

STEPS TOWARDS THE RATIFICATION, ACCEPTANCE AND ENTRY INTO FORCE OF THE WTO AGREEMENT ON TRADE FACILITATION

This Technical Note outlines the steps that WTO Members may need to undertake towards the ratification, acceptance and entry into force of the Protocol inserting the Agreement on Trade Facilitation to the WTO legal system.

INTRODUCTION

At the Ninth Ministerial Conference in December 2013, Members of the World Trade Organization (WTO) concluded the negotiations of the Agreement on Trade Facilitation (TFA). Subsequently, on 27 November 2014, WTO Members adopted the Protocol of Amendment in order to insert this new Agreement into Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The TFA will enter into force (in the terms established in Article X.3 of the WTO Agreement) once two-thirds of the WTO Members, i.e. 108 Members as of June 2015, have ratified and notified acceptance of the Agreement to the WTO Secretariat.

To achieve this, WTO Members shall first complete the following three main stages:

- 1) Ratification stage: At the domestic level, each Member shall undertake ratification procedures, which vary from Member to Member.
- 2) Acceptance stage: At the multilateral level, WTO Members having completed their domestic ratification procedures should notify their acceptance of the Protocol Amending the WTO Agreement (the Protocol) to other WTO Members.
- 3) Entry into force stage: The Protocol will take effect upon acceptance by two-thirds of the WTO Members.

This Technical Note describes the steps within these three stages in a consecutive manner to guide Member States towards the application of the TFA.



TRADE FACILITATION TECHNICAL NOTE #23

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INTRODUCTION

At the Ninth Ministerial Conference in December 2013, Members of the World Trade Organization (WTO) concluded the negotiations of the Agreement on Trade Facilitation (TFA). The TFA will enter into force once

2/3 of the WTO Members, i.e. 108 Members as of June 2015,

have ratified and notified acceptance of the Agreement to the WTO Secretariat.

To achieve this, WTO Members shall first complete the following **THREE MAIN STAGES**

STAGE I RATIFICATION

At the domestic level, each Member shall undertake ratification procedures, which vary from Member to Member

STAGE II ACCEPTANCE

At the multilateral level, WTO Members having completed their domestic ratification procedures should notify their acceptance of the Protocol Amending the WTO Agreement

STAGE III ENTRY INTO FORCE

The Protocol will take effect upon acceptance by two-thirds of the WTO Members

This Technical Note describes the steps within these three stages in a consecutive manner to guide Member States towards the application of the TFA.

I. RATIFICATION STAGE

Ratification is a means of expression for a State to consent to be legally bound by a treaty. This stage involves the relevant procedures that need to be pursued at the national level before a WTO Member can notify its acceptance of the TFA.

**STEP
1**

Looking at the domestic legal requirements for the approval of International Agreements

**STEP
2**

Elaboration of the domestic instrument approving the Protocol Amending the WTO Agreement

**STEP
3**

Approval of the Protocol Amending the WTO Agreement

**STEP
4**

Ratification

- a) WTO Members express their consent to be bound to the TFA through ratification.
- b) In the case of Parliamentary approval, usually the Executive branch ratifies the agreement thereafter.
- c) The instrument of ratification has to be signed on behalf of the State.

II. ACCEPTANCE STAGE

This stage refers to the required procedure at the multilateral level that Members need to follow to become a signatory party to the WTO TFA.

**STEP
5**

Elaboration of the instrument of acceptance of the Protocol

**STEP
6**

Deposit of the instrument of acceptance to the WTO Secretariat

III. ENTRY INTO FORCE OF THE PROTOCOL AND THE WTO TFA

The Protocol and the TFA shall take effect upon acceptance by 2/3 of the WTO Members, pursuant to Article X.3 of the WTO Agreement

I. RATIFICATION STAGE

Ratification is a means of expression for a State to consent to be legally bound by a treaty. This stage involves the relevant procedures that need to be pursued at the national level before a WTO Member can notify its acceptance of the TFA.

Step 1: Looking at the domestic legal requirements for the approval of International Agreements

- a) Each WTO Member should first look at its domestic law (i.e. constitutional and/or other legal requirements) for approving international agreements. For those WTO Members with special rules for trade agreements, they may only need to focus on these requirements.
- b) Constitutional and other legal requirements typically contemplate one of the following two procedures for approving international agreements:
 - i) The Executive branch may approve the agreement if the issues covered by it fall under the exclusive power of the Executive; or
 - ii) The Legislative branch may approve the agreement, e.g. if its implementation will need that the Parliament enacts a new law or amends an existing one, or if the issues covered by the agreement fall under the Legislative's power.

In either case, a legal assessment of the Agreement may need to be carried out (Box 1).

Box 1: Legal assessment

In case a legal assessment is necessary, WTO Members may consider the following steps:

- a) Assessment of which Government Branch has the legal powers to approve the Protocol.
- b) All agencies involved in cross-border trade in goods should participate. The National Trade Facilitation Committee¹ (NTFC) could ideally carry out this exercise. Otherwise, the coordinating agency leading the trade facilitation negotiations, such as the ministry of trade, foreign affairs, or any other relevant agency (i.e. Customs, transport or coordinating ministry) and/or the Attorney-General may head the legal assessment and domestic procedure of approval.
- c) The assessment should include a legal analysis of the obligations contained in the WTO

¹ Pursuant to Article 23.2 of the TFA, WTO Members shall establish and/or maintain a NTFC or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of the TFA. Given that this provision is not subject to categorization, the committee shall exist at the moment of the entry into force of the TFA. For more information on country-experiences establishing a NTFC, please visit the UNCTAD-ECE-ITC repository on Trade Facilitation Bodies around the World at www.unctad.org/tfcommittee

TFA compared to the domestic legal framework.

d) Developing and least-developed WTO Members can support their assessments, e.g. on the analysis carried out by Annex D organizations², such as: UNCTAD national trade facilitation implementation plans, studies and technical notes; as well as the WTO needs assessments.

e) The final outcome of the assessment would be the determination whether the Parliament should enact a new law or amend an existing one in order to implement the TFA. If so, the Legislative branch would be the competent authority to approve the TFA in accordance with the constitutional/legal requirements.

Source: UNCTAD

Step 2: Elaboration of the domestic instrument approving the Protocol Amending the WTO Agreement

Once WTO Members approve either through its Executive or Legislative branch the TFA pertaining to step 1 above, the following actions would be applicable for elaborating the instrument of approval of the Protocol Amending the WTO Agreement:

- a) To elaborate a draft of the required constitutional/legal approval instrument (whether a law, act, decree or decision).
- b) Depending on the procedural requirements, issuing an accompanying note or report explaining/justifying the approval and ratification of the Protocol, containing advantages, economic impact, risk analysis and recommendations; and
- c) To submit the draft of the instrument of approval along with the report to:
 - i) The Cabinet and/or President/Prime Minister in case of Executive approval, or
 - ii) The Parliament in case of Legislative approval.

Annex I contains models that developing and least-developed WTO Members may use to elaborate the instrument of approval that will lead to the act of ratifying the Protocol.

The Decision adopted by the General Council on 27 November 2014 (WT/L/940) explicitly requests WTO Members to notify the acceptance to the “Protocol”. Likewise, this decision clearly states that the “Protocol” shall enter into force in accordance with Article X.3 of the WTO Agreement. Thereby, the instrument of approval may follow one of the two following approaches:

- a) The approval/ratification of the Protocol (Annex I-A); or
- b) The approval/ratification of the Protocol and the TFA annexed to the Protocol (Annex I-B).

² According to the Decision adopted by the WTO General Council (WT/L/579) on 1 August 2004, known as July package, Annex D (Modalities for Negotiations on Trade Facilitation) organizations are the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD), the World Customs Organization (WCO), the World Bank and UNCTAD.

Step 3: Approval of the Protocol Amending the WTO Agreement

Depending on their domestic legal requirements (e.g. constitutional) of each WTO Member, the approval of the WTO TFA can happen in two different instances:

- a) *Executive branch*: if all the issues covered by the TFA are exclusively part of the Executive's powers, the Executive alone, without parliamentary intervention, can approve the agreement.
- b) *Legislative branch*: The Parliament³ may be the appropriate body to approve the WTO TFA when:
 - i) The implementation of agreement requires enacting new or amending existing legislation, and/or
 - ii) The issues covered by the TFA are within the Parliament's powers.

This step allows WTO Members weighing and considering the political and economic consequences of becoming a party of the TFA. Thus, the coordinating agency and other relevant stakeholders, in particular trade facilitation negotiators, could be required to assist and follow-up the debates as well as be available for answering technical questions about the TFA.

Note that neither the TFA (Article 24.9) nor the Protocol (paragraph 2) allows entering reservations in respect of any of the provisions.⁴

Step 4: Ratification⁵

- a) WTO Members express their consent to be bound to the TFA through ratification.
- b) In the case of Parliamentary approval, usually the Executive branch ratifies the agreement thereafter.
- c) The instrument of ratification has to be signed on behalf of the State. Usually, either the Head of the State, Head of Government or Minister of Foreign Affairs has the legal capacity to represent the State with their signature. Anyone else needs full powers⁶ in order to sign the instrument.

³ For more certainty, the term "Parliament" refers to any body exercising the legislative power, namely, Congress, upper and lower houses, Senate, Chambers among others.

⁴ Reservations are a unilateral statement when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. A reservation enables a state to accept a multilateral treaty as a whole by giving it the possibility not to apply certain provisions with which it does not want to comply (Arts.2 (1) (d) and 19-23, Vienna Convention of the Law of Treaties 1969).

⁵ The instruments of "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a State to be bound by a treaty. In the practice of certain States approval has been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state (Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969).

⁶ Full powers is a document emanating from the competent authority of a State designating a person or persons to represent a State for negotiating, adopting, or expressing the consent of the State to be bound by a treaty.

Note: Ratification does not mean that the concerned WTO Member should immediately apply the WTO TFA. The agreement will only be binding for WTO Members that ratify it and once it enters into force. In the case of developing and least-developed WTO Members, as a result of the Special and Differential provisions of the Agreement (Section II of the TFA), provisions that have been self-designated under Categories B and C will be applicable according with their respective schedules (See Box 2).

II. ACCEPTANCE STAGE

This stage refers to the required procedure at the multilateral level that Members need to follow to become a signatory party to the WTO TFA.

Step 5: Elaboration of the instrument of acceptance of the Protocol

- a) Once domestic procedures have been successfully completed in accordance with the guidelines of Point I above, WTO Members, individually, prepare an instrument of acceptance.
- b) This instrument indicates to the rest of the WTO membership the consent of each individual WTO Member to be bound by the Protocol.
- c) The instrument of acceptance shall contain the following information (in preparing their instruments of acceptance, WTO Members may wish to follow a model prepared by the WTO Secretariat-see Annex II):
 - i) Full identification of the Protocol i.e. “the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization done at Geneva on 27 November 2014” or, alternatively, reproduce the Protocol as an attachment to the instrument of acceptance;
 - ii) A formal statement that the concerned WTO Member formally accepts the Protocol and expresses its consent to be bound by it;
 - iii) The date and place when the instrument of acceptance was issued;
 - iv) The signature of the person who has the legal capacity to sign the acceptance instrument; and
 - v) The name and title of the person signing the instrument.

Step 6: Deposit of the instrument of acceptance to the WTO Secretariat

The acceptance to the Protocol should be deposited with the WTO Director-General. In practice, the instrument of acceptance will be deposited with the Depository Assistant in the WTO Legal Affairs Division. The transmission of the acceptance is typically undertaken by the Mission to the WTO.

For more information about WTO Members that have already deposited their instruments of acceptance, see https://www.wto.org/english/tratop_e/tradfa_e/tradfa_agreeacc_e.htm

Box 2: Ratification, Categorization and Implementation

These three concepts play a pivotal role during the process towards the entry into force and the full-implementation of the TFA by all WTO Members. Therefore, it is important to clearly draw some lines between them.

Ratification involves the domestic procedure of approval to be carried out by each WTO Member in accordance with their constitutional/legal requirements. As a result, WTO Members will indicate their consent to be bound by the TFA through the acceptance of the Protocol. All WTO Members, whether developed or developing countries, must comply with this procedure in order to become a signatory party of the TFA.

Categorization allows developing and least developed countries (LDCs) to determine when they will implement individual provisions of the TFA and to identify provisions that they will only be able to implement upon the receipt of technical assistance and support for capacity building. Pursuant to Section II of the TFA, if developing countries and LDCs wish to take advantage of the possibilities to seek support and capacity building, they must categorize each provision of the TFA, as defined below, and notify other WTO Members of these categorizations in accordance with specific timelines outlined in the agreement:

Category A: measures that the WTO Member will implement by the time the Agreement enters into force (LDCs can take an additional year);

Category B: measures for which the WTO Member will need additional time to implement; and

Category C: measures for which the WTO Member will need additional time and technical assistance or capacity building to implement.

Implementation entails to undertake the necessary steps to ensure the full application of the obligations contained in the agreement. In the case of the WTO TFA, the implementation stage will take place at different moments for developed and developing countries, including LDCs.

- a) **Developed countries:** the full implementation of the TFA should be completed at the moment of entry into force of the TFA, after their ratification and acceptance of the Protocol.
- b) **Developing countries and LDCs:** the benefits from the special and differential treatment provision are enshrined in Section II of the TFA. Thereby, developing countries and LDCs will decide on the gradual implementation of the provisions contained in the TFA, possibly linking them to the receipt of technical assistance and support for capacity building.

Source: UNCTAD

III. ENTRY INTO FORCE OF THE PROTOCOL AND THE WTO TFA

The Protocol and the TFA shall take effect upon acceptance by two-thirds of the WTO Members, pursuant to Article X.3 of the WTO Agreement. Customarily, in practice once two-thirds of the Members have ratified and notified their acceptance, the Members will be notified by the WTO Secretariat of the entry into force within a certain delay.

- a) The Protocol and the TFA will enter into force only for those WTO Members that have accepted it.
- b) Thereafter, the Protocol and the TFA shall take effect for each other Member upon acceptance by it.

ANNEX I-A

**RATIFICATION OF THE PROTOCOL AMENDING THE MARRAKESH AGREEMENT
ESTABLISHING THE WORLD TRADE ORGANIZATION**

[LAW/DECREE/ACT/DECISION] NO. [XXXXX]

The [Parliament, Congress, Senate, President];

Having regard to the [Law, Decree, Act, Decision No. XXX] adopted on the [XX] of [XXXX]199[X] approving the Marrakesh Agreement establishing the World Trade Organization (“the WTO Agreement”), and also the Agreements in Annex 1, 2 and 3 to that Agreement;

Considering the paragraph 1 of Article X of the WTO Agreement;

Welcoming the adoption of Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (“the Protocol”), adopted by the WTO General Council at Geneva on 27 November 2014 (WT/L/940);

Welcoming the end of the negotiations on trade facilitation and the adoption of the Agreement on Trade Facilitation, done at Bali in December 2013;

Considering the potential benefits from the implementation of the Agreement on Trade Facilitation, in particular expediting the movement, release and clearance of goods, and reducing trade costs;

Having regard that the aim of the Protocol is to insert the Agreement on Trade Facilitation into Annex 1A of WTO Agreement;

Recalling the Protocol shall enter into force in accordance with Article X: 3 of the WTO Agreement;

Having considered the Protocol and the Agreement on Trade Facilitation annexed to the Protocol;

Hereby has decided as follows:

Article 1

Ratify the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, done at Geneva on November 27, 2014.

Article 2

The [XXXX] is hereby authorized to submit the acceptance of the Protocol.

Article 3

This [Law/Decree/Act/Decision] shall enter into force upon [its publication in the Official Gazette][and after the entry into force of the Agreement on Trade Facilitation, annexed to the Protocol].

Approved at [XXXX], [XX] [XXXX] 2015

ANNEX I-B

RATIFICATION OF THE PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION AND ITS ANNEX, THE AGREEMENT ON TRADE FACILITATION

[LAW/DECREE/ACT/DECISION] NO. [XXXXXX]

The [Parliament, Congress, Senate, President];

Having regard to the [Law, Decree, Act, Decision No. XXX] adopted on the [XX] of [XXXX]199[X] approving the Marrakesh Agreement establishing the World Trade Organization (“the WTO Agreement”), and also the Agreements in Annex 1, 2 and 3 to that Agreement;

Considering the paragraph 1 of Article X of the WTO Agreement;

Welcoming the adoption of Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (“the Protocol”), adopted by the WTO General Council at Geneva on 27 November 2014 (WT/L/940);

Welcoming the end of the negotiations on trade facilitation and the adoption of the Agreement on Trade Facilitation, done at Bali in December 2013;

Considering the potential benefits from the implementation of the Agreement on Trade Facilitation, in particular expediting the movement, release and clearance of goods, and reducing trade costs;

Having regard that the aim of the Protocol is to insert the Agreement on Trade Facilitation into Annex 1A of WTO Agreement;

Recalling the Protocol shall enter into force in accordance with Article X: 3 of the WTO Agreement;

Having considered the Protocol and the Agreement on Trade Facilitation annexed to the Protocol;

Hereby has decided as follows:

Article 1

Ratify the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, done at Geneva on November 27, 2014, and its Annex, the Agreement on Trade Facilitation, which is placed in Annex 1A to the WTO Agreement after the Safeguards Agreement.

Article 2

The [XXXX] is hereby authorized to submit the acceptance of the Protocol.

Article 3

This [Law/Decree/Act/Decision] shall enter into force upon [its publication in the Official Gazette][and after the entry into force of the Agreement on Trade Facilitation, annexed to the Protocol].

Approved at [XXXX], [XX] [XXXX] 2015

ANNEX II

[MEMBER]

**INSTRUMENT OF ACCEPTANCE
OF THE PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE
WORLD TRADE ORGANIZATION**

Whereas the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (“the Protocol”) was done at Geneva on 27 November 2014 (WT/L/940);

And whereas, in accordance with its paragraph 4, the Protocol shall enter into force in accordance with Article X:3 of the Marrakesh Agreement Establishing the World Trade Organization;

Now therefore, I, [name of signatory], [where applicable: head of state, head of government or minister of foreign affairs] of [Member], do hereby formally declare that [Member] accepts the aforementioned Protocol and undertakes faithfully to perform and carry out the stipulations therein contained.

In witness whereof, I [name and title of signatory] have signed this Instrument of Acceptance, at [place] on this [day] of [month] in the year [year].

[Signature, title and seal]

Source for Annex II: WTO Secretariat

The Technical Notes have been produced by technical experts contracted by UNCTAD under different Trade Facilitation projects financed by the Governments of Norway, Sweden, Switzerland and Spain as well as the European Union. Their purpose is to assist policy makers and other Trade Facilitation stakeholders to better understand the scope and implications of the various trade facilitation measures included in the WTO Trade Facilitation Agreement (TFA) and prepare for their implementation. The opinions expressed in the Technical Notes may not necessarily coincide with those of the organization or the donors of the Trust Fund. The Technical Notes have not been formally edited. For comments and enquiries please contact TF@UNCTAD.org

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