

Trade Facilitation Agreement Legal Review (*Preamble - Article 6*)

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Geneva, Switzerland
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Outline

- Background of the TFA
- Purpose of Legal Scrubbing
- TFA “Legal Review” Process
- Revisions of Contention
- Differences between Bilateral and Multilateral Legal Scrubbing
- Review of Main Arguments
- Diplomatic Language for Interventions
- Takeaways

Background

- Negotiations concluded the 9th WTO Ministerial Conference in Bali held on 3-7 December 2013
- Preparatory Committee on Trade Facilitation (PCTF) established under the General Council - open to all Members
 - Legal Review
 - Amendment Protocol
 - Category A Notifications

Background (continued)

- First PCTF meeting: January 31, 2014
- Chairman, Ambassador Esteban B. Conejos, Jr., Philippines



- Work Plan Timeline: July 31, 2014

Legal Review Logistics

- Initial legal scrubbing meeting with limited comments (Article 1-2)
- 16 written comments from different members and groups [samples]
- WTO Secretariat Legal Review table – **199 pages!**

Purpose of Legal Scrubbing

- 到底在scrub甚麼?

- Correctness
- Clarity
- Consistency



What are discussed at legal reviews?

- Structure and numbering of the agreement
- Specific expressions and terms
- and, or, or and/or?
- ; or , or .?
- When are where to put a comma?
- Grammar
- Active or passive voice?

Inside the WTO...



Chairman's Ground Rules

1. The quality of the legal review depends on the contribution from the Members
2. Every improvement to the Bali text requires **consensus**
3. Or, we default back to the Bali text

The objectives of the TFA

Preamble

Members,

Having regard to the Doha Round of Multilateral Trade Negotiations;

Recalling and reaffirming the mandate and principles contained in paragraph 27 of the [Doha Ministerial Declaration](#) and Annex D of the [Decision of the Doha Work Programme](#) adopted by the General Council on 1 August 2004, as well as paragraph 33 and Annex E of the [Hong Kong Ministerial Declaration](#);

*Desiring to clarify and improve relevant aspects of **Articles V, VIII and X of the GATT 1994** with a view to further expediting the movement, release and clearance of goods, including goods in transit;*

Recognizing the particular needs of [developing and especially least-developed country Members](#) and [desiring to enhance assistance and support for capacity building in this area](#);

Recognizing the need for effective cooperation among Members on trade facilitation and customs compliance issues:

Hereby *agree* as follows:

TFA Structure (*15 Articles total in Section I*)

SECTION I

Article 1: Publication and Availability of Information

Article 2: Opportunity to Comment, Information Before Entry into Force and Consultations

Article 3: Advance Rulings

Article 4: Appeal or Review Procedures

Article 5: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency

Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation

SECTION II: Special Differential Treatment Provisions for Developing Country Members and Least Developed Members

SECTION III: Final Provisions

Legal Review Table

Agreed Text (Bali – WT/MIN(13)/36)	Suggested Changes	Comments
AGREEMENT ON TRADE FACILITATION		
<p>Preamble</p> <p><i>Members,</i> <i>Having regard to the Doha Round of Multilateral Trade Negotiations;</i> <i>Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004, as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration;</i> <i>Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit;</i> <i>Recognizing the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area;</i> <i>Recognizing the need for effective cooperation among Members on trade facilitation and customs compliance issues:</i></p> <p>Hereby <i>agree</i> as follows:</p>	<p>CAN, ACP:</p> <p>Preamble</p> <p>IND: <i>Having regard to the negotiations launched under the Doha Ministerial Declaration;</i></p> <p>CAN: <i>Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004, as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration;</i></p> <p>EU:</p> <p><i>Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and <u>in</u> Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004, as well as <u>in</u> paragraph 33 <u>of</u> and Annex E of the Hong Kong Ministerial Declaration;</i></p>	

AGREEMENT ON TRADE FACILITATION**HKC:**

*Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004 [Comment: we notice that the reference in paragraph 1.1 of Section II is different. Members might wish to consider aligning the two if they are meant to be the same. – **CAN makes this same comment**] as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration [Comment: we notice that paragraph 1.1 of Section II specifies the document numbers as well. Members might wish to consider aligning the two presentations.];*

JPN:

*Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the General Agreement on Tariffs and Trade (hereinafter referred to as the "GATT 1994") with a view to further expediting the movement, release and clearance of goods, including goods in transit; **PER makes same proposal***

IND:

Recognizing the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in the area of trade facilitation and customs compliance issues;

MEX:

*Recognizing the need for effective cooperation among Members on trade facilitation and customs compliance issues; **CHN, CAN make the same proposal***

CH: *Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration ([WT/MIN\(01\)/DEC/1](#)) and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004 ([WT/L/579](#)), as well as paragraph 33*

Structure

- SECTION I/II/III...
- TITLE
- Article 1
- Paragraph 1.1
- Subparagraph 1.1(a)
- Subparagraph 1.1(a)(i)
 - Or...sub-paragraph?

Section I
Section II: Special Differential
Treatment Provisions for Developing
Country Members and Least Developed
Members
Section III: Final Provisions

Clarity

- Preamble:

“*Desiring* to clarify and Articles V, VIII and X of the GATT expediting the movement, release of goods in transit; ding

Recognizing the partic especially least-developed count nance assistance and support

- CAN/KOR: “in the area
- IND: “in the area of trade facilitation and customs compliance.”
- Malaysia: “in all areas covered by this agreement”
- US: keep Bali text

1.2 Nothing **in these provisions** shall be construed as requiring the publication or provision of information other than in the language of the Member except as stated in paragraph 2.2.

Articles V, expediting ding especially nance rea.”

SECTION I

ARTICLE 1: PUBLICATION AND AVAILABILITY OF INFORMATION

1 PUBLICATION

1.1. Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them:

- a. Importation, exportation and transit procedures (including port, airport, and other entry-point procedures) and required forms and documents;
- b. Applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation;
- c. Fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;
- d. Rules for the classification or valuation of products for customs purposes;
- e. Laws, regulations and administrative rulings of general application relating to rules of origin;
- f. Import, export or transit restrictions or prohibitions;
- g. Penalty provisions against breaches of import, export or transit formalities;
- h. Appeal procedures;
- i. Agreements or parts thereof with

CAN:

- a. Importation, exportation, and transit procedures (including port, airport, and other entry-point procedures), and required forms and documents;

US:

- g. Penalties provisions against for breaches of import, export, or transit formalities;

US:

- h. ~~Appeal procedures~~ Procedures for appeal;

JPN:

- h. Appeal or review procedures; **PER makes same proposal**

HKC/CAN:

- (i) Agreements or parts thereof with any country or countries relating to importation, exportation or transit; *and [Comment: we suggest adding 'and' or 'or' to each list to clarify whether the list offers choices from among the items, or that all the items must co-exist.]*

TUR Comment: The proposal by Hong Kong to add "and" or "or" between each list may substantially change the content of the obligation in this Article. Therefore, we suggest that the Article is kept as it is.

ACP Comment: The insertion of 'and', 'or' or 'and/or' in lists wherever they appear seem to be substantive changes impinging on interpretation as the choice of one or the other will substantially change the meaning of the lists. Unless there is explicit consensus in the room to change, ACP suggests remaining with the existing text.

**Agreed Text (Bali –
WT/MIN(13)/36)**

**2 INFORMATION AVAILABLE THROUGH
INTERNET**

2.1 Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:

- a. A description of its importation, exportation and transit procedures, including appeal procedures, that informs governments, traders and other interested parties of the practical steps needed to import and export, and for transit;
- b. The forms and documents required for importation into, exportation from, or transit through the territory of that Member;
- c. Contact information on enquiry points.

Suggested Changes

JPN/PER:

- a. A description of its importation, exportation and transit procedures, including appeal or review procedures. . .

CH:

- a. aA description of its importation, exportation and transit procedures. . .

CAN:

- a. A description of its importation, exportation and transit procedures, including appeal procedures, that informs governments, traders, and other interested parties of the practical steps needed ~~to~~ for import, ~~and~~ export, and ~~for~~ transit;

HKC

- b. The forms and documents required for importation into, exportation from, or transit through the territory of that Member; and

The addition of "and" also proposed by JPN, CAN

JPN:

- c. Contact information on its enquiry points.
Also proposed by US

Agreed Text (Bali – WT/MIN(13)/36)

Suggested Changes

ARTICLE 1

2.3 Members are encouraged to make available further trade related information through the internet, including relevant trade-related legislation and other items referred to in paragraph 1.1.

ARTICLE 4

1.3 Members shall ensure that their appeal or review procedures are carried out in a non-discriminatory manner.

CAN:

2.3 ~~Members are~~ Each Member is encouraged to make available further trade related information through the internet, including relevant trade-related legislation laws and regulations and other items referred to in paragraph 1.1.

CAN/JPN/US:

1.3. ~~Members~~ Each Member shall ensure that its their appeal or review procedures are carried out in a non-discriminatory manner.

Substantive changes to the
obligation/meaning of the original text

Australia, wake up!

Agreed Text (Bali – WT/MIN(13)/36)

Suggested Changes

1.4 Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1.1 a. is not given either i. within set periods as specified in its laws or regulations or ii. without undue delay, the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.

IND:

Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1.1 a. is not given either i. within set periods as specified in its laws or regulations or ii. without undue delay in case no set periods are specified, the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.

CAN:

1.4. Each Member shall ensure that⁷ in a case where the decision on appeal or review under subparagraph 1.1 a. is not given either_:

i. within set periods as specified in its laws or regulations_: or

ii.⁷ without undue delay⁷

the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.

Agreed Text (Bali – WT/MIN(13)/36)

ARTICLE 5: OTHER MEASURES TO ENHANCE IMPARTIALITY, NON- DISCRIMINATION AND TRANSPARENCY

1 NOTIFICATIONS FOR ENHANCED CONTROLS OR INSPECTIONS

Where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination or suspension:

- d. when a Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

Suggested Changes

JPN, ZAF, HKC make this same proposal to add and.

HKC also proposes a hyphen in **trade-restrictive in last line**

US:

- d. when a Member ~~decides to~~ terminate^s or suspend^s the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

Agreed Text (Bali – WT/MIN(13)/36)

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Suggested Changes

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HKC also proposes a hyphen in **trade-restrictive in last line**

US:

- d. when a Member ~~decides to~~ terminate^s or suspend^s the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

Other examples

- **JPN:**

d. A Member may require that an applicant ~~have~~has legal representation or registration in its territory. To the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium-sized enterprises. These requirements shall be clear and transparent and ~~not~~ constitute a means of arbitrary or unjustifiable discrimination.

- **US:**

d. A Member may require that an applicant have legal representation or registration in its territory. The Member shall ensure that, t~~To~~ the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium sized enterprises. The Member shall ensure that ~~the~~ These requirements ~~shall be~~are clear and transparent and do not constitute a means of arbitrary or unjustifiable discrimination.

An act of diplomacy

有志者事竟成

Agreed Text (Bali – WT/MIN(13)/36)	Suggested Changes	Comments
<p>1.3 Changes to duty rates or tariff rates, as well as measures that have a relieving effect or whose effectiveness would be undermined by prior publication, measures applied in urgent circumstances, or minor changes to domestic law and legal system are excluded from paragraphs 1.1 and 1.2 above.</p>	<p>CAN: 1.3. Changes to duty rates or tariff rates, as well as measures that have a relieving effect, or <u>measures</u> whose effectiveness would be <u>undermined -as a result of compliance with paragraphs 1.1 and 1.2, by prior publication,</u> measures <u>measures</u> applied in urgent circumstances, and or minor changes to domestic law and legal system are excluded from paragraphs 1.1 and 1.2 above.</p>	<p>Chinese Taipei: “paragraphs 1.1 and 1.2 should be “1.1 or 1.2” (Canada agreed).”</p> <p>India/Bolivia/Dominica/: Accept all other changes, but “or” to “and” is a substantive change.</p> <p>Chinese Taipei: Retaining “or” with Canada’s other changes will change the Bali text. (Canada and Hong Kong echoed the same).</p> <p>Chair’s initial conclusion: go back to the Bali text.</p>

After formal AND informal consultations (台灣出面協調)

- 1.3. Changes to duty rates or tariff rates, ~~as well as~~ measures that have a relieving effect, ~~or~~ measures whose effectiveness would be undermined as a result of compliance with paragraphs 1.1 or 1.2, ~~by prior publication, measures~~ measures applied in urgent circumstances, or minor changes to domestic law and legal system are each excluded from paragraphs 1.1 and 1.2 ~~above~~.

Agreed by Canada, US, Singapore,
and most importantly, INDIA!
All members passed as final text!

BS and MS 大不同

Bilateral Scrubbing

- Both sides have a substantive understanding of the negotiated text

MUCH EASIER!!!

- No “Consensus or Bali text” Rule
- More time, less people
- No subsequent translation issues

Multilateral Scrubbing

- Cannot ensure consistency in attendance
- English as a second language issues
- Proposals on the fly!
- SO HARD to get consensus – 杯葛! (US: “the nail biter...”)
- Bad blood from previous negotiations – labeling!
- 打群架!?

Agreed Text (Bali – WT/MIN(13)/36)	Suggested Changes	Comments
<p>ARTICLE 4: APPEAL OR REVIEW PROCEDURES</p> <p>1 Right to Appeal or Review</p> <p>1.1. Each Member shall provide that any person to whom customs issues an administrative decision has the right, within its territory to:</p> <p>a. administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision; and/or</p> <p>judicial appeal or review of the decision.</p>	<p>US: and/or</p>	<p>Dominica, Turkey, Nigeria, Guatemala, Cuba, India all expressed this was a substantive change.</p> <p>US: Solely legal scrub, less formal and/or is not appropriate language in this text. Was simply to do a text clean up, not removing option to have both in members' individual systems and or is sufficient.</p> <p>India: This was almost make or break issue at one point and and/or was final compromise. See US proposal as substantial change.</p> <p>EU, NZ, SA, Chile supports the US.</p>

Media v. Reality?

Scrubbing TF Too Hard? (WTD April 3, 2014)

Geneva – Ahead of the next week’s meetings to start the legal scrubbing of a new Doha Trade Facilitation Agreement, the United States, the European Union, Japan, Hong Kong, Turkey and Singapore, among others, have proposed several technical changes, **some of which are likely to change obligations**, WTD was told (WTD, 3/28/14).

Preparatory Committee on Trade Facilitation chair Esteban B. Conejos will begin meetings Monday to discuss the changes proposed by some members. He wants to complete the process by next April. The chair has already warned members that if there is no consensus on the proposals, language reached in the Bali ministerial will stand. **Although some** industrialized countries were not keen to suggest substantive changes in the agreement, **there is a sudden push by the United States, the EU, Japan and Hong Kong to add language strengthening legal aspects of the new agreement**, said a negotiator familiar with the developments.

US Proposal

In a restricted proposal circulated to members on April 1, the United States suggested changes to improve the legal phrasing of commitments. The 30-page proposal tightens language in Article 1 concerning publication and availability of information and also introduces legal certainty by placing “shall” in some provisions of advanced rulings, appeal or review procedures and release and clearance of goods. . .

Agreed Text (Bali – WT/MIN(13)/36)	Suggested Changes	Comments
<p>2.2 Whenever practicable, the description referred to in subparagraph 2.1 a. shall also be made available in one of the official languages of the WTO.</p>	<p>US: Whenever practicable, <u>each Member shall make</u> the description referred to in subparagraph 2.1 a. shall also be made available in one of the official languages of the WTO.</p>	<p>Brazil, Indonesia, Tanzania, LDCs, SA object.</p> <p>Chinese Taipei Support US suggestion – just makes a passive voice into an active voice and doesn't impose any obligation – adds clarity to passive voice.</p>

Review of the main arguments...

- Previous case law on the interpretation of a term (e.g., “import, export, transit” or “importation, exportation, transit” procedures)
- Whether the term will open the floor for negotiations
- Not substantially changing the text, merely bringing clarity to the text (India adding “in case no set periods are specified...”)
- Keep in the structure of the sentence in a list (e.g., “appeal procedures” (lead with adv.) to “procedures for appeal” (lead with noun))
- Expand/decrease scope of obligations (deleting “decides to”)
- Language corresponding to other provisions of GATT
- If you change an expression or remove a comma (goods, including...), you need to do this for all the sections with the same expression.

Wisdom of the Chair

- “You have noticed that I have not applied the Bali rule mechanically. I give premium to those who have done the work.”

Diplomatic language

- 1. Thank you, Mr. Chair, **we would like to thank/echo X's proposal...**
- 2. We are inclined to support the proposal by...
- 3. **While this appears to be a substantive change to the Bali text, but it is in spirit with the negotiations...**
- 4. We like to offer a point of explanation.
- 5. **We want to seek clarification from the previous delegations...**
- 6. We can move on.
- 7. So we would not agree with X' proposal based on the convention we have previously adopted.
- 8. **We would like to make the following intervention...**
- 9. Can we make the suggestion that the following provision can read:...
- 10. Please correct me, my colleague from XXX...

Diplomatic Language

- 11. Thank you, Mr. Chair. Mainly two points...
- 12. We thank X for your clarification...but, it is XX's position that...
- 13. We do feel strongly that this provision...because it ensures that...
- 14. I want to express my general caution...
- 15. I hope XXX could reconsider his counter proposal...I believe my friend from XXX would agree that...
- 16. In the same vein, we are also seeking clarity...
- 17. Chair, we don't want to be alone.
- 18. We don't want to prolong the discussion, but would like to go back to footnote X quickly to see whether the suggestion would have traction among the other members.
- 19. The article title should reflect what it contains. "Article 6: penalties should be at the end"
- 20. This would be a substantive change not contemplated in the Bali text.
- 21. We can't speak with two voices. Therefore, it is our position that...
- 22. We have sympathy for XX's position, however, ...
- 23. We feel strongly about this provision...would be most grateful for an explanation.
- 24. Noticing the divergence of preferences, wondering whether the U.S. proposal was still on the table.

Takeaways

- Echo others when possible.
- Offer reasoning, not just position.
- Give others a way out.
- Be neutral – retain credibility
- Sometimes, you just need to...