yield real benefits for developing and landlocked countries, if these countries are provided with an effective capacity to implement their commitments.

The text setting the modalities of negotiations on trade facilitation, the Annex D of the so-called July Package 2004, clearly states that the negotiated outcome will take full consideration of the principle of special and differential treatment and that it should go beyond traditional approaches to special and differential treatment (S&DT). Members aim at crafting legal provisions which are more effective than the existing ones in addressing implementation concerns of developing countries.

UNCTAD provides technical assistance and capacity-building to developing countries during the negotiations to support their effective participation. Advisory services to delegations of developing countries are part of this endeavour. This study contributes to the objectives of UNCTAD's technical assistance. It provides a review of selected provisions of World Trade Organization (WTO) agreements as they relate to S&DT, the review and monitoring mechanisms for the implementation of agreements, and the role of the supervisory bodies of the agreements. When examining these provisions and mechanisms, clarification is provided on their legal and operational effects keeping in mind their potential relevance for the discussions in the Negotiating Group on Trade Facilitation (NGTF).

The review shows that a shortcoming of the currently existing provisions is the lack of operational and legal linkage between technical assistance, special and differential treatment regarding the application of commitments and the reporting, notification and review requirements of member States. On-going discussions in the Sanitary and Phytosanitary (SPS) and TBT Committees and the TRIPS Council underline the benefits and importance of strengthening transparency and reporting mechanisms for a more effective application of the special and differential treatment provisions.

The study concludes that a new and more effective approach to the implementation of WTO obligations should link S&DT flexibilities to technical assistance commitments and an effective transparency mechanism. Based on the findings of the review of the existing provisions, the study concludes with an outline of such a comprehensive implementation framework and the procedural requirements it entails.

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ABBREVIATIONS

AoA	Agreement on Agriculture
GATS	General Agreement on Trade in Services
IPR	Investment Policy Review
LDC	least developed country
MFN	most favoured nation
NGTF	Negotiating Group on Trade Facilitation
RoO	Rules of Origin
S&DT	special and differential treatment
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary
TA	technical assistance
TBT	Technical Barriers to Trade
TF	trade facilitation
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIPS	Trade-related Aspects of Intellectual Property Rights
WTO	World Trade Organization

INTRODUCTION

The WTO negotiations on trade facilitation are part of the Doha Development Agenda and aim at accelerating the movement and clearance of goods in international trade and transit. Negotiations on this subject matter started in October 2004. UNCTAD provides technical assistance and capacity building to developing countries during the negotiations to support their effective participation through the Trust Fund for “*Capacity-Building to support developing countries and least developed countries in their participation in the WTO negotiations on trade facilitation*”. UNCTAD provides research, advice and support to developing countries during the negotiation process, including regional and national capacity building and training activities, advisory services on private-public consultations over the negotiations, development of background documents on the issues under negotiations, and ad-hoc advice to Geneva - and capital -based negotiators. This study is part of these activities.

Special and differential treatment (S&DT) of developing countries will be critical as regards the implementation of commitments under a future WTO Agreement on trade facilitation. Negotiations of the new subject area trade facilitation have been on-going since 2004 with the overall objective of accelerating the movement and clearance of goods, through the simplification and harmonization of trade procedures, documents and formalities. It has been clear from the beginning of the negotiating process that many developing countries would have to undertake domestic reforms to be compliant with new rules, and would require additional time and resource to acquire the implementation capacity. The importance of incorporating S&DT provisions in a new agreement was therefore highlighted by developing countries from the outset of the negotiations.

Moreover, developing countries emphasized that S&DT has to be approached in a new and different manner in these negotiations. This is because existing provisions are widely criticized for having failed to provide a sufficient remedy to developing countries’ implementation concerns. Existing S&DT includes various measures, such as transitional periods or exemptions to delay or forego the application of certain commitments¹, and technical assistance for developing countries. Against the background of this criticism, the modalities text for the negotiations on trade facilitation adopted by the General Council on 1 August 2004, the Annex D, clearly states that S&DT has to be part of the new agreement and that it has to go beyond traditional ways of S&DT.

The negotiations on trade facilitation hence cover two areas: substantive trade facilitation rules, and provisions for the S&DT. Current proposals on this issue include the following elements; differentiation of rules into distinct categories with different application conditions; transitional periods; technical assistance to develop implementation capacity; early warning mechanism for the extension transitional periods; and the notification of implementation plans. Many of these concepts are inspired by existing S&DT provisions of other WTO Agreements.

At the same time, new perspectives on the question are emerging as well. On the one hand, there is a drive to use strong legal language, notably in developed countries’ obligations to provide technical assistance. On the other hand, delegations move away from the limited focus on exceptive norms only. There is a move to a more comprehensive approach to the question of implementation of commitments under a WTO Agreement on trade facilitation. Two logical linkages are at the center of this new approach. Countries’ commitments are

¹ A comprehensive list of these existing S&DT provisions are listed in WTO/COMTD/W/77: WTO Committee on Trade and Development, Note by the Secretariat, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, 25 October 2010, and WTO/COMTD/W/135: WTO Committee on Trade and Development, Implementation of Special and Differential Treatment for Least-Developed Countries, Note by the Secretariat, 5 October 2004. These two documents also provide information on the usage of these provisions by developing countries and least developed countries

linked to their actual implementation capacity and technical assistance is linked to the necessary acquisition of missing implementation capacity. For such an approach to be working there need to be an implementation framework that allows developing countries to self-assess their implementation capacity, to notify their technical assistance needs, and to monitor technical assistance delivery as well as the implementation progress.

Despite broad consensus on these ideas in principle, details of legal, procedural and institutional requirements of such an implementation framework are still subject to intensive discussions. Hard issues, such as the legal language for the exemptions from application of commitments and the obligations technical assistance, feature predominantly in these discussions. This reflects the prevalent defensive approach towards implementation from developing and developed countries. Focusing on these hard issues, however, misses out on the potential of “softer” issues such as a transparency and review mechanism covering technical assistance needs and delivery, and implementation problems and progress. Such a transparency mechanism can fulfill an important role in creating confidence over countries’ commitment, facilitating access and monitoring of technical assistance and implementation in general.

This study contributes to the discussions on S&DT in the context of the negotiations on trade facilitation at WTO by providing a comparative analysis of selected WTO provisions related to two elements: provisions that relate to the traditional areas of S&DT and technical assistance and provisions related to reporting obligations, reviewing and monitoring of commitments. Existing studies on S&DT do not cover the latter provisions. By adding them, this study underlines the role they can play for developing a transparency mechanism on S&DT.

It is very likely that the S&DT and other implementation-related provisions of the new agreement will differ from the provisions in existing agreements, both in terms of ambition and in legal language. Nonetheless, by reviewing the scope of application and the legal effect of some of the existing provisions, this study provides useful guidance for the discussions and the negotiators. It helps pointing out which elements and wording may be useful for the current discussion, and which areas require new legal language or even a new approach to be strengthened and rendered more operational. The study does not attempt to provide an exhaustive overview of all relevant provisions in all the WTO Agreements. The provisions discussed in the study have been selected as they relate in one way or another to elements and ideas expressed in the ongoing negotiations on S&DT in the negotiations on trade facilitation.

This document therefore focuses on the following five issues

- Favourable treatment for developing and least developed countries;
- Technical assistance provisions;
- Reporting, notifications and other communications means for member States;
- Roles and tasks of WTO Committees and Councils; and
- The S&DT discussion in the context of the negotiations on trade facilitation.

Parts 2 and 3 of this document discuss issues that are substantive in nature. The first issue relates, in a general manner, to all types of S&DT measures set forth by WTO Agreements, whereas the second issue focuses on one specific type of S&DT – the delivery of TACB to developing countries, including least developed countries (LDCs). Parts 4 and 5 look into institutional issues related to the (review of the) operation and implementation of WTO Agreements, on the one hand, and the functions and responsibilities of the Councils and Committees set up under the WTO Agreements, on the other. Part 6 of this document deals with the discussion of the relevant elements in the context of the negotiations on trade facilitation.

1. FAVOURABLE TREATMENT OF DEVELOPING AND LEAST DEVELOPED COUNTRIES

This chapter focuses on provisions in WTO Agreements that provide some kind of favorable treatment to developing countries and LDCs. Such favorable treatment varies in nature and scope and may be broadly categorized as follows:

- Exemptions from obligations;
- Transition periods;
- Positive S&DT measures;
- Transparency requirements; and
- Participation in international organizations.

The aforementioned categories are addressed in more detail in the following. It should be noted, though, that the below discussion does not aim to provide a comprehensive, detailed interpretation of each of the provisions in WTO Agreements that are relevant in this context. Rather, the below discussion refers to some of the relevant provisions in WTO Agreements by way of example only.

1.1 EXEMPTION FROM OBLIGATIONS

This category relates to WTO provisions that (fully or partially) exempt developing/least developed countries from obligations that would otherwise apply to these countries. These exemptions apply *ipso iure*, i.e. there is no requirement for developing/least developed countries to request the prior approval of a WTO body for making use of these exemptions. Some examples of such exemptions are given below, based on the Agreement on Agriculture (the “AoA”) and the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”).

Agreement on Agriculture

The AoA includes two provisions that *partially* exempt developing countries from reduction commitments relating to domestic support, on the one hand, and export competition, on the other. These two provisions are Article 6.2 AoA and Article 9.4 AoA. Moreover, the AoA includes a provision that fully exempts least developed countries from any reduction commitments. This provision is Article 15.2 AoA.

In the context of domestic support reduction commitments, Article 6.2 AoA provides as follows:

“In accordance with the Mid-Term Review Agreement that government measures of assistance, whether direct or indirect, to encourage agricultural and rural development are an integral part of the development programmes of developing countries, investment subsidies which are generally available to agriculture in developing country Members and agricultural input subsidies generally available to low-income or resource-poor producers in developing country Members shall be exempt from domestic support reduction commitments that would otherwise be applicable to such measures, as shall domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops. Domestic support meeting the criteria of this paragraph shall not be required to be included in a Member’s calculation of its Current Total AMS.”

Pursuant to Article 6.2 AoA, certain domestic support measures of developing countries are exempt “from domestic support reduction commitments that would otherwise be applicable to such measures”. The measures that benefit from this exemption are: (a) investment subsidies; and (b) agricultural input subsidies. Both measures must meet certain conditions to benefit from the exemption. In the case of investment subsidies, the subsidies have to be “generally available to agriculture in developing country Members”. In the case of agricultural input subsidies, the subsidies have to be “generally available to low-income or resource-poor producers in developing country Members”. Moreover, a third measure that benefits from said exemption consists of domestic support to producers in developing country members in order “to encourage diversification from growing illicit narcotic crops”.

The conditional nature of the exemption is highlighted by the last sentence of Article 6.2 AoA. According to this sentence, the domestic support reduction commitments do not apply to domestic support “*meeting the criteria of this paragraph*”. In contrast, the exemption is not subject to any time limit. Hence, developing countries continue to benefit from that exemption. Countries wanting to make use of this flexibility have to comply with the procedural requirement to notify domestic support measures for which the exemptions are requested.

In the context of export subsidy reduction commitments, Article 9.4 AoA states the following:

“During the implementation period, developing country Members shall not be required to undertake commitments in respect of the export subsidies listed in subparagraphs (d) and (e) of paragraph 1 above, provided that these are not applied in a manner that would circumvent reduction commitments.”

According to Article 9.4 AoA, developing countries are exempt from reduction commitments regarding the export subsidies listed in Article 9.1(d) [subsidies reducing the costs of marketing exports of agricultural products] and (e) [internal transport and freight charges more favorable for export shipments than for domestic shipments].

The exemption provided for by Article 9.4 is conditional in two respects. First, the exemption is subject to the proviso that the export subsidies concerned “*are not applied in a manner that would circumvent reduction commitments*”. Second, the exemption only applies “*during the implementation period*”, which means the six-year period that commenced in 1995, pursuant to Article 1(f) AoA.

As regards least developed countries, the second sentence of Article 15.2 AoA reads:

“[...] Least developed country Members shall not be required to undertake reduction commitments.”

In contrast to developing countries, least developed countries are fully exempt from reduction commitments, in respect of both domestic support and export subsidy reduction commitments. Further, this exemption is not limited in time.

Agreement on Subsidies and Countervailing Measures

Article 27 of SCM Agreement is the central provision on S&DT for purposes of this agreement. Among others, this provision fully exempts developing countries from the prohibition of export subsidies, provided for by Article 3.1(a) SCM Agreement. The relevant provision is Article 27.2 SCM Agreement which states as follows:

“The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.

Article 27.2 SCM Agreement distinguishes between two groups of developing countries: those set out in Annex VII to the SCM Agreement (which include in particular the least developed countries) and all other developing countries. This distinction matters because different conditions apply to each group.

The exemption from the prohibition of export subsidies granted to developing countries referred to in Annex VII is not subject to any conditions, as per Article 27.2 SCM Agreement. Hence, the exemption enjoyed by this group of developing countries is, in principle, unconditional. However, the exemption has to be read in conjunction with Article 27.5 SCM according to which developing countries have to phase-out export subsidies granted to those products for which they have reached export competitiveness². This phase-out obligation also applies to “*a developing country Member which is referred to in Annex VII*”. Consequently, the exemption for developing countries referred to in Annex VII is subject to

² Article 27.6 SCM Agreement defines the export competitiveness in the context of this agreement.

the condition that they do not reach export competitiveness in a given product. Otherwise, export subsidies provided to a product for which export competitiveness has been reached need to be gradually phased out over a period of eight years.

The second group of developing countries, namely all developing countries not referred to in Annex VII, also benefit from the exemption from the prohibition of export subsidies but on a conditional basis. These conditions are threefold. First, the exemption is limited in time. Second, the exemption is subject to “*compliance with the provisions in paragraph 4*”. The latter provision requires, inter alia, that: (a) the export subsidies be phased out, preferably in a progressive manner; and (b) the level of export subsidies not be increased during the exemption period. Third, the exemption is based on the premise that a developing country does not reach export competitiveness in any product for which it grants export subsidies. Otherwise, the export subsidies for any product which has become export competitive have to be gradually phased out over a period of two years, according to Article 27.5 SCM.

As regards the aforementioned time limitation of the exemption for developing countries not referred to in Annex VII, it has to be noted that the exemption only applied for a period of eight years from the date of entry into force of the WTO Agreement, i.e. 1 January 1996. However, Article 27.4 SCM Agreement provides for a procedure whereby developing countries could enter into consultations with the Subsidies Committee with a view to extending the phase out period; such consultations had to be requested at the latest one year before the expiry of the eight year exemption period. Any extensions had to be determined by the Subsidies Committee after an examination of all the relevant economic, financial and development needs of the developing country in question and were subject to an annual review by the Subsidies Committee in order to determine the necessity of maintaining the export subsidies. In July 2007, in response to continuous implementation challenges faced by a number of developing countries, the General Council adopted a decision whereby some 16 developing countries may continue requesting an extension of the phase-out period until the end of 2013, with a final phase-out period of two years ending on 31 December 2015.³

Observations Regarding Exemptions from Obligations

The above-mentioned provisions of both the AoA and the SCM Agreement lead to the following observations:

- Existing provisions in some WTO Agreements exempt developing and least developed countries from certain obligations that would otherwise apply to these countries, i.e. these exemptions apply automatically without the need for prior approval by a WTO body;
- The said exemptions sometimes distinguish between different groups of developing countries, that is between developing countries and least developed countries;
- The scope of the said exemptions is either partial or full in nature;
- The said exemptions are subject to certain conditions, except exemptions for least developed countries; and
- The said exemptions sometimes expire after a given deadline but may provide for the possibility to apply for an extension of the deadline. Extensions may be granted for individual countries or for a group of countries. The said exemptions for least developed countries are not subject to any time limits.

³ WT/L/691: WTO General Council, Article 27.4 of the Agreement on Subsidies and Countervailing Measures, Decision of 27 July 2007, 31 July 2007.

1.2 TRANSITION PERIODS

This category concerns WTO provisions that set out transition periods for developing countries and LDCs with respect to the implementation/application of all or certain obligations under a given WTO Agreement. These transition periods are effective *automatically*, that is to say that no specific request has to be made and that no prior approval by a WTO body is required for making use of these transition periods. Some examples of such transition periods are illustrated below, based on the Agreement on the Application of Sanitary and Phytosanitary Measures (the “*SPS Agreement*”), the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (the “*Customs Valuation Agreement*”), and the Agreement on Trade Related Intellectual Property Rights (the “*TRIPS Agreement*”).

SPS Agreement

The SPS Agreement contains a provision that grants developing and least developed countries a transition period regarding the application of SPS measures. This provision is Article 14 SPS Agreement which reads:

“The least developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.”

Similar to Article 27.2 SCM Agreement, Article 14 SPS Agreement differentiates between least developed countries, on the one hand, and “*other developing countries*”, on the other. This distinction has ramifications for both the length of the transition period as well as the conditionality of the transition period.

Least developed countries benefited from a transition period of five years following the date of entry into force of the WTO Agreement. During this transition period, least developed countries “may delay application of the provisions” of the SPS Agreement “*with respect to their sanitary and phytosanitary measures affecting importation or imported products*”. In other words, least developed countries were not required to apply the provisions of the SPS Agreement for a period of five years, starting with the entry into force of the WTO Agreement. This transition period was unconditional and applied to all provisions of the SPS Agreement.

Developing countries also benefited from a transition period but this transition period was shorter and subject to certain conditions. The transition period was two years following the date of entry into force of the WTO Agreement but it did not apply to Article 5.8 and Article 7 (transparency) of the SPS Agreement. Furthermore, the transition period was conditional on the fact that the “*application [of the SPS measure] is prevented by a lack of technical expertise, technical infrastructure or resources*”.

Customs Valuation Agreement

Article 20.1 and 2 Customs Valuation Agreement differ from Article 14 SPS Agreement in that these provisions do not distinguish between least developed and developing countries. However, only developing countries which were not parties to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 (the so-called Tokyo Customs Valuation Code) could avail themselves of Article 20.1 and 2 Customs Valuation Agreement. These provisions state:

“1. Developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may

delay application of the provisions of this Agreement for a period not exceeding five years from the date of entry into force of the WTO Agreement for such Members. Developing country Members who choose to delay application of this Agreement shall notify the Director-General of the WTO accordingly.

2. *In addition to paragraph 1, developing country Members not party to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade done on 12 April 1979 may delay application of paragraph 2(b)(iii) of Article 1 and Article 6 for a period not exceeding three years following their application of all other provisions of this Agreement. Developing country Members that choose to delay application of the provisions specified in this paragraph shall notify the Director-General of the WTO accordingly.”*

According to the first paragraph of Article 20 Customs Valuation Agreement, developing countries benefited from a five year transition period. During that period, developing countries were able to “*delay application of the provisions*” of the Customs Valuation Agreement without having to comply with any substantive conditions, except a procedural requirement to notify the Director-General of WTO if they made use of the transition period.

Pursuant to the second paragraph of Article 20 Customs Valuation Agreement, an *additional* transition period of three years was available to developing countries, after the initial transition period under Article 20.1 Customs Valuation Agreement had expired. This additional transition period was more limited in scope, though, because it only applied to “*paragraph 2(b) (iii) of Article 1 and Article 6*” whereas all other provisions of the Customs Valuation Agreement had to be applied. The same notification requirement as for the initial transition period applied to this additional transition period.

Agreement on Trade Related Intellectual Property Rights

Article 65.1 TRIPS Agreement provides for a transitional period of one year from date of entry into force of the Agreement to all members to delay the application of the entire agreement. Further to this general transitional period, developing countries and economies in transition may make use of an additional transitional period of four years (Art. 65.2 and Art. 65.3) and LDCs may make use of an additional transitional period of 10 years (Art. 66.1). These additional transitional periods however, do not cover the entire agreement. The obligations of Article 3, 4, and 5 (respectively National Treatment, Most Favoured Nation (MFN), and Multilateral Agreements on Acquisition or Maintenance of Investment Policy Reviews (IPRs)) of the TRIPS Agreement are excluded from the additional transitional periods and apply to all Members after the one year from entry into force of the agreement.

Developing countries and economies in transition therefore could delay application of the provisions of the agreement -excluding those of Article 3, 4, and 5- until 1 January 2000, and LDCs until 1 January 2006. Furthermore, LDCs have the possibility to request an extension of this additional transitional period from the TRIPS Council.

Article 66.1 reads:

“In view of the special needs and requirements of least developed country Members [...], such Members shall not be required to apply the provisions of this Agreement, other than Articles 3,4, and 5, for a period of 10 years from the date of application as defined under paragraph 1 of Article 65. The Council for TRIPS shall, upon duly motivated request by a least developed country, accord extensions of this period”.

The transitional periods contained in Article 65.2 and 66.1 are automatically effective. Only Article 65.3 introduces conditionality for this transitional period to apply insofar as these countries must undertake structural reforms of their intellectual property system and must be facing problems in implementing IP laws and regulations. This condition, however, seems to be fulfilled per se in the context of the transition to a market economy.

Paragraph 5 of Article 65 introduces a stand-still clause applying during the additional transitional periods of Article 65. It is, nevertheless, not clear to what extent this clause also applies to Article 66.1.

“A Member availing itself of a transitional period [...] shall ensure that any changes in its laws, regulations and practice made during that period do not result in a lesser degree of consistency with the provisions of this Agreement”.

Article 65.4 TRIPS Agreement provides for another transitional period available for developing countries. This transitional period, however, is limited to a specific type of IPR; *“patent protection to areas of technology not so protectable in [a Member’s] [...] territory”* at the entry into for the agreement. Article 65.4 has to be read in conjunction with Article 70.8 and 9 further defining obligations for members invoking this additional transition period.

Observations Regarding Transition Periods

Based on the aforementioned provisions of both the SPS Agreement and the Customs Valuation Agreement, the following observations may be made:

- Existing provisions in some WTO Agreements provide for transition periods for developing and least developed countries, sometimes making a distinction between the two groups of countries;
- Transition period in these agreements means that the developing countries and LDCs may delay the application of all or some of the provisions of the Agreement in question for a certain period of time, ranging from two to eight years;
- In the agreements under revision in this study the transitional period time frame is fixed against the entry into force of the agreement;
- Transition periods are sometimes broken down in initial and additional periods, with the additional period being more limited in scope than the initial period. Transition periods available to least developed countries are not subject to any conditions;
- Transition periods available to developing countries other than least developed countries are sometimes subject to conditions of a purely technical nature, e.g. the lack of technical expertise, infrastructure or resources required for implementing the agreement concerned;
- Making use of a transition period may trigger a requirement to *notify* WTO accordingly, but is not subject to prior approval by any WTO body.
-

1.3 POSITIVE S&DT MEASURES

This category refers to WTO provisions that acknowledge the special needs of developing/least developed countries and call for positive measures to accommodate their special needs as regards the subject-matters covered by the provisions concerned. Some examples of such provisions are set out below, based on the SPS Agreement and the Agreement on Technical Barriers to Trade (the “TBT Agreement”).

SPS Agreement

Article 10 SPS Agreement calls for certain measures that respond to the special needs of developing and least developed countries regarding SPS measures and compliance with the SPS Agreement. The first three paragraphs of this provision state as follows:

“1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least developed country Members.

2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.

3. *With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.*"

The first paragraph of Article 10 SPS Agreement is based on the premise that developing countries, in particular LDCs, have special needs in the area of SPS measures. These special needs have ("shall") to be taken into account by WTO members in both the preparation and the application of SPS measures. The provision does not prescribe, however, how a WTO member ought to take account of the special interests of developing/least developed countries when preparing and applying SPS measures.

The second paragraph of Article 10 SPS Agreement relates to the application of *new* SPS measures, including to products of interests to developing countries. When introducing any new SPS measure, WTO members "should" grant longer time frames of compliance to such products so as to maintain opportunities for their exports. This "phased" introduction of new SPS measures is subject to the condition that it is not contrary to the appropriate level of SPS protection to be achieved by the said measures.

The third paragraph of Article 10 of the SPS Agreement deals with "*specified, time-limited exceptions in whole or in part from obligations*" under the SPS Agreement which may be granted by the SPS Committee, upon request, to developing countries. While these latter exceptions come in addition to the transition periods provided for by Article 14 of the SPS Agreement, these exceptions differ from the transition periods in that they do not apply automatically. Rather, a developing country wishing to avail itself of such an exception has to submit a request to the SPS Committee which then has to take a decision on whether or not to grant the requested exception. In taking a decision on whether to grant such an exception, the SPS Committee has to take account of the "*financial, trade and development needs*" of the developing country requesting the exception. The aim of granting such exceptions to developing countries is to ensure that they "*are able to comply with the provisions*" of the SPS Agreement.

TBT Agreement

In a manner similar to Article of the 10 SPS Agreement, Article 12 of the TBT Agreement focuses on S&DT as regards technical barriers to trade. Among others, the provision acknowledges both the special problems and the special needs of developing/least developed countries with respect to the implementation of the TBT Agreement and the preparation and application of technical regulations, standards and conformity assessment procedures. In part, Article 12 of the TBT Agreement provides:

"12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

[...]

12.8 [...] Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the 'Committee') is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological

development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least developed country Members.”

The second paragraph of Article 12 of the TBT Agreement seeks to address the “special development, financial and trade needs” of developing countries by requiring (“shall”) WTO members to take account of these special needs *“in the implementation”* of the Technical Barriers to Trade (TBT) Agreement. This obligation applies to the implementation of the TBT Agreement at domestic level and the operation of its institutional arrangements, in particular as regards the TBT Committee. The provision does not specify, though, how WTO members have take account of the special needs of developing countries in implementing the TBT Agreement.

Like the second paragraph, the third paragraph of Article 12 TBT Agreement is concerned with the *“special development, financial and trade needs”* of developing countries. In contrast to the second paragraph with its emphasis on the implementation of the TBT Agreement as such, the third paragraph is more specific in that it focuses on the central issue of the TBT Agreement, namely the *“preparation and application of technical regulations, standards and conformity assessment procedures”*. In this respect, the provision mandates (“shall”) that WTO members take account of the said special needs of developing countries *“with a view to ensuring”* that the *“aforementioned technical barriers to trade”* do not create unnecessary obstacles to exports from developing countries”. Arguably, this is a special necessity test, in addition to the necessity test set out by Article 2.2 of the TBT Agreement, because the special needs of developing countries have to be included in the process of balancing required by the necessity test.

The eighth paragraph of Article 12 of the TBT Agreement is similar to Article 10.3 SPS Agreement in that it confers the power on the TBT Committee to grant, upon request, developing and least developed countries *“specified, time-limited exceptions in whole or in part from obligations”* under the TBT Agreement (it is to be noted in this context that the TBT Agreement does not provide for any automatic transition period for developing countries, such as the SPS Agreement). The TBT Committee must take account of the special problems, the special needs and the stage of technological development of the developing country requesting an exception when considering the request. The exceptions pursue the goal of ensuring that developing countries *“are able to comply”* with the TBT Agreement.

Observations Regarding Positive S&DT Measures

Based on the foregoing provisions of the SPS and TBT Agreements, the following observations can be made:

- Existing provisions in some WTO Agreements require WTO Members to take account of the special problems and special needs of developing and least developed countries, in particular their special development, financial and trade needs, in the preparation and application of measures covered by the agreement in question; and
- WTO Committees are enabled to grant to developing and least developed countries, upon their request, specified, time-limited exceptions in whole or in part from obligations under the agreement in question, having regard to the special problems and special needs of the country requesting an exception. Any such exceptions have to be differentiated from exemptions and transition periods since these exceptions do not apply automatically but require a request from a developing country and a positive decision by the Committee in question.

1.4 TRANSPARENCY REQUIREMENTS

This category relates to WTO provisions regarding transparency that put a particular emphasis on (products of) developing countries. Examples of such provisions are referred to below, based on the SPS Agreement and the TBT Agreement.

SPS Agreement

Par. 9 of Annex B to the SPS Agreement concerning transparency of SPS regulations states:

“The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.”

Notifications in the sense of par. 9 of Annex B to the SPS Agreement relate to (proposed) SPS regulations of a WTO member which may have a significant effect on trade of other WTO Members. Such (proposed) SPS regulations have to be notified to the WTO secretariat where (a) an international standard, guideline or recommendation does not exist or (b) the content of the (proposed) SPS regulation is not substantially the same as the content of an international standard, guideline or recommendation. Where such SPS regulations concern “products of particular interest” to developing countries,⁴ the WTO secretariat has to draw the attention of developing countries to the notifications of such regulations.

TBT Agreement

Article 10.6 of the TBT Agreement reads:

“The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.”

Notifications within the meaning of Article 10.6 TBT Agreement relate to all notifications required by the TBT Agreement, including notifications of (proposed) technical regulations in accordance with Article 2.9 of the TBT Agreement, (proposed) conformity assessment procedures in accordance with Article 5.6 of the TBT Agreement or agreements on issues related to technical regulations, standards or conformity assessment procedures in accordance with Article 10.7 TBT Agreement. Where such notifications concern “products of particular interest” to developing countries,⁵ the WTO secretariat has to draw the attention of developing countries to such notifications.

Observations Regarding Transparency Requirements

The abovementioned provisions of the SPS and TBT Agreements allow the following observation:

- Several WTO Agreements contain transparency provisions which require the WTO Secretariat to draw developing countries’ attention to notifications by WTO Members regarding their (proposed) measures where such notifications relate to products of particular interest to developing countries.

1.5 PARTICIPATION OF DEVELOPING COUNTRIES IN RELEVANT INTERNATIONAL ORGANIZATIONS

This category refers to WTO provisions that seek to foster the active participation of developing countries in international organizations relevant to the subject matter covered by the agreement in question. Examples of such provisions are illustrated below, based on the SPS and TBT Agreements.

SPS Agreement

Article 10.4 SPS Agreement provides:

⁴ Note that the term “products of particular interest” is not defined by par. 9 of Annex B to the SPS Agreement.

⁵ Note that the term “products of particular interest” is not defined by Article 10.6 TBT Agreement.

“Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.”

The relevant international organizations are those responsible for the international standards, guidelines and recommendations on the various measures covered by the SPS Agreement. WTO members are required to *“base their sanitary and phytosanitary measures on international standards, guidelines or recommendations, where they exist”* as per Article 3.1 SPS Agreement. Therefore, Article 3.4 SPS Agreement requires WTO members *“to play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies [...] to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.”* It is for this reason that Article 10.4 SPS Agreement calls on WTO members (“should”) to encourage and facilitate the *“active participation of developing countries”* in these organizations.

TBT Agreement

Article 11.2 TBT Agreement reads:

“Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.”

The code of good practice for the preparation, adoption and application of standards, set out in Annex 3 to the TBT Agreement, provides that standardizing bodies are, in principle, to use international standards, or the relevant parts thereof, as a basis for the standards they develop. Further, standardizing bodies are to play a full part, within the limits of their resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matters for which they either have adopted, or expect to adopt, standards. This is why Article 11.2 TBT Agreement requires WTO members (“shall”) to grant developing countries technical assistance regarding their participation in these international standardizing bodies.

Observations Regarding Participation in Relevant International Organizations

In light of the aforementioned provisions of the SPS and TBT Agreements, the following observation can be made:

- Some WTO provisions seek to enable the participation of developing countries in international organizations and bodies which are of relevance to the functioning of the WTO Agreement in question by calling on WTO members to support, including through the provision of technical assistance, developing countries’ participation in such organizations and bodies.

1.6 SUMMARY OF FINDINGS

The foregoing observations lend support to some preliminary conclusions regarding: (a) the differentiation between exemptions, transition periods and specified, time-limited exceptions; (b) the direct and indirect effect of the different types of favourable treatment of developing countries provided for in WTO Agreements; and (c) the way in which these WTO Agreements structure the provisions on said favourable treatment.

Exemptions, Transition Periods and Specified, Time-Limited Exceptions

WTO Agreements distinguish between exemptions, transition periods and specified, time-limited exceptions. Although these instruments are legally distinct, in practical terms they lead to similar results in terms of the flexibility provided to developing countries benefiting from these instruments.

Exemptions exempt developing countries from the application of certain obligations under an Agreement that would otherwise apply to these countries, absent the exemption. If such exemptions are subject to a given deadline, the obligations in question will apply to developing countries once the deadline has expired. In contrast, transition periods only defer the application of obligations incumbent on WTO developing country members under an agreement until the point in time when the transition period has lapsed. Exemptions and transition periods thus lead to the same result, in practical terms, whenever an exemption is limited in time. Exemptions for least developed countries, however, may not be subject to any deadline.

In contrast to exemptions and transition periods, specified, time-limited exceptions from certain or even all obligations under an Agreement do not apply *ipso jure* to developing countries. Rather, these exceptions have to be requested by a developing country that wishes to avail itself of such an exception. Any such request will have to be granted by the Committee in charge of the Agreement concerned which has to take account of the special problems and special needs of the developing country in question when considering the request.

Direct and Indirect Effect

The aforementioned types of favourable treatment of developing countries do not all have the same effect. Put differently, some are of direct effect whereas others are of indirect effect.

Exemptions and transition periods are of direct effect because they are automatically available to developing countries, irrespective of the fact that both exemptions and transition periods may require compliance with certain conditions (albeit not in the case of least developed countries). The same is true for the transparency requirements in the context of both the SPS and TBT Agreements.

Specified, time-limited exceptions are of an indirect effect in that developing countries wishing to avail themselves of these exceptions have to submit a request; in addition, any such request has to be decided on by the Committee in charge of the Agreement concerned. Somewhat similar are provisions in WTO Agreements that seek to enhance participation of developing countries in relevant international organizations since they presuppose the active support of developed countries in this respect.

Structure of Provisions Regarding SD&T

The provisions in WTO Agreements providing for favourable treatment of developing countries are not always entitled “special and differential treatment”. Although this has no bearing on the legal meaning of the provisions concerned, it would seem advisable that a future TF Agreement should group all provisions relating to S&DT in a dedicated section of the Agreement under the heading “special and differential treatment”, for reasons of transparency and the importance of S&DT measures for the overall functioning of the Agreement.

2. TECHNICAL ASSISTANCE DELIVERY OBLIGATIONS

Several WTO Agreements contain provisions regarding technical assistance delivery in support of the implementation of the agreement and application of individual commitments in question. These provisions differ in a number of ways, reflecting the needs for technical assistance arising from the challenges set by the respective agreement’s scope and disciplines. (See the annex for the detailed comparative presentation of technical assistance provisions included in different existing agreements).

2.1 TYPOLOGY

Three main elements are usually contained in most existing WTO Agreements with regard to the provisions for technical assistance: an indication of who is obliged, or expected, to provide the technical assistance in question; an indication of who is the recipient of the technical assistance; and, what type of technical assistance is to be provided. Technical assistance delivery positions also differ with regards to the legal nature of the commitment.

a) Who is Obligated or Expected to Provide Technical Assistance?

Technical assistance provisions usually indicate who is obliged, or expected, to provide the technical assistance in question. Many provisions state in general terms that “members” – which in principle would include all members, developed and developing – are obliged or expected to provide technical assistance. Other provisions specify (only) developed country Members or, in some cases, also “*to the extent possible other Members.*” Some provisions more specifically target involved members as providers, usually defined by the trading context (e.g. exporting member, importing member).

In some provisions, members are specifically requested to work through certain bodies, such as “*regulatory bodies within their territory,*”⁶. In such instances, the obligation is limited, for example, to the “*encourage[ment]*”⁷ of such bodies to provide the assistance needed.

The WTO secretariat can also be obliged or expected to provide technical assistance, either alone or alongside with members.

Existing and future WTO Agreements, in the absence of special circumstances, create direct legal obligations only for Members and the WTO secretariat, and hence do not directly address non-members (other than observers) and other organizations. It can however, create soft forms of inclusion of these third parties through, for example, an obligation on Members or the Secretariat to work with or through certain organizations where appropriate.

b) Who is the Recipient of Technical Assistance?

The provisions differentiate in some cases recipients by type of country and/or by type of institution.

Some WTO provisions do not actually limit the range of recipients, referring to “Members”, and thereby at least in principle including all members. Other provisions explicitly refer, for example, to “*Members, especially the developing country Members*” as potential beneficiaries of expected technical assistance. Other provisions limit the circle of recipients clearly to developing countries, including both LDC and non-LDC members, or limiting the assistance to LDCs only. A soft priority for LDCs through language such as “*developing country Members, in particular LDCs*” is also found.

c) What Type of Technical Assistance?

WTO provisions generally refer to technical assistance, coupled in some instances with financial assistance. Some provisions provide further detail as to the type of assistance to be provided. Usually, they differentiate with regards to the form, the target activity to be supported and the purpose of the technical assistance.

Form

Often the specific form of technical assistance is not specified in the relevant provisions. Among those provisions where more defined specification is provided, the most usual reference is made to the provision of information and advice.

Such obligations to provide information or advice often relate to national measures introduced by a member and with which other members’ trade in goods or services is expected to comply. Advice is also mentioned regarding the establishment of national standards bodies in or by the recipient member or the participation of that member or its

⁶ See e.g. Article 11.3 TBT Agreement.

⁷ See e.g. Article 11.2 TBT Agreement.

standards body in international standards bodies. Training, a rather important form of technical assistance, is rarely specifically mentioned in existing WTO provisions.

Target (activity to be supported by technical assistance)

Regarding the target activity, that is to be supported by the assistance, several provisions foresee support for trade-related institutions building, for example in the establishment of national standards bodies. Others envisage support for trade-related national legislative and regulatory activities. Some envisage support in the recipient's participation in organizations, such as international standards bodies.

Some provisions foresee some – usually indirect – support to private sector activities, in particular to conform to Members' requirements by upgrading and changing production processes, strengthening conformity assessments, and standards regulation.

Purpose

Some provisions specifically and explicitly focus on the provision of assistance to a member for the purpose of achieving compliance with WTO obligations. Other provisions focus on the compliance of businesses (usually producers/exporters) with national trade regulation measures of (other) Members (usually importing members).

Nature of Commitment

The nature and strength of the obligation to provide, and the entitlement to receive, technical assistance of the provisions varies from one existing agreement to another.

Some provisions provide for "hard" legally binding obligations to provide technical assistance, be it triggered or not by certain conditions (for example a request). The key legal term used is usually "*shall*." Some provisions establish only "soft" obligations, using classical "best endeavor" language: "*should*", "*best endeavour*".

Some technical assistance provisions found in WTO agreements are hybrids; combining "hard" obligations with criteria. This is the case, for instance, where a member "*shall*" (*i.e.*, is obliged to) provide technical assistance, but only "on mutually agreed terms and conditions" – a language found in several provisions. Here a member, although legally obliged in principle, may *de facto* block the obligation from taking hold by avoiding the required mutual agreement on terms and conditions. This arguably dilutes the legal force, and hence the entitlement of the potential recipients. The latter problem is a point raised repeatedly in the ongoing DDA negotiations on Special and Differential Treatment provisions.

In some cases the legal force of the obligation remains entirely vague. This is the case, for example, where members "*agree to facilitate the provision of technical assistance.*"⁸

2.2 TECHNICAL ASSISTANCE NEEDS AND PRIORITIES

Technical assistance provisions in WTO Agreements create obligations to provide technical assistance. Such provisions, however, only create a weak or non-mandatory legal obligation, and are usually kept unspecific in terms of form and purposes. This has led to concerns with regard to putting into practice the technical assistance provisions of the WTO Agreements; how can it be ensured that developing country members fulfill their obligations and that the assistance provided is adequately designed and targeted to assist developing countries in overcoming their compliance and implementation difficulties?

The identification of technical assistance needs and priorities, and enhanced transparency on technical and financial assistance through monitoring and reporting, have been identified

⁸ Article 9.1 SPS Agreement.

by members as important elements for improving the effectiveness of the technical assistance (TA) provisions.

Existing WTO Agreements, however, do not contain any guidance on these two elements. Procedures for the identification of TA needs and reporting and notification on these needs and TA delivery have been adopted by some committees and councils. The examples below provide an overview of the decisions adopted in relation to TA needs and priorities identification.

SPS committee

Technical assistance and S&DT are regular agenda items of meetings of the SPS Committee. Notably, members are invited to present their specific TA needs during these meetings. With the aim to *“offer developing countries the possibility to present their specific needs in the SPS area in a way which helps to better ensure the provision of targeted and efficient technical assistance.”* the WTO secretariat prepared two questionnaires on technical assistance; one in July 1999 for information on TA provided, and the other one in July 2001 on TA needs (SPS/W/113). By June 2005, 33 members had replied using the form. These replies are updated by the member whenever the need occurs.⁹

In addition to the questionnaire on technical assistance needs, the WTO secretariat has produced a note on *“Technical Assistance Typology within the SPS Agreement”* (G/SPS/GEN/206 of 18 October 2000). This note is a useful addition to the technical assistance provisions found in Article 9 SPS Agreement. It ascertains that *“the objectives of technical assistance and cooperation are to help beneficiary countries improve their understanding of the SPS Agreement, implement the obligations and fully benefit from rights derived there from”* and outlines possible technical assistance activities grouped into three types of TA: information, training, and infrastructure development. Although in essence limited to technical assistance, which can be delivered by the WTO secretariat, the Annex to the document also lists areas of intervention of international organizations and technical bodies, such as IPPC, OIE, and FAO/WHO.

TBT Committee

Technical Assistance features regularly on the agenda of the annual and the triennial reviews of the TBT Agreement regular meetings of the TBT Committee. The TBT Committee has discussed ways to improve transparency in demand and supply of TA, and agreed in 2000 during the second triennial review to develop a demand-driven technical cooperation programme. This programme rests on four central elements; *“a survey on needs identification and prioritization by developing country Members; consideration of existing technical assistance activities by multilateral, regional and bilateral organizations; enhancement of cooperation between donors; and identification of technical assistance partners and financial considerations.”*¹⁰

This *“demand-driven technical assistance programme”* is, to date, the most ambitious attempt to match technical assistance needs with technical assistance provision within a WTO Agreement.

In order to conduct the survey on developing countries' TA needs and priorities the WTO secretariat developed a questionnaire (G/TBT/W/178). In this questionnaire, members are invited to screen the overall implementation of the agreement and provide information on the current situation, specific problems, difficulties and interests, and technical assistance activities required. As of November 2003, 53 Members replied to the secretariat using the questionnaire. A compilation as well as an analysis of their replies was undertaken by the

⁹ Countries responses can found as addenda to G/SPS/GEN/295.

¹⁰ G/TBT/13, 13 November 2003, page 8.

secretariat.¹¹ Members have been since then invited to update their responses continuously and updates are included in the annual review of the Committee.

TRIPS Council

The decision of the TRIPS Council of 29 November 2005 (IP/C/40) Article II:2 invites LDCs to provide to the Council an assessment of their TA needs and priorities, ideally by 1 January 2008. The decision reads as follows:

"[...]2. With a view to facilitating targeted technical and financial cooperation programmes, all the least developed country Members will provide to the Council for TRIPS, preferably by 1 January 2008, as much information as possible on their individual priority needs for technical and financial cooperation in order to assist them taking steps necessary to implement the TRIPS Agreement. [...]"

The council has, however, not provided further guidance on how to conduct the needs assessment, as was the case with the questionnaires and survey developed in the SPS and TBT Agreement context. The International Center for Sustainable Development (ICTSD) has developed an assessment methodology and provides assistance upon request to countries in undertaking needs assessments based on this methodology. At this date and using the above cited methodology two LDCs, Sierra Leone, and Uganda, have provided information pursuant to Article II:2 of the Decision to the Council.

In the same decision, members have strengthened the link between technical assistance needs and technical assistance provided by stating in Article II:3 that:

"[...]3. Developed country Members shall provide technical and financial cooperation in favour of least developed country Members in accordance with Article 67 of the Agreement in order to effectively address the needs identified in accordance with paragraph 2."

2.3 SUMMARY OF FINDINGS

Provisions on technical assistance contain information on the targeted recipients, providers of the technical assistance, and types of technical assistance to be provided. Developed country donor members, multilateral organizations and the WTO secretariat have different roles with regard to the implementation of these provisions and are often referred to separately. The provisions vary widely in respect of forms, target and specific purposes. The predominant forms of technical assistance are information, advice and training. Some agreements, such as the TBT Agreement, focus in their technical assistance provisions on particular elements of the agreement such as the establishment of an appropriate institutional framework including a standard setting body and conformity assessments.

The legal nature of the obligation to provide, and the entitlement to receive, technical assistance varies, from "hard", legally binding obligations often using the term "shall" to "soft" obligations, using classical "best endeavour" language such as "should". The legal force of some of the provisions is often further limited by mitigating conditions in the provisions, such as "on mutually agreed terms and conditions" and "to the extent possible."

The fact that the information on the type of technical assistance required is often formulated in vague terms may actually not be negative per se. Every member faces a different implementation context, implementation difficulties and technical assistance needs. It would therefore not seem possible or useful to include a closed definition of these needs in the text of an agreement. Technical assistance is known to be more effective when tailored to specific needs. The review and monitoring of technical assistance activities is also facilitated when put into relation with the actual difficulties and needs expressed by recipient members. Because of their extreme relevance, the identification of technical assistance needs and the

¹¹ The questionnaire is G/TBT/W/178, the responses are compiled in G/TBT/W/186 and G/TBT/W/186/Add.1, and analysed by the Secretariat in G/TBT/W/193.

exchange of information on these needs have therefore received much attention in the discussions at WTO on strengthening the technical assistance provisions.

The supervisory bodies of WTO Agreements play a central role in providing a forum for discussion of technical assistance. In the instances of the TBT and SPS Agreements, surveys of the technical assistance needs have been carried out by the secretariat questionnaires for this purpose and for the general purpose of reporting on technical assistance needs. Matching technical assistance needs with technical assistance provided, or, as expressed in the TBT Committee “demand with supply”, may be however difficult to achieve. The TBT and SPS Committee already play an important role in this by structuring an information exchange on technical assistance, and by matching information on needs with information on delivery.

3. REPORTING, NOTIFICATIONS AND OTHER COMMUNICATIONS

The monitoring of the implementation of an agreement or the application of specific provisions requires communication from member States on actions taken or not taken either on a regular or on an ad-hoc basis. Every agreement therefore contains reporting and notification obligations. Other forms of communication obligations exist as well in the agreements; such as a request for flexibilities, for example the extension of a transitional period, or a notification of change in a schedule of commitments. This chapter reviews a range of provisions in WTO Agreements that reflect obligations relating to such communications.

3.1 REGULAR REPORTING ON MEASURES TAKEN/NOT TAKEN

For the purpose of this document regular reporting obligations are differentiated from notification obligations. Regular reporting requirements, as defined here, are those that require a WTO member to report on a regular, timed basis on developments, or the absence thereof, in one or more areas of (potential) activity. Importantly, such reporting obligations apply irrespective of whether any measures were actually taken. Such reporting thus ideally covers a certain area of regulation not only positively (measures taken) but also negatively (measures not taken). This stands in contrast to notifications, which includes requirements to notify other members specifically if and when certain measures are taken (e.g. technical regulations) and/or if and when certain further qualifying circumstances apply (e.g., no relevant international standard exists). In contrast to regular reporting, such notifications thus relate to, and are triggered by, specific circumstances. That said, both types of communication serve similar purposes, and hybrid forms exist (for example, reporting on “significant changes” in between regular reporting intervals).

a) General reporting

Trade Policy Review Mechanism

The Trade Policy Review Mechanism (TPRM) requires WTO members to provide the Trade Policy Review Body (TPRB) with regular reports regarding their trade policy as a means of enhancing transparency. The WTO secretariat in consultations with the member produces a report that describes the member’s trade policy (in general terms without specifying WTO inconsistencies). The member concerned delivers a separate report in form of a policy statement. Both are then discussed among members in a dedicated session of the TPRB.

The relevant parts of Section D of the TPRM read as follows:

“In order to achieve the fullest possible degree of transparency, each Member shall report regularly to the TPRB. Full reports shall describe the trade policies and practices pursued by the Member or Members concerned, based on an agreed format to be decided upon by the TPRB [...]

[...] Between reviews, Members shall provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format [...].”

As part of the regular TPR, the member concerned is thus asked to cover all that happened, or did not happen, with regard to the areas of trade policy making covered by WTO. Its main purpose is to enhance transparency on the trade policy objectives and measures in place, not to monitor compliance (in a stricter legal sense) with existing WTO obligations.

Section D of the TPRM foresees different reporting periods for members; the first four members in share of world trade are required to report on their trade policy every two years while the next 16 members in share of world trade are required to report every four years. Other members are required to report every six years, with longer reporting periods for LDCs. In addition to this prescriptive reporting period, every member is further required to report on an ad hoc basis on “significant changes”, if and when they occur.

b) Agreements’ specific reporting

SCM Agreement

The SCM Agreement requires members to regularly report on the use, or abstention from the use, of specific subsidies. In what at first sight may appear as a notification obligation (as defined here) Article 25.2 of the SCM Agreement requires the regular (yearly) “notification” of all specific subsidies within their territories:

“Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.”

Interestingly, however, the SCM Agreement in Article 25.6 requires members to inform the secretariat equally if there are no subsidies to report on:

“Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.”

Members are thus required to report in any case, and thus state clearly whether or not they have granted relevant subsidies. Notwithstanding the terminology, both provisions read together thus create the regular reporting requirement as defined here – resulting in a timed and thereby inevitable scrutiny of a certain area of governmental activity, namely the provision of subsidies.

Agreement on Agriculture – Article 18.2

In article 18.2 the Agreement on Agriculture (AoA), a regular review process is prescribed and Members obliged to report regularly on activity (or the absence thereof) in a number of areas using notifications as a reporting tool. The provision reads as follows:

“The review process shall be undertaken on the basis of notifications submitted by Members in relation to such matters and at such intervals as shall be determined, as well as on the basis of such documentation as the Secretariat may be requested to prepare in order to facilitate the review process.”

Interestingly, the AoA combines the general requirement to report on a yearly basis on all activities (or their absence) in an area of the agreement with the obligation for specific notifications when specific measures are taken (e.g. the use of SSG). Details of the reporting procedures are contained in the Committee decision entitled “Notification Requirements and Formats”¹².

¹² G/AG/2, 30 June 1995.

TBT Agreement

While the TBT Agreement is more known for its notification requirements, it is worth noting that Section J of Annex 3 (Code of Good Practice) to the TBT Agreement requires standardizing bodies that have accepted the “Code of Good Practice” to notify their work programmes to the ISO/IEC Information Center in Geneva. As the work programmes themselves must be published every six months, this in fact arguably amounts to a regular reporting obligation.

The relevant parts of Section J of Annex 3 to the TBT Agreement read as below:

“At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period [...]

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standards development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.”

A more general reporting obligation is contained in Article 15.2 TBT Agreement. The provision reads:

“Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee. “

The TBT Committee has adopted in 1995 a decision on the member’s statements under Article 15.2 and the review process.¹³ It is required that the statements *inter alia* provide information on the actions taken on the regulatory level, the names of the publications used to divulge information on work on draft technical regulations or standards and procedures for assessment of conformity and those in which the texts of technical regulations and standards or procedures for assessment of conformity are published, the expected length of time allowed for presentation of comments in writing on technical regulations, standards or procedures for assessment of conformity, the name and address of the enquiry point(s), the name and address of any other agencies that have specific functions under the Agreement. These statements can be updated continuously and members are also invited to make oral statements on progress pursuant to Article 15.2 in regular meetings of the committee. Members’ statements are contained in the G/TBT/2/Add – series and a list of members having submitted their 15.2 Statements is maintained in the G/TBT/GEN/1/ - series. 117 Members had submitted at least once a statement by 2008.

c) Specific reporting obligations for developed country members

The WTO Agreements do not contain specific reporting obligations on the provision of technical and financial assistance by developed or donor country members. In the case of some agreements, such as the TBT, SPS, reporting obligations for developed countries on technical assistance delivery and the S&DT were defined by the supervisory bodies of the agreement, the councils and committees. These reporting obligations, however, remain voluntary. A different situation can be found in the context of the Agreement on Agriculture and the Agreement on trade related intellectual property rights. These two agreements introduce mandatory reporting mechanisms for developed countries on technical assistance delivery in one case and efforts to encourage technology transfer in the other.

¹³ The tenth revision of the compilation of the TBT Committee's Decisions and Recommendations can be found in G/TBT/W/1/Rev.10: Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, Note by the Secretariat, 9 June 20011.

Agreement on Agriculture – Article 16.2

A reporting requirement is contained in the aforementioned document “Notification Requirements and Formats”¹⁴ for the follow-up on the Uruguay Round Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least developed and Net Food-Importing Developing Countries, as foreseen in Article 16.2 of the AoA.

The document foresees that developed country members are required to report, on an annual basis, on technical and financial assistance provided under paragraph 3(iii) of the Decision.

Agreement on Trade Related Intellectual Property Rights

In an attempt to create pressure on developed country governments to comply with obligations under Article 66.2, the TRIPS Council, mandated by the Doha Ministerial Decision on the Implementation-Related issues and concerns of 14 November 2001 (WT/MIN(01)/17), adopted in 2003 a mechanism to ensure the monitoring and full implementation of the obligation (TRIPS Council decision (IP/C/28)). It requires developed countries to submit annual reports on their efforts to encourage technology transfer to LDCs and instructs the Council to review annually these reports during the end of year meeting.

“1. Developed Country Members shall submit annually reports on actions taken or planned in pursuance of their commitments under Article 66.2. To this end, they shall provide new detailed reports every third year and, in the intervening years, provide updates to their most recent reports. These reports shall be submitted prior to the last Council meeting scheduled for the year in question.

2. The submissions shall be reviewed by the Council at its end of year meeting each year. The review meetings shall provide Members an opportunity to pose questions in relation to the information submitted and request additional information, discuss the effectiveness of the incentives provided in promoting and encouraging technology transfer to least developed country Members [...].”

The decision further specifies, with significant detail, the information to be provided by developed country members ranging from an overview of the incentive regime put in place to details about, e.g., types of incentives, responsible government agencies, eligible enterprises/institutions, types of technology transferred, beneficiaries and modes of transfer.¹⁵ The strength of this reporting mechanism is that these reports become publicly available and can thus be scrutinized.¹⁶ The impact of this mechanism is, however, limited by the fact there is no uniform reporting format and the lack of a common definition of the term “*transfer of technology*” and “*incentives to be provided to institutions and enterprises*”. Some developed countries indeed referred to technical assistance and capacity-building when reporting on transfer of technology¹⁷ in the Council.

Concluding Observations on Regular Reporting Obligations

- Some WTO agreements contain obligations for regular reporting of measures by members to enhance transparency in multilateral trade rules;
- Measures subject to regular reporting include those that may have adverse effects on trade such as subsidies whether these measures are taken by members or not;¹⁸

¹⁴ G/AG/2, 30 June 1995.

¹⁵ A list of reports received on activities under Article 66.2 TRIPS Agreement can be found in IP/C/W/522.

¹⁶ Such a comprehensive scrutiny is provided in the UNCTAD-ICTSD Policy Brief Number 2 December 2008; Does TRIPS Article 66.2 encourage technology transfer to LDCs?

¹⁷ See the minutes of the fifth annual review of activities, IP/C/M/55, para 174-180.

¹⁸ An Indicative List of Notifiable Measures is contained in the “Decision on Notification Procedures”- part of the Uruguay package.

- Mandatory reporting obligations on TA delivery and the granting of S&DT measures by developed countries remain limited but are at the core of on-going discussions.

3.2 NOTIFICATIONS OF MEASURES

As indicated above, in this paper notification requirements are separated from reporting obligations and are defined as requirements to notify other members specifically if and when certain measures are taken (e.g. technical regulations) and/or if and when certain further qualifying circumstances apply (e.g. no relevant international standard exists). In contrast to regular reporting, such notifications thus relate to individual events, not (only) a reporting period, and are triggered by specific circumstances, not (only) the passage of time.

As discussed in the preceding section, reporting and notification obligations may operate side by side, and rather effectively so. This section aims to provide an additional, specific focus on some of the numerous notification requirements in the WTO legal system.¹⁹

TBT Agreement

The TBT Agreement contains three provisions that mandate the notification of measures to the WTO if certain conditions or triggers are met. The relevant condition triggering the need to notify in two of these provisions is met when members adopt technical regulations (Article 2.9) and/or conformity assessment procedures (Article 5.6) that are not based on international standards and that may have a significant effect on trade. The third provision requires Members to report (notify) to the WTO when agreements on TBT-related matters with third parties are concluded (Article 10.7).

SPS Agreement

Similar to the TBT Agreement, the SPS Agreement obliges members to notify any new or changed sanitary or phytosanitary measures according to Article 7, and Annex B of the SPS Agreement.

Furthermore, members are obliged to notify any proposal for (draft of) SPS regulation that either does not conform to international standards or where international standards do not exist and that may have a significant effect on trade of other members. Annex B, Section 5 of the SPS Agreement reads as follows:

“Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall: [...]

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account”

Upon the initiative of developing country members, the SPS Committee adopted in 2006 a proposal to enhance transparency on the S&DT provisions within the SPS Agreement, in particular Article 10.2 of the SPS Agreement.²⁰ The proposal foresees that the notification procedure mandated by Article 7 of the agreement shall be extended to include steps regarding the treatment of S&DT regards pursuant to Article 10.2. If such a request had been received, the Member has to update the initial notification of the introduction of a new or amended regulation. The proposed steps were the following:²¹

¹⁹ An Indicative List of Notifiable Measures is contained in the “Decision on Notification Procedures” included in the package of results of the Uruguay Round.

²⁰ See the Committee’s decision to extend the procedure G/SPS/33, 8 February 2006.

²¹ G/SPS/33, 8 February 2006

“Step 6. [...] In the case of such a request from an exporting developing country Member, the importing Member would, in any discussions, examine whether and how the identified problem could best be addressed to take into account the special needs of the interested exporting developing country Member, so as to enable it to satisfy the requirements of the measure. Resolution of the concern identified could include one of the following, or a combination thereof: (1) a change in the measure to be applied on a MFN basis; (2) the provision of technical assistance to the exporting Member; and (3) the provision of special and differential treatment. Should special and differential treatment be provided, it would apply equally to all developing country Members.

Step 7. When a decision is taken on whether and how special and differential treatment may be provided for a final measure in response to specific requests, the notifying Member should promptly submit to the WTO Secretariat an Addendum to its original notification. The Addendum shall indicate: (1) if special and differential treatment was requested; (2) the name(s) of Member(s) that requested special and differential treatment; (3) if special and differential treatment was provided, the form of such treatment; and (4) if not provided, the Addendum shall indicate why special and differential treatment was not provided and whether technical assistance or any other solution was found to address the identified concern.”

Details of this proposed notification procedure are, however, still under discussion.²²

Agreement on Import Licensing

Similar to Article 7 of the SPS Agreement, Article 5.1 of the Agreement on Import Licensing (the “AILP”) obliges members to notify any introduction or change of import licensing procedures. The Article reads as follows:

“Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication.”

Safeguards Agreement

The Safeguards Agreement mandates members to notify to WTO the main steps of a safeguard action taken under the agreement, namely (a) the initiation of the safeguard investigation, (b) the finding of serious injury, and (c) the decision to apply safeguard measures. Article 12.1 Safeguards Agreement prescribes as follows:

“1. A Member shall immediately notify the Committee on Safeguards upon:

- (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;*
- (b) making a finding of serious injury or threat thereof caused by increased imports; and*
- (c) taking a decision to apply or extend a safeguard measure.”*

GATT Article XXIV

GATT Article XXIV: 7 (a) contains notification requirements for the creation or the joining of customs unions and free-trade area. These notification requirements are further developed in the Understanding on the Interpretation of Article XXIV of GATT of 1994, and the Transparency Mechanism for Regional Trade Agreements (the “*Transparency Mechanism*”), adopted in 2006. Because customs unions or free-trade areas have to fulfill a set of criteria to be considered as compatible with WTO law, the main purpose of the notification obligation requirement is to provide information allowing an examination process. To this end, Par. 4 of the Transparency Mechanism states that members that are party to an RTA have to submit the following information;

²² See G/SPS/W/242, 16 June 2009.

“4. [...]They will also provide the full text of the RTA (or those parts they have decided to apply) and any related schedules, annexes and protocols, in one of the WTO official languages; if available, these shall also be submitted in an electronically exploitable format. Reference to related official Internet links shall also be supplied.”

If a member becomes party of an RTA the information to be submitted is the following:

“1 (b) [...] shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.”

Article XXIV: 7 (c) already provided for the obligation to provide “[...] a plan and schedule for the formation of such a customs union or [of] such a free-trade area within a reasonable length of time”. if an interim agreement leading to a customs union or a free-trade area is notified to the WTO under Article GATT XXIV. This obligation applies parties to that agreement.

Pursuant to the Transparency Mechanism parties to RTAs have subsequent notification obligations; (a) if the parties to the RTA introduce any changes to the RTA that affect the implementation or the operation of the agreement (§ 14); and (b) if the RTA is implemented over a transition period, parties to the RTA are required to report on the implementation of liberalization commitments at the end of the transition period (§ 15).

General Agreement on Trade in Services

Article III:3 GATS obliges members to inform the Council for Trade in Services of measures that “significantly affect trade in services” in committed sectors:

“Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.”

At first look, this provision may appear to establish a regular reporting mechanism (“at least annually”). A close look, however, indicates that the obligation remains conditioned: it requires that there are, in fact, measures to report on, namely those that “significantly affect trade in services covered by [the respective Member’s] specific commitments.”

Agreement on Agriculture

The Agreement on Agriculture (AoA) in two instances provides for reporting/notification obligations. As discussed above, Article 18.2, as interpreted by the “Notification Requirements and Formats”²³, includes both reporting and notification obligations.

A separate, and typical, notification requirement is found in Article 18.3 of the agreement. It mandates the notification of domestic support measures for which exemption from reduction commitment is claimed (trigger):

“[...] any new domestic support measure, or modification of an existing measure, for which exemption from reduction is claimed shall be notified promptly. This notification shall contain details of the new or modified measure, and its conformity with the agreed criteria as set out either in Article 6 or in Annex 2.”

Concluding Observations on Notifications

- Notification requirements are characterized by their triggers – the circumstances that lead to the obligation to notify. Notification requirements serve to ensure that ad hoc scrutiny is applied, or facilitated, in situations where specific risks for the trade interests of other Members arise;

²³ G/AG/2, 30 June 1995.

- Specific circumstances that trigger such notifications obligations under WTO agreements and decisions include the following:
 - Introduction of measures that may have adverse effects on trade (AIP and Agreement on Safeguards);
 - Introduction of any changes or modifications of existing measures or laws and regulations (TBT, SPS);
 - Introduction of measures that are not in compliance with international standards or specifications (TBT, SPS);
 - Introduction of measures that are subject to flexibilities (AoA) or use of flexibilities;
- Discussions in the SPS committee may lead to notification requirements if S&DT is requested.

3.3 OTHER COMMUNICATIONS

d) General Waiver (Article IX:3 of the WTO Agreement)

Under WTO law, a member can also request a waiver to suspend certain obligations under the WTO Agreement or any other multilateral agreement. A waiver, in principle, can justify any measures adopted by a requesting party which otherwise would violate its obligations under the WTO Agreement and could not be justified under the foreseen provisions in the Agreements.²⁴

To obtain a waiver, the substantive requirements, as set in Art. IX:3 WTO Agreement, and the procedural requirements as set in Art. IX:3 (a), (b) WTO-Agreement and the “Understanding in Respect of Waivers under GATT 1994” have to be fulfilled. Pursuant to Art. IX:3, the obligations imposed by the WTO Agreement or any other multilateral trade agreement to a party can be waived under the condition that:

- “Exceptional circumstances” prevail; and
- The Ministerial Conference decides to grant the Waiver by at least three-fourth of the Membership.

“Exceptional circumstances” can refer to any circumstances. Measures can be adopted for any purpose, whether or not such end is referred to or in line with the WTO Agreement and its annexes. Exceptional circumstances can mean such diverse things as the historical link of the member States of the EC to their ex-colonial territories,²⁵ or the various problems that arise with the trade of conflict diamonds to a State’s stability, human rights and non-proliferation of firearms.²⁶ However, waivers were granted in most cases for more mundane reasons, namely to allow for tariff-harmonization.²⁷

A request for a waiver concerning the WTO Agreement shall be submitted to the Ministerial Conference (in most cases represented by the General Council). The Ministerial Conference (or General Council) then establishes a time period to decide which shall not exceed 90 days.²⁸ In case a request concerns a Multilateral Trade Agreement in the Annexes 1A (GATT 1994), 1B (GATS) or 1C (TRIPS) of the WTO Agreement, the request shall first be submitted to the respective Council to the agreement for consideration in a time period which shall not exceed 90 days. At the end of the time period the respective council submits a report to the Ministerial Conference.²⁹

²⁴ E.g., Art. XX GATT or Art. XIV GATS.

²⁵ See the waivers granted to the EC for preferential treatment accorded to ACP countries under the Lomé Conventions and the Cotonou Agreement.

²⁶ See the Waiver Concerning Kimberley Process Certification Schemes for Rough Diamonds (G/C/W/432).

²⁷ See table of granted Waivers under Art. IX:3: on the WTO website, WTO Analytical Index.

²⁸ Art. IX:3 (a).

²⁹ Art. IX:3 (b).

The request for a waiver concerning obligations under GATT 1994 has to accomplish certain specific requirements. It has to contain (a) a description of the measures the member proposes to take; (b) the specific policy objectives which the member seeks to pursue; and (c) the reasons which prevent the member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.³⁰ The second and third criteria are worth a closer look:

- *Policy objectives the member seeks to pursue:* Although a WTO waiver can in principle be granted under any “*exceptional circumstances*”, the *understanding* here clarifies that a requesting party has to demonstrate that it pursues a legitimate objective;
- *Reasons which prevent the member from achieving its policy objectives by measures consistent with its obligation under GATT 1994:* In respect of this provision, the requesting member has to demonstrate that, and why, its objectives cannot be achieved by measures that are consistent with the GATT 1994. In other words: that and why the measures adopted are not (even) covered by exceptions such as Art. XX or XXI of GATT 1994. This negative statement required means that members are later likely *de facto* precluded from using any built-in defences should they decide to pursue the measure if a waiver is not granted or when it expires.

Although in legal terms the decision to grant a waiver can be adopted by three fourth of the member States if a decision by consensus cannot be achieved, in practice waivers are adopted by consensus, due to former GATT practice³¹ and as foreseen in Art. IX:3 (a) WTO Agreement. The decision of the Ministerial Conference (or the General Council) shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and a date of expiry.³² A waiver thus does not mean that the requesting party is free from any obligation. The exemption only reaches as far as the waiver specifies, including with respect to the way a measure is applied, and only as long in time as its stated duration. In case a waiver is granted for a period of more than one year the Ministerial Conference shall review it annually and examine if the “exceptional circumstances” still exist and – importantly – whether the terms and conditions attached to the waiver have been met. On the basis of the review, the Ministerial Conference may extend, modify or terminate the waiver.³³

e) Notification of Amended Schedules of Commitments

Both GATT and GATS provide for the possibility for members to achieve amendments to their original schedules of specific commitments on goods and services – in other words, to obtain a permanent change in WTO law applicable between the respective member and the other members.

GATS: Notifications regarding withdrawal of specific commitments (Article XXI)

Under GATS Article XXI and the specific procedures established by the Council for Trade in Services,³⁴ members may withdraw or modify specific commitments in its schedule, provided specific procedural steps are followed and, where applicable, due compensation in the form of other commitments is accorded by the applying member. In a nutshell:

³⁰ Understanding in Respect of Waivers of Obligations under GATT 1994.

³¹ “The Contracting Parties [...] in general should not grant an application in cases where are they not satisfied that the legitimate interests of other contracting parties are adequately safeguarded.” See: BISD 5S/25 “Guiding Principles to be followed in considering applications for Waiver”, 1st November 1956.

³² Art. IX:4 of the WTO Agreement.

³³ Art. IX:4 of the WTO Agreement.

³⁴ See S/L/80 and S/L/84.

- Notification of intent to withdraw or modify. As a first step the “modifying member”, as GATS calls the member concerned, notifies to the Council for Trade in Services its intention to withdraw or modify specific commitments.³⁵
- Negotiations with affected members on compensation. Any member whose benefits (i.e. use of rights under the commitments that are about to be withdrawn/modified) “may be affected” may seek negotiations with the modifying member.³⁶ These negotiations, interestingly, do not concern the proposed modification itself, but rather “compensatory adjustments,” i.e. the improvement of any other commitment in the modifying member’s GATS schedule (on an MFN basis). The declared aim goes beyond the bilateral relationship between the two. It is:
 - [...]”to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.”³⁷
- Arbitration (if requested). Any such “affected member” may seek arbitration if the negotiations do not yield a satisfactory result within the allocated period. It *must* do so if it wants to retain its rights to obtain compensation, namely to withdraw concessions on a reciprocal basis if need be (see below). In other words: Members who do not seek arbitration are later precluded from retaliatory withdrawals of concessions. The arbitration will determine the compensatory adjustments the modifying Member is to make if it wishes to go ahead with the planned withdrawal/modification;
- Three possible outcomes. Depending on the steps taken by modifying and affected members, three outcomes are possible:
 - Unilateral modification or withdrawal without compensation. This may occur if negotiations do not succeed but no affected member seeks arbitration;
 - Modification or withdrawal in combination with compensatory adjustments. These could be either agreed or the result of the arbitration process;
 - Modification or withdrawal without required compensation, possible retaliation. If the modifying member implements its proposed modification/withdrawal without implementing the results of the arbitration (i.e., grant compensatory concessions elsewhere), affected members who have participated in the arbitration may retaliate by withdrawing equivalent concession vis-à-vis that Member (i.e., not on an MFN basis).
- Notification (submission for circulation) of draft modified schedule and certification procedure. In either case the modifying member will submit for circulation its modified schedule in draft form. The schedule is then certified and becomes final.

GATT: Notifications regarding withdrawal of concessions (Article XXVIII)

The withdrawal of tariff concessions under GATT Article XXVIII follows very similar procedural lines, with one significant difference. Only a few members, not all members that “may be affected” by the withdrawal/modification, have the right to negotiate with the modifying member and obtain compensatory concessions that are especially valuable to them. These members are

- Those with “Initial Negotiating Rights”, a privilege negotiated at the time the concession is made and inscribed in the (conceding) member’s goods schedule;

³⁵ GATS Article XXI:1 (b).

³⁶ GATS Article XXI:2 (a).

³⁷ Id.

- Those who have “principal supplying interests,” a term further concretized by the *Ad* note to Article XXVIII and the *Understanding on the Interpretation of Article XXVIII*.

A third group of members, those with “substantial interests” involved, have the right to be consulted but do not participate in the negotiations on compensation. They do, however, have the right to withdraw concessions *vis-à-vis* the modifying member if the withdrawal/modification. This right applies also insofar as they are not satisfied with the compensation agreed between the modifying Member and those with “Initial Negotiating Rights” or “principal supplying interests”.

Concluding observations on other communications

- Existing WTO provisions entail communication obligations for members wanting to request special flexibilities provided for by an agreement. This can include:
 - Request for a specific time-limited exemption (Article 10.3 SPS Agreement, Article 12.8 TBT Agreement);
 - Request for the extension of a transitional period (Article 66.1 TRIPS Agreement) or extension of exemption (Article 27.4 SCM Agreement);
 - Request for a waiver (Article IX:3 WTO Agreement).
- The communication containing the request may have to include detailed justification for the request if this is required by the agreement;
- The notification of withdrawal/modification of a concession, provided for under GATS and GATT, leads to a bilateral negotiation with the member(s) directly affected by the decision of withdrawal.

3.4 SUMMARY OF FINDINGS

The seemingly minor difference between notification and reporting, as defined in this paper, is very important in practical terms. A reporting obligation engages the member to provide information in any case on a regular basis. A notification obligation on the other hand has to be triggered by a circumstance which in majority of the provisions is defined in rather vague terms as having a “significant effect on trade”. Members can therefore more easily “hide” behind the triggers, claiming (if ever confronted) that these are not fulfilled. A regular reporting makes it more difficult to leave out significant developments and thus would make it likely that more measures of relevance would come to the attention of WTO members.

Regular reporting obligations may be designed to act in concert with notification requirements. This is the case, for instance, under Article 18.2 of the AoA. Both instruments can be effectively combined to ensure both ad hoc scrutiny if and when certain circumstances converge (e.g. a Member takes a measure, such as a Special Safeguard (The “SSG”) measure under the AoA) and comprehensive scrutiny on a regular, timed basis irrespective of whether or not anything has actually happened.

The communication obligations related to actions in view of the implementation of the substantial commitments of the agreements. Only few reporting obligations cover so-called cross-cutting issues of technical assistance and S&DT on a mandatory basis.

The texts of the agreements define the general principles of the reporting obligations and review mechanism. The detailed procedures for the reporting and notifications obligations are then developed and agreed upon in meetings of the committees and councils.

These communications thus not only fulfill transparency requirements of the particular agreements, but also have a more generally important function in relation to allowing a public scrutiny of members’ actions and thus contribute to soft pressure on members to comply with their commitments.

4. ROLE AND TASKS OF COMMITTEES AND COUNCILS³⁸

Committees and Councils have an important role in the structure of the WTO Agreements. Not only do they review the implementation of agreements; they may also issue recommendations for amendments of the respective agreement, issue own reports and request members to report to them. There are further tasks and responsibilities.

4.1 REVIEW OF THE OPERATION AND IMPLEMENTATION OF THE AGREEMENT

Most committees and other bodies in WTO have as one of their functions a general mandate to review the operation and implementation of the respective agreement under which they were created. These reviews take place in different intervals indicated in the agreement or decisions. These reviews are usually based on various documents submitted as background documents: members' submissions (notifications and reports), WTO secretariat and committee and council reports, and documents, and statements and reports made by international organizations.

SPS Committee

Article 12.7 of the SPS Agreement mandates the SPS Committee to "review the operation and implementation of this Agreement three years after the date of entry, and thereafter as the need arises". As a result of such reviews and the experience gained in the implementation of the Agreement, the SPS Committee may submit proposals for future amendments of the SPS Agreement to the CTG.

At the Doha Ministerial Conference in 2001, Ministers instructed the SPS Committee "*to review the operation and implementation of the Agreement on Sanitary and Phytosanitary Measures at least once every four years.*"

The SPS Committee review process consists of a succession of informal meetings during which items are identified and members are invited to discuss and submit written comments on these items. At the end of the informal process, a report of the discussions is forwarded to the Committee for discussion and adoption and discussion during a regular formal meeting.³⁹

TBT Committee

Article 15.3 of the TBT Agreement mandates the TBT Committee to annually review the implementation of the TBT Agreement. The basis for such reviews are in particular written submissions (statements or communications) made by WTO Members under Article 15.2 of the TBT Agreement regarding measures taken to ensure that the provisions of the Agreement are applied as well as specific TBT-related trade concerns raised by Members.

The TBT Committee completed the fourteenth annual review of the TBT Agreement in March 2009.⁴⁰ In addition to the annual reviews, the TBT Committee is specifically mandated to hold triennial reviews of the operation and implementation of the Agreement for purposes of

³⁸ The distinct terminology councils and committees lies in the institutional structure of WTO as established by Article IV of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). With the Ministerial Conference as the highest level of authority in the WTO and the General Council acting on behalf of the Ministerial Conference as the second level of authority, the third level of authority lies with the specialized councils, namely, the TRIPS Council, Council for Trade in Goods (the "CTG") and Council for Trade in Services (the "CTS"). These councils, operating under the guidance of the General Council, are responsible for overseeing the functioning of the WTO agreements dealing with their respective area of trade. The CTG and the CTS have subsidiary bodies reporting to them including committees and working groups responsible to carry out certain functions relating to the implementation of particular agreements.

³⁹ See Procedure to Review the Operation and Implementation of the Agreement, decision by the SPS Committee G/SPS/10, 21 October 1997, and Process for the Review of the Operation and Implementation of the Agreement, decision by the SPS Committee G/SPS/32, 25 June 2004.

⁴⁰ See G/TBT/25, 4 March 2009.

making recommendation of “*adjustment(s) of the rights and obligations*” of members under the TBT Agreement. This means that the committee has a specific mandate⁴¹ to propose changes to the Agreement if the need arises. Such changes are warranted “*where necessary to ensure economic advantage and balance of rights and obligations*” as stipulated in Article 15.4 of the TBT Agreement.

TRIPS Council

Article 68 of the TRIPS Agreement mandates the TRIPS Council to “*monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder*”.

In regard to geographical indication, the TRIPS Council is tasked with keeping “*under review the application of the provisions of this Section; the first such review shall take place within two years of the entry into force of the WTO Agreement.*”

TRIPS Article 71 further provides that the TRIPS Council review the implementation of the Agreement periodically every two years. As part of that review it may suggest amendments to the Agreement.

GATT XXIV working parties/ Committee on Regional Trade Agreements

Individual working parties established under the WTO General Council, and since 1996 the Committee on Regional Trade Agreements (CRTA) are entrusted pursuant to XXIV: 7 and the “Understanding” with the examination of any RTA notified made under paragraph 7(a) XXIV. The examination report is submitted to the Council for Trade in Goods. Pursuant to Article 7(b) the examination also covers the implementation plan and schedule submitted for an interim agreement leading to a customs union or free-trade agreement and notified under Article XXIV. In the studying of the plan and the schedule members have the possibility to make recommendations to the parties to the interim agreement “*[...] if the contracting parties find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one[...]*”, and that these parties “*[...] shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.*”

Concluding observations regarding the review function

- WTO Councils and Committees review the implementation and operation of agreements at different intervals;
- Where so mandated Councils and Committees may include in their review considerations regarding possible needs for amendments, and may propose such amendments to agreements;
- Guidelines and procedures for such reviews may be adopted by the respective Committee and Council. In certain cases higher bodies (General Council, Ministerial Conference) may get involved;
- The review of the operation and implementations may specifically or implicitly include the review under provisions on TA and S&DT.
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4.2 OVERSIGHT OF TECHNICAL ASSISTANCE DELIVERY

With some exceptions – see the discussion on Articles 16.2 of the AoA and 66.2 of the TRIPS Agreement above – information exchange on technical assistance delivery and S&DT takes place on a voluntary basis in meetings of the agreement’s supervisory body. Councils and Committees have adopted procedures regarding this information exchange and different approaches have emerged.

⁴¹ Arguably more than the mere right (“may”) of the SPS Committee to do so (see above).

SPS Committee

Article 9 of the SPS Agreement requires members to “*facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally, or through the appropriate international organizations*”.

Technical assistance is discussed as a regular agenda item during regular meetings of the SPS Committee. During these meeting developing country Members have the possibility to report on specific technical assistance needs they may have, and developed country members report on SPS-related capacity building and technical assistance activities they are involved in. The questionnaire on technical assistance needs developed by the SPS Committee serves a basis for the discussions on technical assistances and members update information regularly.⁴² International standard-setting organizations (Observer Organizations) also provide updates about technical assistance activities in their respective areas of work and the WTO Secretariat keeps the Committee informed of the work of the Standard and Trade Development Facility (STDF).⁴³

TBT Committee

The TBT Committee serves as a forum to discuss technical assistance needs and delivery. Technical assistance is an independent agenda item of the regular meetings of the committee and features also in informal meetings. The committee plays a central role in ensuring a transparent information exchange on demand and supply of technical assistance in the framework of the demand-driven technical cooperation programme.

The survey on technical assistance needs and priorities is the means to collect information from members on this topic. Aiming at strengthening further the information exchange, the TBT Committee laid down parameters for exchanging information on technical assistance, and adopted a format for the ‘Voluntary Notification of Specific Technical Assistance Needs and Responses’ in 2005⁴⁴ for a trial use of two years.

Nevertheless, the information exchange continues to be based on voluntary submissions only. The role of the secretariat is to circulate information provided through the voluntary mechanism to all Members through, amongst others, documents prepared for the annual reviews pursuant to Article 18.2 of TBT Agreement.

With regard to the role of the committee in relation to technical assistance, members recommended in the third triennial review (G/TBT/13, 11 November 2003, paras. 54-56) the following:

“iii) [...] should provide a forum for feedback and assessment of the outcomes and effectiveness of technical assistance; and considers, based on Members’ experience of technical assistance received and provided, developing further elements of good practice in technical assistance in the TBT field.”

Concluding observations regarding the overview of technical assistance function

- Reporting on technical assistance delivery may be voluntary or obligatory;
- In both cases, Committees and Councils have an important role in monitoring technical assistance by creating a forum for transparency and discussion, and strengthening obligations;
- Committees can adopt detailed procedures defining what information has to be provided, and how it has to be provided.
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⁴² Members responses are circulated as addenda to G/SPS/GEN/295.

⁴³ The STDF is a joint initiative of the WTO, World Health Organization, World Bank, World Organization for Animal Health and Food and Agriculture Organization for enhancing developing countries’ capacity to meet SPS standards.

⁴⁴ G/TBT/16, 8 November 2005.

4.3 PROVIDING FLEXIBILITIES

WTO councils and committees may further be empowered to grant members certain exemptions or dispensations from WTO obligations. This could be additional time periods for exemptions and/or transition periods, or specific time-limited exceptions.

Committee on Subsidies and Countervailing Measures

As mentioned above, developing country members can apply for an extension of the phase out period granted in Article 27.4 of the SCM Agreement. Applicant countries under this provision may be granted extensions by the Committee on Subsidies and Countervailing Measures (SCM Committee). The text of the provision states that:

"[...] [i]f a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question."

The Committee has an important role in this process. The applicant member has to put forward, an extensive explanation supporting the request for extension. The Committee then has to review the "justification" of the extension on the basis of notably the justification for "development needs" alongside "economic" and "financial" needs and approval the extension. Other members can submit questions related to the concerned product to the applicant country.

Once an extension has been granted, the member comes under rather tight scrutiny through the Committee, not dissimilar to the regular review by the DSB of adopted panel and Appellate Body Reports. The member is required to "hold annual consultations with the Committee to determine the necessity of maintaining the subsidies." While this makes the member a constituent part of the process, it remains that of an applicant; the decision (determination) is the Committee's alone. If it is not positive (i.e., the Committee does not positively determine that the extension is still justified), the member concerned must phase out the relevant export subsidies within a two-year grace period, starting from the end of the last authorized extension period.

SPS Committee

Article 10.3 provides S&DT for developing countries and LDCs as follows:

"With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs."

It appears that such a request for time-limited dispensation from obligations was never granted (and/or requested) from the SPS Committee.

TRIPS Council

As described earlier (see Part A, chapter 1) Article 66.1 of the TRIPS Agreement provides for the possibility for least developed country Members to apply for the extension of the additional transitional period of 10 years granted by Article 66.1.

"[...] The Council for TRIPS shall, upon duly motivated request by a least developed country, accord extensions of this period."

Here again, it is the Council which reviews the request for extension and grants the extension. The extension is granted on an individual country basis, provided a "duly motivated request" is made by the LDC member concerned. The assumption appears to be that this would happen if the Council agrees with the reasoning put forward. The provision does not indicate what constitutes a "duly motivated request".

This provision was used in an arguably unusual way by the membership as a whole in the context of the discussion on TRIPS and public health. At the Doha Ministerial in 2001, members declared the following:

“7. [...]We also agree that the least developed country Members will not be obliged, with respect to pharmaceutical products, to implement or apply Sections 5 and 7 of Part II of the TRIPS Agreement or to enforce rights provided for under these Sections until 1 January 2016, without prejudice to the right of least developed country Members to seek other extensions of the transition periods as provided for in Article 66.1 of the TRIPS Agreement. We instruct the Council for TRIPS to take the necessary action to give effect to this pursuant to Article 66.1 of the TRIPS Agreement.”⁴⁵

The Council for TRIPS interpreted this Declaration as a “*duly motivated request*” by all LDC members and granted a collective extension of the implementation period with respect to pharmaceutical patents until 2016.⁴⁶ This being a mere application of the provision, it leaves the possibility for individual LDCs to apply for further extensions on the basis of further “*duly motivated requests*” untouched.

Article 66.1 was invoked again by all LDCs in 2005. LDCs requested an extension of the transitional period under Article 66.1 of the TRIPS Agreement for a further 15 years, arguing that this group of countries continues to face economic, financial, and administrative constraints, such as recognized in Article 66.1 and the preamble of the TRIPS Agreement.⁴⁷ The Council for TRIPS accepted his request and decided to extend the transitional period of Article 66.1 until 1. July 2013.⁴⁸

Concluding Observations on providing flexibilities

The aforementioned provisions lead to the following observations:

- The role of the committees and councils is to review the request and to verify if the substantial and procedural requirements for such a request are met. The flexibilities are only granted upon positive determination by the WTO body in question;
- The “density” or criteria applied in the decision making however varies. While the TRIPS Agreement only vaguely requires a “duly motivated request” for LDCs seeking extension under Article 66.1, the SCM Committee needs to find more specifically that the “economic, financial and development needs” warrant an extension (specifically) of export subsidies, or the right to use them, for the applying developing country member.
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4.4 FORUM FOR TECHNICAL DISCUSSION (AND ADVICE)

WTO committees and councils may further have the explicit task of acting as a forum for technical discussions with the aim of sharing information and extending mutual advice.

SPS Committee

Among the functions and responsibilities of the SPS Committee is to provide a forum for technical discussion as provided for in Article 12.2 below:

“[T]he Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between

⁴⁵ Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 (WT/MIN(01)/DEC/2).

⁴⁶ Decision of the Council for TRIPS of 27 June 2002 on the Extension of the transition period under Article 66.1 of the TRIPS Agreement for least developed country Members for certain obligations with respect to pharmaceutical products (IP/C/25, 27 June 2002).

⁴⁷ The request was submitted by Zambia on behalf of all LDC members. IP/C/W/457, 21 October 2005.

⁴⁸ IP/C/40, 30 November 2005.

international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs.”

As part of the Committee's effort to provide a forum for technical discussion and advice, the Committee organizes specialized workshops and expert discussions on relevant subjects under its purview. For example, in cases where members raise issues with (international) standards that may have negative impacts on trade, the Committee may invite the standard setting body to provide information and discussion on the standard under consideration.

Furthermore, Article 3.5 of the SPS Agreement provides that the SPS Committee “*shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations*”.

TBT Committee

TBT Committee serves as a forum for consultations on matters relating to the operation of TBT Agreement including affording “*Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives*” as stipulated in Article 13.1 of the TBT Agreement. The Committee can also establish working groups or similar bodies to carry out specific tasks attributed by the Committee.

Technical Committee on Rules of Origin

The Agreement on Rules of Origin (the “RoO Agreement”) establishes in addition to the Committee on Rules of Origin a Technical Committee on Rules of Origin (the “Technical Committee”). Annex I to the RoO Agreement sets out the responsibilities of the Technical Committee including *furnishing “information and advice on any matters concerning the origin determination of goods as may be requested by any Member or the Committee”* as stipulated in 1 (b) of the Annex. The Technical Committee is also tasked with preparing and circulating “*periodic reports on the technical aspects of the operation and status of this Agreement*”.

Concluding Observations on forum for technical advice

- The exchange of technical advice between members in Committees and Councils fulfils an important function. It advances not only the technical understanding of the agreements and their implementation but also, implicitly, the understanding of other Members’ perspectives in this regard;
- Committees and Councils may, in addition to fostering such exchange between Members, organize targeted measures such as workshops to enhance the effect. Such workshops may feature external experts.
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4.5 CONSULTATIONS ON SPECIFIC CONCERNS (SETTLEMENT OF DISPUTES)

Committees and councils may further be tasked with offering a forum for consultations on “*specific trade concerns*”, meaning complaints by Members over measures taken by other Members.

SPS Committee

Article 12.2 of the SPS Agreement requires the SPS Committee to “*encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues.*”

Part of each Committee meeting is devoted to the consideration of specific trade concerns raised by members. Some of these concerns are procedural, such as the failure to notify an SPS measure, while others are substantive such as the adequacy of scientific basis.

The member raising the concern should provide an outline of its concerns demonstrating the consequences of the regulatory proposal in advance of the Committee meeting for concerns relating to notified measures.⁴⁹ Where the concern is not related to notified measures, the member raising the concern would request placing the issue on the agenda. The SPS Committee operates as a forum to discuss these concerns. The member imposing or proposing the measure is asked to explain and justify its measure under the scrutiny of other Members. Discussions in the Committee are often accompanied by bilateral consultations aimed at resolving the issue.

A total of 29 specific trade concerns were brought to the attention of the Committee in 2008, of which two were resolved and another two partially resolved.⁵⁰ The number of specific trade concerns raised in the SPS Committee is an indication of the number of problems faced by members and is evidence to the increasing use of the Committee as a forum to resolve these problems. The second review of the operation and implementation of the SPS Agreement recommended that the SPS Committee “*continues to consider specific trade concerns raised by Members as a standing item on the agenda of its regular meetings*”.⁵¹

TBT Committee

The TBT Committee was established with the objective of “affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members” as stipulated in Article 13:1 of the Agreement.

Similar to the SPS Committee, the TBT Committee serves as a forum to discuss TBT-related measures maintained by other members, including technical regulations, standards or conformity assessment procedures. These measures are referred to as “*specific trade concerns*” and relate to proposed measures notified to the TBT Committee or to existing measures. In 2008, 59 specific trade concerns were brought to the attention of the TBT Committee.⁵² Through the Committee meetings or informal discussions between members held in the margins of such meetings, members have opportunity to review trade concerns in a bilateral or multilateral setting and to seek further clarification.

Technical Committee on Rules of Origin

Article 1 of Annex I to the RoO Agreement provides that the responsibilities of the Technical Committee examining “*specific technical problems arising in the day-to-day administration of the rules of origin of Members and to give advisory opinions on appropriate solutions based upon the facts presented*”.

TRIPS Council

Article 68 of the TRIPS Agreement provides the TRIPS Council “*shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures*”.

In addition, Article 24.2 provides that “*Any matter affecting the compliance with the obligations under these provisions may be drawn to the attention of the Council, which, at the request of a Member, shall consult with any Member or Members in respect of such matter in respect of which it has not been possible to find a satisfactory solution through bilateral or plurilateral consultations between the Members concerned. The Council shall*

⁴⁹ Para 3 of the Working Procedures of the Committee in G/SPS/1.

⁵⁰ See the Note by the Secretariat on Specific Trade Concerns considered in 2008 in G/SPS/GEN/204/Rev.9/Add.1.

⁵¹ G/SPS/36, 11 July 2005.

⁵² G/TBT/25, 4 February 2009

take such action as may be agreed to facilitate the operation and further the objectives of this Section.”

- Consultations in Committees or Councils on “specific concerns,” i.e. actual issues that have arisen between members, fulfils a very important systemic function in the avoidance or settlement of disputes before they reach a level of intensity and confrontation requiring formal dispute settlement under the DSU.

4.6 LIAISON WITH OTHER (INTERNATIONAL) ORGANIZATIONS

Liaison with other organizations including for example the World Customs Organization may be a one of the functions of a future committee on trade facilitation under a TF Agreement.

SPS Committee

Paragraph 3 of Article 12 of the SPS Agreement mandates the SPS Committee to maintain close contact with relevant international standardization bodies *“especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement”*.

Also, in an effort to avoid duplication, *“the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations”*. (Article 5 of the Agreement).

Another dimension of the liaison with relevant international organizations is provided in Article 12.6 allowing the SPS Committee, *“on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4”*.

Technical Committee on Rules of Origin

The Technical Committee on Rules of Origin is established *“under the auspices of the Customs Cooperation Council (CCC) as set out in Annex I,[...], The CCC Secretariat shall act as the secretariat to the Technical Committee.”*

TRIPS Council

Article 68 of the TRIPS Agreement allows the TRIPS Council to “consult with and seek information from any source it deems appropriate. In consultation with the World Intellectual Property Organization, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization”.

Several organizations are granted observer status at the TRIPS Council, including the Food and Agriculture Organization of the United Nations, the International Monetary Fund, the International Union for the Protection of New Varieties of Plants, the Organization for Economic Cooperation and Development, the United Nations, UNCTAD, the World Bank, the World Customs Organization and the World Intellectual Property Organization.

Concluding observations on liaison with international organizations

- As specialized bodies the Committees and Councils are best suited to liaise with technical international organizations outside the WTO;
- They thereby help to ensure coherence, the avoidance of duplication, the creation of convergence and the management of divergence between WTO and other international systems.

4.7 SUMMARY OF FINDINGS

Councils and Committees fulfil a variety of important functions in the operation of the various WTO Agreements. As forums, they create transparency on issues of operation and implementation and offer the opportunity for technical exchanges as well as the discussion of specific trade concerns. They further organize members' exchanges through targeted internal procedures.

They also act as bodies to advance the goals of the respective agreements. Some have the explicit authority to grant dispensation from obligations on an individual basis, thus act as bodies with the authority to regulate. They further may provide direct substantive input into Members' debates through workshops.

5. NEGOTIATIONS ON TRADE FACILITATION

5.1 IMPLEMENTATION CONCERNS

Trade facilitation has been put on the WTO negotiations agenda at the Ministerial Conference in Singapore in 1996 – explaining the appellation of Singapore issue, together with investment, competition, and government procurement. With the launch of the Doha Round in November 2001, WTO members agreed to start discussions and, since August 2004, negotiations on trade facilitation. Trade facilitation is the only one of the initial four new Singapore issues which has been retained in the Doha Round. Pursuant to the modalities text, the Annex D of the General Council Decision of 1 August 2004, the so-called “July Package” (WT/L/579), a Negotiating Group on Trade Facilitation (NGTF) was established and meets regularly since 2005.

Many developing country members were initially skeptical and even opposed to new WTO rules in a new area as long as outstanding issues from the Uruguay Round were not addressed. Doubts were also raised with regard to the development impact of multilateral rules on trade facilitation. Developing countries were concerned to what extent such new rules would be supportive of their development path, whether they have sufficient implementation capacity, and that adequate technical assistance to assist developing countries in addressing implementation challenges would not be forthcoming.

a) Multilateral rules on trade facilitation and development

Despite the initial skepticism towards multilateral rules on trade facilitation, there is now widespread agreement that developing countries' economies stands to benefit from trade facilitation reforms. Trade barriers, caused by administrative procedure and operations, are highest in least developed countries, and developing countries in Central and South-East Asia and Africa. The potential gains from trade facilitation reforms are thus very high in these countries, in particular with regard to regional integration processes aiming at facilitating trade amongst regional partners. The overall goal of the trade facilitation negotiations to accelerate further the movement and clearance of goods is thus no longer perceived as being in conflict with the economic development path of developing countries.

The nature of multilateral rules on trade facilitation and hence the negotiation process also differs from the other areas of negotiations under the Doha Round. The negotiations are not about achieving market access through liberalization and tariff reduction and are thus less linked to the protection of particular industries or segments of the economies. Instead, the focus of the trade facilitation negotiations is on the drafting of the most appropriate set of rules not only from a technical point of view but also from the economic development perspective and realities on the ground in developing countries.

To ensure the development impact of multilateral rules on trade facilitation, an appropriate implementation framework for the new obligations has to be part of the negotiations and the negotiated outcome. This implementation framework shall include flexibilities in the application of the new commitments and provisions for technical assistance and capacity-

building. The technical assistance promise and expectations are thus a rallying point for many developing countries in these negotiations. The negotiations may indeed create opportunities for access to technical assistance and capacity building supporting national and regional trade facilitation reforms. Hence, developing country members have now become active proponents of a trade facilitation agreement – if the agreement leads to the mobilization of support and means for the implementation.

b) Developing countries' leverage in the negotiations

The modalities for the negotiations on trade facilitation are the Annex D of the July Package. The mandate given to delegations is to clarify and improve GATT Articles V, VIII, and X, to draft provisions on cooperation amongst customs and other border agency organizations, and to enhance technical cooperation in the trade facilitation area. Within these general lines the WTO members have to decide on their level of ambition in these negotiations.

The Doha Round focuses on the contribution of the WTO trade rules to economic development and poverty reduction and puts developing countries' needs and priorities at the center of the Round negotiations. This new approach is also reflected in § 27 of the Doha Ministerial Declaration dealing with trade facilitation and the modalities text.

Both documents make reference to the identification of members', in particular developing and least developed country members', trade facilitation needs and priorities. The underlying assumption is that the drafting of the new rules would be derived from countries' trade facilitation needs, with a particular emphasis on developing countries' needs. Developing countries would thus leverage a leading role in shaping the obligations of the new agreement into an effective pursuit of their interests and needs.

But only a few developing country members had undertaken a comprehensive analysis of their trade facilitation situation prior to the beginning of the negotiations⁵³ despite trade facilitation projects being implemented by developing partners in their countries. Most of the proposals for obligations were instead based on concepts and procedures already implemented in developed or emerging economies or, for which international standards, best practices, and instruments exist. The question of developing countries' needs and priorities has thus become a reactive approach focusing on flexibilities and technical assistance needed for compliance with the new rules.

A discussion on the ambition of the negotiations from the development perspective seems thus to have been overshadowed by compliance concerns. This poses the risk of encouraging developing countries to adopt a defensive approach towards new rules, instead of embracing the opportunities embodied in the new rules and the prospective for technical assistance. Such a defensive position affects the drafting of the rules — with the push for rather vague legal language and commitments — as well as the discussion on the implementation framework — with developing countries prioritizing opting out of commitments over setting reasonable goals and time frames for implementation.

Currently, developing country members stress the importance of efficient special and differential treatment and technical assistance provisions for success in the negotiations. A clear idea of these provisions will frame their decision on the substantive rules of the agreement. Through the S&DT and TA provisions developing countries seek leverage over the agreement aiming at adopting multilateral rules on trade facilitation that will contribute to economic development and that will be implemented.

⁵³ Only a few developing country members had been engaged in identifying their trade facilitation needs. Submissions in meetings on trade facilitation of the Goods Council prior to October 2005 under this topic remained limited to few countries and rather general statements. It was only with the WTO trade facilitation self-assessments that the question of members' needs and priorities emerged again, albeit with a changed purpose and parameters. The assessment focused on what would be required to fully comply with the obligations of the future agreement and not what should be in the agreement from the development perspective of developing and least developed countries.

5.2 EVOLUTION OF S&DT PROPOSALS

The discussions on the S&DT and TA provisions have received a lot of attention since the beginning of the negotiations. The starting point for the discussions and delegations proposals is the Annex D modalities text and the reference made therein to S&DT and technical assistance.

c) Annex D modalities

Ascertaining that the results of the negotiations on trade facilitation will contain special and differential treatment provisions, the Annex D defines further the general principles regarding this S&DT. Annex D: 2 states that:

“2. The results of the negotiations shall take fully into account the principle of special and differential treatment for developing and least developed countries. Members recognize that this principle should extend beyond the granting of traditional transition periods for implementing commitments. In particular, the extent and the timing of entering into commitments shall be related to the implementation capacities of developing and least developed Members. It is further agreed that those Members would not be obliged to undertake investments in infrastructure projects beyond their means.”

Annex D: 6 further adds that implementation of commitments is not required if countries lack implementation capacity.

“6. [...] it is recognized that negotiations could lead to certain commitments whose implementation would require support for infrastructure development on the part of some Members. In these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation. It is understood, however, 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.”

And Annex D:3 contains an LDC clause which reads;

“3. Least developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.”

The Annex D thus links commitments of developing countries to their implementation capacity and therewith points to the necessity of providing technical assistance if the outcome of these negotiations will be a WTO agreement with full compliance of all members.

d) Delegations' proposals

Pursuant to the general lines and principles defined in the Annex D delegations have put forward several communications describing their expectations from special and differential treatment and technical assistance provisions and proposing wording introducing different provisions on S&DT and TA. The proposals have evolved over time. Since the beginning of the negotiations delegations have put forward proposals on how they wish to see the implementation framework and the provisions on S&DT unfold. The first of such proposals includes general statements reiterating the importance of S&DT, and preliminary ideas on how to translate the Annex D principles into legal wording⁵⁴. For example, one proposal, TN/TF/W/41 by a group of Latin American countries clarified in 2005 the linkage between commitments, implementation capacity and technical assistance. It stated that:

“the scope of the commitments must be commensurate with the capacity for implementation of developing and least developed countries, the capacity for implementation of the new commitments, [...] shall be determined in accordance with their

⁵⁴ See the following proposals: TN/TF/W/29, TN/TFTW/30, TN/TF/W/33, TN/TF/W45, TN/TF/W/56, TN/TFW/62, TN/TF/W/63, TN/TFW/73, TN/TF/W/74.

trade facilitation needs and priorities, and the TA and CB should help [them][...] to implement the commitments resulting from the negotiations” (para 5).

Later proposals each presented new ways to achieve this linkage in operational and legal terms and are roughly summarized in the following paragraphs.

March 2006; TN/TF/W/82 China, Pakistan, Sri Lanka, Key elements. Country-specific self categorization of commitments into those not difficult, and those difficult to implement. Additional transitional time and TA for commitments for the latter category of commitments.

April 2006; TN/TF/W/81 group of Latin-American countries. Key elements: Negative list for those commitments which can't be implemented at entry into force and require S&DT. S&DT provides for additional transitional time, limited to x years, and TA.

July 2006; TN/TF/W/95 African Group, Key elements: GATS type approach, meaning that not all obligations of the agreement would be implemented by developing country members, and that countries individually submit a positive list of commitments to be implemented. Progressive implementation and best endeavour efforts.

July 2006; TN/TF/W/137 group of Latin American countries, EC, and others, Key elements: Two types of obligations defined in advance for all members; those applied from the entry into force, and those which can be considered for S&DT. The transition period granted under the S&DT is set to x years in the agreement.

July 2006; TN/TF/W/142 Core group, Key elements: AoA-similar closed boxes approach. Obligations of the agreement fall in one of the pre-agreed closed lists of commitments, and classes of obligations. One list determines those obligations applied by all countries but for which S&DT (transitional time and TA) can be made available. The other list regroups best endeavour obligations.

July 2007; TN/TF/W/147 ACP, African Group, Core Group, and LDCs, Key elements: GATS-type approach. Countries choose obligations to be implemented either at the entry into force or after a given time frame. Others will remain best endeavour efforts. Reservations and limitations can be put on each obligation.

The different scope and objectives of the proposals shows the difference in positions prevailing in the negotiations on trade facilitation on the issue of S&DT and TA during the first three years of negotiations. Indeed, the formal discussions did not seem to bring forward common positions which would be acceptable to all delegations. With the support of key negotiators delegations advanced in this dossier in informal consultations. The outcomes of these consultations were submitted as a communication from Argentina in a job document in June 2008.⁵⁵ This document sketches central elements of the implementation framework as they were emerging from the consultations, and points to areas where further discussion is needed. As these informal consultations have proven to be accepted and very efficient in advancing consensus building, the chair of the NGTF appointed in 2009 a friend-of-the-chair to continue the informal consultations on this issue with the objectives of increasing the understanding amongst delegations and finding a common ground.

5.3 ELEMENTS OF THE FRIEND OF THE CHAIR CONSULTATIONS

The following section gives a critical review of the elements of the implementation framework and mechanism as discussed in the informal negotiations led by the friend of the chair in informal meetings from February to October 2009. The review is based on the revised Job Document (JOB(09)/85.Rev.1.) circulated at the end of the October session.

⁵⁵ JOB(08)/44/Rev.1.

e) Different categories of commitments and flexibilities

At present, WTO members discuss the possibility for each developing country member⁵⁶ to set different implementation conditions and time frames on the commitments contracted with the new agreement. Three different types of time frames and conditions would be foreseen by the agreement. Commensurate to their implementation capacity developing country Members would have the possibility to differentiate amongst the obligations they can implement immediately at entry into force, and those obligations that cannot be implemented immediately. The first group of obligations would figure under category A. The obligations a member cannot implement immediately are split into category B for the commitments for which a longer time frame is needed, and category C when a longer time frame and technical assistance for capacity acquisition are necessary.

Following these categorizations, different flexibilities will be made available for implementing the commitments of the categories B and C. Developing country members would thus have additional time for implementation for commitments of category B and C. Delegations further link the implementation of the category C commitments to the delivery of technical assistance, so that the obligation to implement category C commitments would only materialize if the member has received the technical assistance necessary for acquiring the implementation capacity for the commitments in question.

The concept of categorization seems to be well accepted among negotiating members and has already been a common feature of earlier proposals described above. There are however, some elements which require further detail and examination. One of these elements is the timing for the communication by countries of their "list" of commitments by category.

f) Notifications of list of commitments

Developing country members will have to submit a communication,⁵⁷ listing the obligations pursuant to the relevant category. This communication would become integral part of the agreement. The timing of when to submit this communication is a central question as developing country members will have to assess their implementation capacity for each of the new rules contained in the future agreement. This assessment however can only be undertaken once the final text of the agreement is available. It further requires a coordinated process on the national level offering a platform for input from the different national stakeholders. The WTO Trade Facilitation self-assessments which most developing country members have undertaken in the past two years, was an initial test run of such a multi-agency assessment process. They were, however, based on an approximation of the possible future legal norm and not on the final legal text of the new agreement. As the assessment only allowed for a first gathering of ideas and perceptions on the implementation gaps developing country Members would have to undertake a deeper assessment once the text of the agreement has been agreed. Several time frames for the submission of the communication of the list of the commitments are currently discussed, ranging from signature of the agreement, to entry into force and [x] years after entry into force. It also seems likely that countries can submit the list of the commitments in a two-staged process.

g) Implementation time frames

Another element on which consensus is outstanding is the setting of maximum time frame for the implementation of all the commitments by all members. Whilst some members favor an overall maximum time frame, others argue that, according to the Annex D, the application of commitments depends on the successful acquisition of the implementation capacity. The implementation capacity and the acquisition and building of missing capacity vary from

⁵⁶The Kyrgyz Republic and the Republic of Moldova proposed that the S&DT flexibilities should also be extended to small-low income economies in transition (TN/TF/W/74).

⁵⁷ Different wording for this communication has been put forward; Schedule, list, notification.

country to country. An overall maximum time frame would thus go against the same idea of linking the application to the implementation capacity, as it could entail enforcing an obligation before capacity has been built.

Time frames however, have a useful function of enhancing the credibility of the countries' commitments to implement, and they exert pressure for countries to move ahead with the necessary reforms. This pressure can also be useful to overcome domestic resistance to change and necessary reforms. The benefits of time frames need therefore to be balanced with a justified claim for flexibility. As a possible means of compromise the idea has been floated that common time frames may only apply to category A and B commitments. No overall time frames for implementation of category C commitments would be included in the text of the agreement. Yet, even in this approach, time frames will be communicated to WTO members in a notification of a so-called "implementation plan". This notification of the implementation plan will become an obligation, and the time frame thus communicated will acquire legal binding character, although not being included in the text of the agreement but rather annexed to the agreement.

Currently, the majority of developing countries continue to support the option of no overall maximum time frames for B and C commitments. It is however not obvious whether this is for practical or ideological reasons or part of their negotiation strategy.

Although the country individual "implementation plan" seems to be a good solution to the setting of time frames, there are practical reasons to doubt its usefulness for the objectives expected here. This will be discussed later in this chapter under 6.3 g).

h) Early Warning Mechanism

Delegations have also proposed a so-called "Early Warning Mechanism", serving two purposes: the shifting of a commitment from category B to C, and the request for the extension of the time frame for implementation. The first purpose reflects developing countries' uncertainty regarding their capacity to truly assess the implementation capacity, and in particular the technical assistance needs. Providing the possibility to shift a commitment from category B to C would give the country the possibility to make the implementation dependent on the delivery of technical assistance and provide a forum for the submission and response to technical assistance requests. Although the idea seems to be accepted, delegations still discuss if there should be an indication of the period during which the mechanism would apply and if a justification for their request has to be submitted for discussion.

i) Peace clause

With the peace clause, members aim at setting a time period during which members agree to refrain from bringing other members to dispute settlement panel for reasons of non-compliance with their obligations. This peace clause can cover entire agreements, or selective parts thereof.

The peace clause had been advanced by delegations in the context of the discussions on the timing of the submission of the list of commitments, in particular commitments falling under category A. If countries, including developing countries, have to notify obligations falling under this category at entry into force or even at signature, the peace clause would give these countries limited additional time to bring their current operations and regulations into full compliance. Developed country members may also benefit from this peace clause. It seems that some developing countries aim for extending this peace clause also to the categories B and C. The role it plays for these categories which are exempted from application and therewith enforcement through the dispute settlement mechanism is however unclear at this moment, in particular as developed countries engage themselves in the DSU to act with due restraint with regard to make use of the DSM against developing members.

j) Role, tasks and responsibilities of the committee

The role and tasks of the future trade facilitation committee are linked to the topic of the special and differential treatment provisions but have received less attention by delegations so far. The Canadian delegation led an informal discussion process on these and other cross-cutting topics. There is, however, implicit or direct reference made to this committee in the Friends-of-the-Chair discussions and documents. It seems that the committee will deal with the requests put forward under the Early Warning Mechanism; it would receive the requests, lead the discussion on it, and decide on the granting of the requested flexibility. A second role is linked to the technical assistance provision, or rather to the question of a forum for matching technical assistance needs with technical assistance provision. How this can be put into practice remains to be defined yet, and it may not be necessary to define it in the text of the agreement itself, but later on as part of the decisions and recommendations of the committee itself.

k) Communications by Member States

The currently discussed implementation framework contains the following communication obligations: a) notifications by developing country members of the categories of commitments; (b) communication of an implementation plan for those commitments with flexibilities; (c) request for additional time or shifting of commitments to different category foreseen under the “Early Warning Mechanism”; (d) notification of capacity acquisition by a developed country member which would inform members that the member will no longer delay application of the specific obligation from a given date; and (e) reporting by donor or developed country members on technical assistance (Another communication is referred to indirectly.); (f) technical assistance requests.

Four of these communications are discussed more in detail below as they receive a lot of attention in the discussions and variant opinions on them are expressed.

Notification of implementation plan

As explained above the proposed “implementation plan” would serve the purpose of setting the implementation time frames for all commitments falling under the category B and C exceptions for direct application, and committing the country to the respect of these time frames. These implementation plans will have to be notified for the commitments of the different categories. Such implementation plans could also have a transparency function if additional information, such as the identified donor for technical assistance activities, the agency responsible for the implementation, and detailed implementation steps are contained in such a plan. At this stage of the discussion, delegations still have to define and agree on the role of such an implementation plan and according to the role the elements to be contained in such a plan as well as the legal validity of the plan. The latter question is the question whether the plan should be a soft-law type document serving a monitoring function, or an information function only. It has to be noted that no other WTO agreement request the communication of such an implementation plan.

There are practical considerations which lead to doubts on the applicability of this obligation. Questions have to be raised on the certainty of the assessment of the required time and the timing when this assessment can be concluded. Information on the resources needed as well as the time period for the implementation is part of a policy design process. Nevertheless, it is neither the only nor the earliest element of this process Resources and time are determined by the implementation options and instruments chosen, which are themselves defined by the overall policy objective and the specific change context. Ideally, the different options and instruments are tested before engaging in the full implementation to limit failures and costs as well as time surprises. Even then, an implementation plan is always subject to certain assumptions, including risks assumptions established following the testing of the options. Dependency on funding and support from external donors increases

the risk factors for successful and timely implementation as this is a factor out of countries' own control.

Given these considerations, an implementation plan can at its best provide an indication of the prospective as well as planned time frame. If time frames of the implementation plan will become legally binding information, this will require foreseeing the possibility to ex-post change the plan and allow for exceptions to the rule. It may be advisable to use implementation plans as a monitoring and transparency document, and to include for this purpose other elements allowing members to provide advice and support.

Notification of capacity acquisition

In the current scenario, capacity acquisition is the criteria for granting flexibility and the criteria for "graduation", meaning the point from which no further flexibility can be requested. The application of commitments notified under category C, and under category B is therefore deferred until a member notifies that it has acquired the capacity for compliance, and has notified WTO thereof.

The verification of capacity acquisitions is arguably a sovereign decision by the member, and it is only for the member, to assess if sustainable capacity has been attained for the compliance with the commitment. However, delegations have expressed doubts on whether the determination of the capacity acquisition can rest only with the member in question and would thus constitute the danger of retracting de facto from the commitment. It is alternatively discussed to involve third parties in the verification of the capacity acquisition in particular if technical assistance was provided and donors involved. Another option would be to provide the trade facilitation committee a given responsibility regarding the capacity acquisition verification. For example, it could, as part of its review process, allow members, and in particular the donor members, to ask for explanations for the continued non-application of a specific obligation, in particular if technical assistance has been provided, or appoint a neutral third party to verify the situation may be foreseen. Otherwise it has been discussed to what extent indicators for full compliance can be established by the member or all members.

Several delegations pointed out that technical assistance delivered can not be set equal to acquisition of capacity. Often technical assistance is only one element needed for the successful building of capacity.

Information on technical assistance by donor country members

Although currently not clearly referred to as a reporting obligation, reference is made to the obligation of donor country members or developing country members to provide regularly information related to technical assistance. This information would include general contact information of aid agencies, a description of channels to request assistance, and specific information on technical assistance provided in support of the implementation process.

Needs and priorities

It is not yet clear when and how a developing country member has to communicate its technical assistance and capacity building needs. It could be argued that the communication of commitments listed under category C reflect the technical assistance needs of a member and hence serves the purpose of a request for technical assistance. Otherwise a separate request may have to be submitted at a later stage, with the purpose of providing a reference point for the discussion and review of the effectiveness of the technical assistance provisions of the agreement in the trade facilitation committee.

6. CONCLUSION AND WAY FORWARD

The negotiations on S&DT as part of the negotiations on trade facilitation build on the experience brought by the implementation of the existing agreements. This study compared selected existing provisions and their legal effect. In doing so it clearly showed that up to now implementation flexibilities, such as transitional periods or exemptions, remain unlinked to technical assistance delivery. Furthermore, it can be noted that there are no mandatory reporting obligations on technical assistance delivery and technical assistance needs established neither through the text of existing agreements nor through documents and guidelines issued by supervisory bodies of the agreements. As a result, the existing SD&T provisions remain largely ineffective and difficult to operationalize. In the past years, and in response to mounting criticism of the failure to address developing countries' implementation concerns, changes to operations of S&DT have been proposed or introduced, in particular through different bodies of the WTO, such as the TBT or SBS committees and the TRIPS council. These changes aim, among other, at strengthening the reporting obligations on positive SD&T measures and technical assistance delivery, and at improving the assessment of implementation concerns and technical assistance needs. They those supplement the provisions of the agreement with the possible and wishful effect of making them more effective. In the majority of the cases, however, these procedural requirements remain voluntary obligations and are still heavily debated.

The negotiations on trade facilitation therefore offer the opportunity of rethinking implementation and technical assistance and capacity building in the context of the WTO. This opportunity is at the same time burden for the negotiators and explains why so much time is spent on this issue. Although such new provisions will de facto be limited to the application of the prospective trade facilitation agreement, they are likely to influence the WTO system as a whole and in particular discussions of special and differential treatment in the Committee on Trade and Development. This may lead to a new approach, including possible changes in the mandate and role of the WTO secretariat in relation to TA. As Gregory Shaffer pointed out in 2005⁵⁸, TA is a rather new issue to the WTO and the organization continues to define its role predominantly as a "contract organization". Technical assistance and capacity building is thus designed to serve this purpose through training and information on contract obligations but focuses less or little on other development related considerations, perceived to be in the realm of the responsibility of other agencies, such as UNDP and the World Bank. Maybe this view and role is no longer compatible with Member states expectations and requests for a coordinating and monitoring role of the WTO in TA, and the on-going drive to legalize procedural requirements of in the WTO.

An opportunity for achieving a more effective implementation framework lies in establishing functional linkages between the implementation flexibilities granted for developing countries, the technical assistance provided by donor countries, and a transparency mechanism. Such a comprehensive implementation framework would provide for a multilateral monitoring of the acquisition of compliance capacities, and encompass a multilateral exchange on technical assistance needs and delivery.

The following chapter provides a description of a possible linkage of these three elements in an implementation framework based on the ideas expressed and currently discussed by WTO members in the NGTF. Although this framework would build upon legal provisions establishing the rights and obligations of WTO members with regard to SD&T and technical assistance the description below does not propose legal language for these provisions. Rather it sketches the functional linkages between implementation flexibilities, technical assistance delivery, and transparency obligations and describes procedural requirements necessary to the operation of these linkages.

⁵⁸ See Gregory Shaffer (2005) Can WTO Technical Assistance and Capacity Building Serve Developing Countries? in *Wisconsin International Law Journal*, Vol. 23, pp. 643-686, 2006.

6.1 POSSIBLE COMPREHENSIVE IMPLEMENTATION FRAMEWORK

The proposed implementation framework would consist of three sequential phases: (a) the development of implementation plans, by individual members; (b) the reporting process at the multilateral level involving all WTO members; and (c) the determination of capacity acquisition by individual members.

For each step, WTO members would be required to undertake defined actions at national level and keep the WTO informed in order for other members to react accordingly.

a) Step 1: Development of implementation plans

- The development of the implementation plans stage starts when a developing country member submits a request for flexibilities with regard to the compliance of a given commitment; such flexibility might take the form of either a transitional period or an exemption limited in time. This request can take the form of a notification or an application sent to the WTO. If it is a notification, the flexibilities are granted automatically. An application on the other hand entails that a WTO body takes the decision to grant the flexibility;
- Following this communication the developing country member submits to the WTO a technical assistance request, if technical assistance is required for acquiring the implementation capacity necessary to be fully compliant with a given discipline. The submission of such a request would trigger an extension of the time frame for the flexibility until a notification is received from the developing country member informing about satisfactory compliance capacity acquisition;
- In response to the request for technical assistance, the Committee will ask the developing country member to submit in a specified period of time an implementation plan. The period of time could be either set equal for all countries or could be individualized by country or group of countries;
- Following the submission of the technical assistance request, the developing country member initiates discussions with donors over the provision of the required technical assistance. When such discussions results in the signing of a technical assistance project the developing country member prepares and submits the implementation plan to the Committee. The implementation plans contains at least information on the expected date of full compliance capacity and the donor or donors with whom an agreement over the provision of technical assistance was found. These implementation plans are circulated to all members and the Committee can make recommendations on the implementation plan to the developing country member. If no donor support can be secured in the given time frame the developing country member informs the Committee thereof and the technical assistance request is put on the agenda of the annual review of the agreement.

▪

b) Step 2: Reporting on progress

As part of the general review process of the agreement, WTO members would be required to report on progress with the implementation of the agreement. The reporting obligation and the review mechanism also cover technical assistance requests, information on technical assistance delivery, and progress made with the execution of relevant technical assistance projects.

- During the report on progress phase, the Committee circulates in regular meetings to all members the technical assistance requests and implementation plans received. Technical assistance requests which have not been addressed by donors in a given time frame are discussed as a separate item during these regular meetings;
- Developed donor countries also on their part submit annual reports on the responses given to the requests for technical assistance, and on the progress made with technical assistance projects already being executed and included in implementation plans;

- The Committee reviews these annual reports, establishes a chart comparing requests with projects, and formulates recommendations to its members with regards to the observations made on progress with technical assistance;
- Developing country members also submit reports on progress made on compliance capacity acquisition for the provisions notified under the flexibility provisions. In these reports developing country members present their technical assistance requests and actions undertaken as well as responses received in view of securing donor funding. If an implementation plan had been submitted, a detailed report on progress made in implementation the project is provided by the developing country member. Difficulties or unexpected changes can be highlighted in this report, and if necessary, an updated implementation plan is submitted to the Committee for discussion and approval. The Committee discusses the updated implementation plan, formulates recommendations and decides on the acceptance of the new implementation plan to replace the plan submitted previously.

▪

c) Step 3: Capacity acquisition

The final step is the notification on capacity acquisition. Following the successful implementation of the technical assistance project or projects and upon verification by the developing country member that a sustainable capacity for the implementation of the given commitment has been acquired, the developing country member notifies the Committee of the capacity acquisition. Upon receipt of the notification the Committee decides on or simply notes the end of the flexibility granted.

The chart below summarizes the process and the procedural requirements for each phase.

Stage	Action at the country level	Responses on the level of the WTO
Development of Plan	Developing country member (DCM) determines implementation capacity for each of the legal provisions or parts thereof.	
	DCM notifies a set of legal provisions of the agreement for which it does not have compliance capacity under the provision for transitional periods. ⁵⁹	
	DCM submits to the Committee a technical assistance request if the acquisition of full compliance capacity for a given provision or parts thereof requires technical assistance support. ⁶⁰	(a) The Committee decides on the extension of the transitional period for the given provision until notification of capacity acquisition by developing country member; ⁶¹ (b) The Committee registers the TA requests and circulates it to members; (c) The Committee requests the notification of the implementation plan related to the technical assistance request in [x] ⁶² months.
	Bilateral negotiations between DCM and donors.	
	Notification of implementation plan for those technical assistance requests for which donors have been secured.	The Committee submits recommendations on the implementation plan.
	Communication by DCM if no donor support could be secured in the defined period of time.	The technical assistance request in question is put on the agenda of the annual review of the Committee.
Report on Progress		The Committee circulates bi-annually TA requests and implementation plans received to all members.
	Donor country members submit annual reports to the Committee on their technical assistance, including: (a) Responses given to TA requests by developing country members including information on projects under discussion; (b) General TA information.	The Committee undertakes the following (a) Reviews report; (b) Establishes comparative list of TA requests and responses; (c) Formulates recommendations.
	DCM submits annual report to the Committee on progress with the acquisition of implementation capacity for: (a) provisions which require technical assistance; (b) provisions which require national actions only. A request for a revision of the implementation plan can be submitted if substantial difficulties with the execution of the project as planned occurred.	The Committee reviews report annually and formulates recommendations where and when necessary The Committee reviews request to replace implementation plan, formulates recommendations and decides on the acceptance of the request.
Acquisition of capacity	Implementation of necessary reforms to acquire for full compliance capacity, including the execution of technical assistance projects notified in the implementation plans.	
	DCM notifies of capacity acquisition.	The Committee decides on the end of the transitional period.

⁵⁹ With this notification, the transitional periods or exemption limited in time are granted automatically. Another possibility would be to apply for the flexibilities with the Committee having to take a decision on the application of the flexibilities.

⁶⁰ There may be the time period defined in the agreement during which such technical assistance requests can be submitted.

⁶¹ This step may not require a decision if the agreement provides for an automatic extension,

⁶² [x] refers to the time period set in the agreement ,

ANNEX: COMPARATIVE OVERVIEW OF TECHNICAL ASSISTANCE PROVISIONS

The following section provides a synoptic overview of selected technical assistance-related provisions in existing WTO agreements following a specifically developed typology of these provisions that reflects the various aspects in which these provisions differ

Box 1. Typology of Technical Assistance Provisions

- 1. Who is obliged / expected to provide technical assistance?**
 - All members
 - Developed country members only
 - Other groups
 - Individual members
 - WTO secretariat
 - Others
- 2. Who is the recipient of technical assistance?**
 - Recipient country
 - All members
 - All developing countries
 - All developing countries, but especially LDCs
 - Only LDCs
 - Specific members
 - Beneficiary institution
 - Government bodies
 - Non-governmental bodies
 - Businesses
 - Other
- 3. What type of technical assistance?**
 - Format
 - Unspecified
 - Advice
 - Information
 - Training
 - Other
 - Target (activity to be supported by TA)
 - Unspecified
 - Institution building
 - Regulation
 - Participation in organizations
 - Production, trade, other economic activities
 - Other
 - Purpose
 - General/upgrade
 - To achieve compliance with WTO obligations
 - To achieve compliance with measures of other members
 - To achieve compliance with receiving members' measures
 - Upgrading of supply-side capacity
 - Other
 - Technical assistance coupled with financial assistance
- 4. Nature of Commitment**
 - Fully binding obligation
 - Best endeavor
 - Other

Agreement / provision	Who is expected to provide TA	Who is the recipient of TA	Type of TA	Nature of commitment
Agreement on Technical Barriers to Trade (Article 11)				
Art. 11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.	<ul style="list-style-type: none"> o Members 	Other Members, especially developing countries (LDCs with priority, para. 8)	Format: <ul style="list-style-type: none"> ▪ Advice Target activity to be supported by TA: <ul style="list-style-type: none"> ▪ Regulation: <ul style="list-style-type: none"> o Preparation of technical regulations Purpose <ul style="list-style-type: none"> ▪ General/upgrade 	<ul style="list-style-type: none"> o Binding (“shall”) o Subject to trigger (if requested)
Art. 11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.	<ul style="list-style-type: none"> o Members o Indirectly Members’ national standardizing bodies, to be “encouraged” by their respective government 	Other Members, especially developing countries (LDCs with priority, para. 8)	Format: <ul style="list-style-type: none"> ▪ Advice Target activity to be supported by TA: <ul style="list-style-type: none"> ▪ Institution building: <ul style="list-style-type: none"> o Establishment of national standardization bodies ▪ Participation in organizations: <ul style="list-style-type: none"> o Participation in international standardization bodies Purpose <ul style="list-style-type: none"> ▪ General/upgrade 	<ul style="list-style-type: none"> o Binding (“shall”) o Subject to trigger (if requested) o but <i>de facto</i> subject to agreement, thus soft obligation (“on mutually agreed terms and conditions”)
Art. 11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding: 11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and 11.3.2 the methods by which their technical regulations can best be met.	<ul style="list-style-type: none"> o Members to “arrange for”... o ...national regulatory bodies within their territory 	Other Members, especially developing countries (LDCs with priority, para. 8)	Format: <ul style="list-style-type: none"> ▪ Advice Target activity to be supported by TA: <ul style="list-style-type: none"> ▪ Institution building: <ul style="list-style-type: none"> o Establishment of regulatory bodies o Establishment of bodies for the assessment of conformity with technical regulations ▪ Production and other methods: <ul style="list-style-type: none"> o Methods by which technical regulations of a member are best met Purpose <ul style="list-style-type: none"> ▪ General/upgrade ▪ Compliance with other members’ technical regulations (11.3.2) 	<ul style="list-style-type: none"> o Binding (“shall”) o Subject to trigger (if requested) o but <i>de facto</i> subject to agreement, thus soft obligation (“on mutually agreed terms and conditions”)
Art. 11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant	<ul style="list-style-type: none"> o Members 	Other Members, especially developing countries (LDCs with priority,	Format: <ul style="list-style-type: none"> ▪ Advice Target activity to be supported by TA: <ul style="list-style-type: none"> ▪ Institution building: <ul style="list-style-type: none"> o Establishment of bodies for the 	<ul style="list-style-type: none"> o Binding (“shall”) o Subject to trigger (“if requested”) o But <i>de facto</i> subject to availability of

<p>them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.</p>		<p>para. 8)</p>	<p>assessment of conformity with standards</p> <p>Purpose</p> <ul style="list-style-type: none"> ▪ General/upgrade ▪ To achieve compliance with measures of other Members 	<p>measures and to agreement, thus soft obligation (“on mutually agreed terms and conditions”)</p>
<p>Art. 11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.</p>	<ul style="list-style-type: none"> ○ Members 	<p>Other Members, especially developing countries (LDCs with priority, para. 8)</p>	<p>Format:</p> <ul style="list-style-type: none"> ▪ Advice <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Production and other methods: <ul style="list-style-type: none"> ○ Steps to be taken by producers to have access to systems for conformity assessment operated in the territory of the Member providing the TA <p>Purpose:</p> <ul style="list-style-type: none"> ▪ To achieve compliance with measures, arguably both of their own government and of other Members (unspecified) 	<ul style="list-style-type: none"> ○ Binding (“shall”) ○ Subject to trigger (if requested) ○ but <i>de facto</i> subject to agreement, thus soft obligation (“on mutually agreed terms and conditions”)
<p>Art. 11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfill the obligations of membership or participation in such systems.</p>	<p>Members participants of international or regional systems of conformity assessment</p>	<p>Other Members, especially developing countries (LDCs with priority, para. 8)</p>	<p>Format:</p> <ul style="list-style-type: none"> ▪ Advice <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Institution building: <ul style="list-style-type: none"> ○ Establishment of institutions for the assessment of conformity ▪ Regulation: <ul style="list-style-type: none"> ○ Establish legal framework ▪ Participation in organizations: <ul style="list-style-type: none"> ○ Participation in international or regional systems of conformity <p>Purpose:</p> <ul style="list-style-type: none"> ▪ Other: <ul style="list-style-type: none"> ○ To achieve compliance with the obligations of membership or participation in international or regional systems for conformity assessment 	<ul style="list-style-type: none"> ○ Binding (“shall”) ○ Subject to trigger (if requested) ○ but <i>de facto</i> subject to agreement, thus soft obligation (“on mutually agreed terms and conditions”)
<p>Art. 11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfill the obligations of membership or participation.</p>	<ul style="list-style-type: none"> ○ Members to “encourage”... ○ ...bodies within their territory that are participants in international or regional systems of conformity assessment 	<p>Other Members, especially developing countries (LDCs with priority, para. 8)</p>	<p>Format:</p> <ul style="list-style-type: none"> ▪ Advice <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Institution building: <ul style="list-style-type: none"> ○ Establishment of institutions what would enable other bodies to fulfil the obligations of membership / participation ▪ Participation in organizations: <ul style="list-style-type: none"> ○ Participation in international or regional systems of conformity <p>Purpose:</p> <ul style="list-style-type: none"> ▪ Other: 	<ul style="list-style-type: none"> ○ Binding (“shall”) ○ The binding obligation is to encourage bodies within the Members’ territories ○ Subject to trigger (if requested)

			<ul style="list-style-type: none"> ○ To achieve compliance with the obligations of membership or participation in regional or international systems of conformity 	
Agreement of Sanitary and Phytosanitary Measures (Article 9)				
<p>Art. 9.1 Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, <i>inter alia</i>, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.</p>	<ul style="list-style-type: none"> ○ Members 	Other Members, especially developing countries	<p>Format:</p> <ul style="list-style-type: none"> ▪ Advice ▪ Other <ul style="list-style-type: none"> ○ Credit, donations and grants, to finance <i>inter alia</i> ○ Technical expertise, training and equipment <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Institution building <ul style="list-style-type: none"> ○ National regulatory bodies ▪ Production and other methods: <ul style="list-style-type: none"> ○ Processing technologies, research and infrastructure <p>Purpose:</p> <ul style="list-style-type: none"> ▪ To achieve compliance with measures of other Members (other was deleted as I could not find on what it was based...) <p>Technical assistance coupled with financial Assistance.</p>	<ul style="list-style-type: none"> ○ Soft obligation ("agree to facilitate the provision" of TA)
<p>Art. 9.2 Where substantial investments are required in order for an exporting developing country Member to fulfill the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.</p>	<ul style="list-style-type: none"> ○ Importing Members 	Exporting developing country Members	<p>Format</p> <ul style="list-style-type: none"> ▪ Unspecified <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Unspecified <p>Purpose:</p> <ul style="list-style-type: none"> ▪ To achieve compliance with SPS measures of other Members ▪ Other <ul style="list-style-type: none"> ○ To maintain and expand market access opportunities 	<ul style="list-style-type: none"> ○ Binding ("shall consider") - The obligation is to consider granting TA but not necessarily to grant the TA. ○ Subject to trigger ("where substantial investments are required")
Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation Agreement) (Article 20)				
<p>Art. 20.3 Developed country Members shall furnish, on mutually agreed terms, technical assistance to developing country Members that so request. On this basis developed country Members shall draw up programmes of technical assistance which may include, <i>inter alia</i>, training of personnel, assistance in preparing implementation measures, access to sources of information regarding customs valuation methodology, and advice on the application of the provisions of this</p>	<ul style="list-style-type: none"> ○ Developed country Members 	Developing country Members	<p>Format:</p> <ul style="list-style-type: none"> ▪ Advice ▪ Information ▪ Training <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Regulation <ul style="list-style-type: none"> ○ Assist in preparing implementation measures ▪ Other: <ul style="list-style-type: none"> ○ Capacity building of personnel ○ Enable access to information regarding 	<ul style="list-style-type: none"> ○ Binding ("shall") ○ Subject to trigger (if requested) ○ but <i>de facto</i> subject to agreement, thus soft obligation ("on mutually agreed terms")

Agreement.			valuation methodologies Purpose ▪ To achieve compliance with WTO obligations	
General Agreement on Trade in Services (GATS) (Articles XXV and IV; and Paragraph 6(c) of the Annex on Telecommunications).				
Art. XXV:1 Service suppliers of Members which are in need of such assistance shall have access to the services of contact points referred to in paragraph 2 of Article IV. Article IV:2 Developed country Members, and to the extent possible other Members, shall establish contact points within two years from the date of entry into force of the WTO Agreement to facilitate the access of developing country Members' service suppliers to information, related to their respective markets, concerning: a) commercial and technical aspects of the supply of services b) registration, recognition and obtaining of professional qualifications; and c) the availability of services technology	o Developed country Members o Other Members, "to the extent possible"	Service suppliers of Members (in need of the services provided by the contact point)	Format: ▪ Information (Unspecified in Art. XXV, but since the provision refers directly to the services of contact points referred to in Art. IV:2 of the GATS ,, it is clear that the Format of TA is information) Target activity to be supported by TA: ▪ Other o Access to information on the Member's services market Purpose ▪ To achieve compliance with measures of other Members (services importing Members)	o Binding ("shall") o Subject to trigger – request ("in need of such assistance") o Soft for developing country Members ("to the extent possible")
XXV:2 Technical assistance to developing countries shall be provided at the multilateral level by the Secretariat and shall be decided upon by the Council for Trade in Services.	o WTO Secretariat	Developing countries	Format: ▪ Unspecified Target activity to be supported by TA: ▪ Unspecified Purpose ▪ General	o Binding ("shall") o But subject to decision by Council for Trade in Services
Para. 6(c) of the Annex on Telecommunication In cooperation with relevant international organizations, Members shall make available, where practicable, to developing countries information with respect to telecommunications services and developments in telecommunications and information technology to assist in strengthening their domestic telecommunications services sector.	o Members	Developing countries	Format: ▪ Information Target activity to be supported by TA: ▪ Unspecified Purpose ▪ General/upgrade ▪ Arguably to achieve compliance with regulatory Measures of recipient and other Members' measures ("To assist in strengthening developing countries' domestic telecommunication services sector")	o Binding ("shall") o But subject to practicability ("where practicable"), thus soft obligation
Decision on Institutional Arrangements for the GATS (Para 2)				
Para 2 Any sectoral committee shall carry out responsibilities as assigned to it by the Council and shall afford Members the opportunity to consult on any matters relating to trade in services in the sector concerned and the operation of the sectoral annex to	o Any (services) sectoral committee arguably through the WTO	Developing country Members and Developing countries	Format: ▪ Unspecified o Arguably advice, information and/or training Target activity to be supported by TA:	o Binding ("shall")

<p>which it may pertain. Such responsibilities shall include:</p> <p>(e) to provide technical assistance to developing country Members and developing countries negotiating accession to the Agreement Establishing the World Trade Organization in respect of the application of obligations or other matters affecting trade in services in the sector concerned</p>	Secretariat	negotiating accession	<ul style="list-style-type: none"> ▪ Unspecified <p>Purpose:</p> <ul style="list-style-type: none"> ▪ To achieve compliance with WTO obligations in respect to measures affecting trade in services 	
<p>Guidelines and Procedures for the Negotiations on Trade in Services (adopted by the Special Session of the Council of Trade in Services on 28 March 2001)</p>				
<p>Para 14 The Council for Trade in Services in Special Sessions shall continue to carry out an assessment of trade in services in overall terms and on sectoral basis with reference to the objectives of the GATS and of Article IV in particular. This shall be an ongoing activity of the Council and negotiations shall be adjusted in the light of the results of the assessment. In accordance with Article XXV of the GATS, technical assistance shall be provided to developing country Members, on request, in order to carry out national/regional assessments.</p>	<ul style="list-style-type: none"> ○ WTO Secretariat (reference to Art. XXV) 	Developing countries	<p>Format:</p> <ul style="list-style-type: none"> ▪ Unspecified. Arguably, advice, information and other forms of support necessary to carry out the national/regional assessments. <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Other <ul style="list-style-type: none"> ○ National/regional assessments of trade in services in overall terms and on sectoral basis <p>Purpose:</p> <ul style="list-style-type: none"> ▪ Other <ul style="list-style-type: none"> ○ To facilitate WTO negotiations 	<ul style="list-style-type: none"> ○ Binding (“shall”) ○ But subject to trigger (“on request”)
<p>Modalities for the Special Treatment for Least developed Country Members in the Negotiations on Trade in Services (adopted by the Special Session of the Council for Trade in Services on 3 September 2003)</p>				
<p>Para 12 Targeted and coordinated technical assistance and capacity building programs shall continue to be provided to LDCs in order to strengthen their domestic service capacity, build institutional and human capacity, and enable them to undertake appropriate regulatory reforms. In pursuance of paragraph 14 of the Guidelines and Procedures for Negotiations on Trade in Services (S/L/93), technical assistance shall also be provided to LDCs to carry out national assessments of trade in services in overall terms and on sectoral basis with reference to the objectives of the GATS and Article IV in particular.</p>	<ul style="list-style-type: none"> ○ Unspecified but arguably Members and WTO Secretariat 	Least developed countries	<p>Format:</p> <ul style="list-style-type: none"> ▪ Unspecified. Arguably, advice, information and other forms necessary to strengthen LDCs domestic service capacity and support them to carry out the national/regional assessments. <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Institution building ▪ Regulation (regulatory reform) ▪ Production, trade, other economic activity (“to strengthen LDCs domestic service and human capacity”) ▪ Other <ul style="list-style-type: none"> ○ National/regional assessments of trade in services in overall terms and on sectoral basis <p>Purpose:</p> <ul style="list-style-type: none"> ▪ General ▪ Upgrade of supply-side capacity (arguably to benefit from liberalization) 	<ul style="list-style-type: none"> ○ Binding (“Shall”)

			<ul style="list-style-type: none"> ▪ Other <ul style="list-style-type: none"> ○ To facilitate WTO negotiations on services. 	
<ul style="list-style-type: none"> ○ Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) (Article 66 & 67) / Decision of the Council for TRIPS of 29 November 2005 (IP/C/40) 				
<p>Art. 66.2⁶³ Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least developed country Members in order to enable them to create a sound and viable technological base.</p>	<ul style="list-style-type: none"> ○ Developed country Members to provide “incentives” to... ○ ...Enterprises and institutions operating within their territory, 	Least developed countries	<p>Format:</p> <ul style="list-style-type: none"> ▪ Technology transfer (through “incentivized” private operators) <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Arguably production, trade and other economic activity (“to create a sound technological base”) <p>Purpose</p> <ul style="list-style-type: none"> ▪ Upgrade of supply-side performance <ul style="list-style-type: none"> ○ Arguably to facilitate use / enjoyment of TRIPS rights in the future ▪ Arguably indirectly compliance with TRIPS. 	<ul style="list-style-type: none"> ○ Binding (“shall”) ○ But binding obligation relates only to the “incentivization” of enterprises/institutions, not the actual transfer of technology
<p>Art. 67 In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.</p> <p>IP/C/40 §3 Developed country Members shall provide technical and financial cooperation in favour of least developed country Members in accordance with Article 67 of the Agreement in order to effectively address the needs identified in accordance with paragraph 2</p>	<ul style="list-style-type: none"> ○ Developed countries 	Developing and least developed countries	<p>Format:</p> <ul style="list-style-type: none"> ▪ Unspecified ▪ Training <p>Target activity to be supported by TA:</p> <ul style="list-style-type: none"> ▪ Regulation <ul style="list-style-type: none"> ○ On the protection and enforcement of IP rights and prevention of their abuse ▪ Institution building (and capacity building) <p>Purpose</p> <ul style="list-style-type: none"> ▪ To achieve compliance with TRIPS Agreement <p>Technical and financial assistance</p>	<ul style="list-style-type: none"> ○ Binding (“shall”) ▪ But subject to triggers (“on request”) and (“on mutually agreed terms and conditions”), thus a soft obligation

⁶³ The Article 66.2 calls for incentives for technology transfer. It is therefore a very specific form of technical assistance, and it is not directly targeted activities in the territory of LDCs but calls for actions in developed country members’ territory. Furthermore the term transfer of technology is not defined by the TRIPS agreement nor by any other international agreement and can encompass a variety of actions.