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Trade Facilitation in WTO and Beyond

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Trade Facilitation in WTO and Beyond

Introduction

A new subject under negotiation in WTO during the Doha Round is Trade Facilitation. While the subject is new, the concept of Trade Facilitation is as old as international trade itself. In the GATT and then in WTO, the Agreements on subjects like Customs Valuation, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Import Licensing Procedure and Rules of Origin are all ultimately aimed at Trade Facilitation. Outside WTO, Trade Facilitation has a much wider remit and it refers to trade practices and procedures mandated by government agencies as well as by private players. Trade related infrastructure is also a major determinant of Trade Facilitation environment in a country.

A more limited dimension of Trade Facilitation is procedures relating to border clearance of goods. To preserve the value of binding low customs duties achieved through successive rounds of tariff negotiations in the GATT/WTO, it is desirable that the procedures for clearance of goods at the border should be simple, transparent and equitable to keep the transaction cost to the minimum. The negotiation of a new displine on Trade Facilitation in WTO is an effort in this direction. It aims to make border clearance procedures simple and modern. The aim of this paper is to explain the meaning of Trade Facilitation, trace the evolution of the subject of Trade Facilitation in the WTO, give a snap shot of the subjects which are likely to be the subject matter of commitment in WTO and finally to give certain perspectives on the negotiation on Trade Facilitation and the way forward for India.

Meaning of Trade Facilitation

As mentioned above Trade Facilitation has a vast ambit. Studies indicate that broadly there can be four major areas to improve Trade Facilitation[1]; port infrastructure, customs environment, regulatory environment and e-business infrastructures namely service sectors of telecommunication and financial intermediation which are key for all types of trades. The study indicates that an improvement in these four sectors can lead to an increase of trade by about 10%[2]. The study pointed out that with respect to regions, the largest gainers, in percentage terms, would generally be South Asia and Eastern Europe and Central Asia, followed by Latin America and the Caribbean. The projected benefits are based on the level of integration of a region in international trade. Consequently, it projects a lower gains in trade flows in Middle East, North Africa and sub Saharan Africa.

Some other studies have also pointed to the benefits of Trade Facilitation and the Table 1 (on the next page) summarises the findings of some of the major studies.

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1 World Bank Research Paper (March 2003): Trade Facilitation and Economic development by John s. Wilson, Catherine L. Mann and Tsunchiro Ostuski

2 The study has developed a gravity model that accounts for bilateral trade flows in manufactured goods in 2000-01 between 75 countries, using traditional factors (such as GDP, distance and trade areas), and evaluating their impact on trade. The study indicates that an improvement in these four sectors in 75 countries will lead to an increase of trade by about 10 per cent (US $ 377 billion). Out of this about US $ 107 billion of the total gain will come from improvement in port efficiency and about US $ 33 billion will come from improvement in customs environment. The gain from improvement in regulatory environment is projected to be US $ 83 billion and gains from improvement in Service Sector Infrastructure are projected at US $ 154 billion.

TABLE 1
GAINS FROM TRADE FACILITATION: SUMMARY OF CONCLUSIONS FROM TRADE FACILITATION LITERATURE

Author	Trade Facilitation issues considered	Gains in US $ from Trade Facilitation reform
UNCTAD (2001)	Banking and insurance, customs, business information, transport and logistics (that add up to 10 % of the total value of world trade)	400 billion
Hummels (2001)	Reduction of 1 day in delivery times by developing countries by targeting delays associated with customs and cargo handling	240 billion
Walkenhorst and Yasui (2003)	Improvement in logistical efficiency and reduction in transaction costs of trading	40 billion

Source: Roy and Banerjee (2007)

In the WTO context Trade Facilitation has been defined more narrowly. In initial phases of discussion it was defined as the "simplification and harmonisation of international trade procedures", where trade procedures are "the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade". However even this definition was felt to be very wide. This definition encompasses transaction between private players as also transaction between Government and private players. As WTO is an intergovernmental rule making body, it was recognized that only such commitments can be undertaken which relate to mandatory Government requirements.

In view of these considerations, the scope of negotiations on Trade Facilitation was gradually narrowed and limited to subjects covered under the three existing articles of GATT, namely, Articles V (relates to transit), VIII (relates to fees and formalities) and X (relates to publication and administration of trade regulations).

Evolution of Trade Facilitation in WTO

The subject of Trade Facilitation was first mooted in WTO during the Singapore Ministerial Conference in 1996. The Declaration directed the Council for Trade in Goods "to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, dealing with the simplification of trade procedures in order to assess the scope for WTO rules in this area". This subject formed a part of a quartet called 'Singapore Issues'. The other three issues of the quartet were Trade and Investment, Trade and Competition Policy and Transparency in Government Procurement.

Steady work took place on the subject in WTO following the Singapore mandate. Several developed and developing countries presented papers on the subject. The papers outlined the possible areas which could be covered in the work programme on Trade Facilitation. Some papers also outlined their own country experience to illustrate how modernisation and automation of customs procedures led to gain for traders as well as the Government through reduction in transaction cost, better deployment of officers and better use of scarce resources. While discussions largely focussed on customs and other border clearance issues, some proposals were also made with respect to banking and insurance, like development of ISO quality management standards to set norms for satisfactory performance regarding payment delays; access to improved ordinary and commercial insurance to address the problem of

exporters regarding diversion *en route* of their consignments; and development of suitable laws regarding the right to interest on late payments.

Keeping in view the sensitivities and concerns of developing countries for undertaking negotiations on a new subject, the area of coverage was slowly whittled down and limited to a clarification and improvement of the three existing articles of GATT namely Articles V, VIII &X.

Doha Mandate

The formal negotiating mandate on Trade Facilitation was given in the Doha Ministerial Declaration of 14th November, 2001. It mandated a work programme of clarification and improvement of the GATT articles, V, VIII & X. A formal decision to commence negotiations on the subject was, however, deferred to the next Ministerial Conference in Cancun, Mexico, in 2003 subject to an explicit consensus on the modality of negotiations.

The consensus on modality proved to be elusive during the negotiations in September 2003 in Cancun, Mexico. In fact differences between the Members on the subject of Singapore Issues in general and on Trade Facilitation in particular led to the collapse of the Cancun Ministerial Conference. However, the Cancun deliberations paved the way for the future treatment of Singapore Issues. It was clear that a common minimum consensus on this subject was possible only if out of the four Singapore Issues, only Trade Facilitation was kept on the table and furthermore, the concerns of developing countries regarding resource implication, infrastructure constraints, technical assistance and capacity building were adequately addressed.

The controversy surrounding the Singapore Issues was finally thrashed out in the July 2004 Geneva meeting of the Ministers of the WTO member countries, (though not formerly called a

Ministerial Conference). The Geneva Framework Agreement of 1 August 2004 reflected a compromise by providing that no negotiations on Trade and Investment, Trade and Competition Policy and Transparency in Government Procurement would be carried out in the Doha Round and that there was an explicit consensus to commence negotiations on Trade Facilitation. The modalities for negotiations were also agreed upon and they formed Annex D of the Framework Agreement of 1 August 2004[3].

Annex D Modalities

The modalities for negotiations on Trade Facilitation under Annex – D of the July Framework Agreement of 2004 represents a successful effort by the developing countries to address the concerns that they had raised in the negotiations till then. These concerns were raised effectively by a grouping of Developing Countries called the Core Group[4] which presented joint papers from Cancun Ministerial onwards. During the Cancun Ministerial Conference, they presented a joint paper[5] listing out the issues where clarity was still lacking and because of which, they argued that it was premature to commence negotiations on Trade Facilitation. Some of the important concerns raised were: how developing countries would mobilise resources to meet new commitments; how dispute settlement understanding would apply to Trade Facilitation; what would be the estimated cost for developing countries to undertake commitments; what

[3] WTO document WT/L/579

[4] The Core Group Members included Bangladesh, Botswana, China, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Zambia, Zimbabwe, Uganda and Venezuela. China left the Core Group after the Cancun Ministerial Conference of 2003

[5] WT/MIN/(03)/W/4

would be the mechanism to handle situations where the infrastructure facilities available in a Member country at different entry points varied widely; given the fact that 'implementation capacity' was an important factor on Trade Facilitation, within what parameters, developing countries would be exempt from taking certain commitments due to lack of adequate implementation capacity; what shall be the nature of special and different treatment and whether it would be limited only to the extension of time frames or would also extend to differentiated levels of commitments; what possible methods would be envisaged for enhancing effective cooperation between customs authorities in the multilateral framework to complement the adoption of Trade Facilitative procedures.

The paper got wide support of other developing countries. In the same paper, similar set of issues were also raised for other Singapore Issues. This paper proved to be one of the rallying points for opposition to Singapore Issues in the Cancun Ministerial Meeting leading to its failure. However, during the Green Room deliberations in Cancun, EC offered to drop negotiations on three out of four Singapore Issues.

The Cancun deliberations provided the future roadmap for work on this subject, though this offer failed to break the stalemate in Cancun. Accordingly, during negotiations in Geneva in July 2004, the Ministers reached an understanding to drop further negotiations on three of the Singapore Issues, namely Trade and Investment, Trade and Competition Policy and Transparency in the Government Procurement. There was an agreement to start negotiation on trade facilitation. To draft Trade Facilitation negotiating modalities, a Drafting Group was formed. The core Drafting Group consisted of representatives from Brazil, Bangladesh, Canada, Chile, China, Costa Rica, EC, Georgia, India, Japan, Jamaica, Malaysia, Morocco, Philippines, Singapore, Tanzania, Trinidad and Tobago, US and Zimbabwe.

The main basis of negotiations was a draft modality text circulated by the WTO Secretariat. Another draft was presented by the Core Group in a document titled "Contribution to Improve Annex D". In this, the Core Group suggested additional elements to be added into the modalities, namely:

i) Identification of Trade Facilitation needs and priorities of developing countries;

ii) Provision of financial and technical assistance including support for infrastructure development to be a prior condition for developing countries to implement results of the negotiations;

iii) Negotiations to provide for effective cooperation between customs administration of Members in cases involving reasonable suspicion of violation of laws governing imports and exports;

iv) The applicability or non-applicability of the Understanding on Rules and Procedures Governing the Settlement of Disputes to be addressed in the negotiations.

The final negotiating modalities on Trade Facilitation formed Annex D of the General Council's Framework Agreement of 1st August 2004. The modalities took into account the concerns raised by the developing countries and this led to several changes in the initial negotiating draft circulated by the WTO Secretariat. Firstly, it led to addition of a new, third aim of negotiation, namely to aim at provision for effective cooperation between customs or any other appropriate authority on Trade Facilitation and customs compliance issues. Secondly, the modalities gave a much broader mandate for special and differential treatment. It recognised that the S & D principle should extend beyond the granting of traditional transition period for implementation of commitment and that, in particular, the extent and the timing of entering into

commitment shall be related to the implementing capacity of developing countries. Thirdly it also recognised that Members would not be obliged to undertake investment in infrastructure project beyond their means. Fourthly, the modalities drew a linkage between implementation of commitments and support of developed countries for development of infrastructure linked to implementation of commitment. It clearly provides that where required support and assistance for such an infrastructure is not forthcoming and where a developing country continues to lack the necessary capacity, implementation of commitment will not be required. As a result of these elements, the negotiating modalities on trade facilitation are very friendly to developing countries. The three objectives of negotiations on trade facilitation under Annex 'D' modalities are:

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

b. Enhance technical assistance and support for capacity building in trade facilitation;

c. Aim at provision for effective cooperation on trade facilitation and custom compliance issues.

While the mandate on trade facilitation is seemingly limited only to three GATT Articles, in substance, it covers a wide area encompassing a large gamut of measures at and behind the border for goods clearance.

Work up to Hong Kong Ministerial Conference in 2005

Trade Facilitation negotiations commenced in WTO after the conclusion of the Annex D modality in August 2004. A specialised negotiating body called Negotiating Group on Trade Facilitation (NGTF) was created for focussed work on this

subject. All WTO Members are represented in this Negotiating Group. The strong mandate for special and differential treatment provided considerable comfort to developing countries to engage in the negotiation. However, this also had the potential risk of giving them a degree of complacency that binding commitments on trade facilitation can be avoided where capacities are lacking.

As negotiations commenced, it was clear that while considerable home work had been done by the demandeurs for negotiation on trade facilitation (like EC, Canada and Japan.), the same degree of preparation was not seen with the delegations of most of the developing countries. Be as it may, the negotiation on trade facilitation was much less confrontational and contentious, post signing of Annex D modality, than what had been witnessed prior to it. This allowed for rapid progress in the negotiations.

In the initial stages, proposals were quite detailed explaining the rationale for proposed commitments. This was followed by detailed technical level discussions on these proposals. The quick progress in terms of making written proposals, and starting of technical level discussions allayed the concerns of several Members that trade facilitation, being a late starter in the Doha Round, could act as a drag to the overall progress of the Round.

By the time the 6th Ministerial Conference took place in Hong Kong in December, 2005 a great deal of progress had been achieved on trade facilitation negotiation. Hong Kong Declaration[6] reaffirmed the mandate and modalities for negotiations on trade facilitation contained in Annex 'D' of the Framework Agreement of 1st August, 2004, and went on to note "with appreciation the report of the Negotiation Group" attached to the declaration as Annex 'E'.

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[6] (WT/Min(05)/DEC dated 25th December, 2005

This report of the Negotiating Group on Trade Facilitation to the Trade Negotiating Committee noted that 60 written proposals had been sponsored by more than 100 delegations and that good progress had been made in all areas covered by the mandate. It also gave a listing of the proposed commitments under trade facilitation. Many regarded this document as almost a blue print of a future agreement on trade facilitation. However, the document made it clear that the listing was without prejudice to the position of individual Members on these issues and that there was room to put further proposals on the table.

Negotiating Process

The proposals put on the Table show that substantial inputs have been provided by national stakeholders connected with international trade. The initial proposals described the areas where Member countries wanted improvement in procedures for goods clearance as well as more transparency and predictability of laws and regulations covered under the three GATT Articles. As a follow up on this, countries presented draft legal texts. This is more popularly called the 'bottoms up approach', which means that instead of the WTO Secretariat presenting the negotiating text, it is the WTO Members which present the draft legal texts on the subjects of their interest. It was well understood that countries which failed to present the draft Text Proposals as a follow up to their initial submissions would signify that they were no longer interested in pursuing their proposals.

The WTO Secretariat complied these textual proposals in one document and revised it periodically on the basis of fresh text proposals made by the WTO Members. The last WTO document in this series was TN/TF/W/43/Rev.19 of 30th June 2009. After substantial discussion on these texts, the WTO Secretariat came

out with the first consolidated draft legal text[7] of the proposed new Trade Facilitation Agreement during December 2009. Discussions since then are based on the Draft Legal Text. This text does not reflect the position of individual WTO Members. Members are expected to work on this text by way of refinement, consolidation and merger in open ended plenary meetings as well as in small group meetings of interested Member countries. The latest such text which formed the basis of negotiation is TN/TF/W/165.Rev.1 of 2nd March 2010.

Existing commitments under GATT Article VIII

Amongst the three GATT Articles, the most substantive area of discussion is GATT Article VIII, and is the subject of the largest number of proposals. The existing disciplines under GATT Article VIII are:

(i) all fees and charges in connection with imports or exports (other than import and export duties) shall be limited in amount to the approximate cost of the services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes;

(ii) WTO Members recognize the need for reducing the number and diversity of fees and charges;

(iii) the Members recognize the need for minimizing the incidence and complexities of import and export formalities and for decreasing and simplifying import and export documentation requirements;

(iv) WTO Members shall not impose substantial penalties for minor breaches of customs regulations or procedural requirements;

[7] TN/TF/W/165 dated 14th December 2009

(v) the provisions of Article VIII shall apply to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation. Some specifically identified areas in this regard are consular transactions such as consular invoices and certificates; quantitative restrictions; licensing; exchange control; statistical services; documents, documentation and certification; analysis and inspection; quarantine; sanitation and fumigation.

It is important to note that the listing above is not a closed one and other subjects can also be covered under the broad heading of fees, charges, formalities and requirements of governmental authorities and can thus potentially be a subject matter of negotiation under GATT Article VIII.

Proposed improvements under GATT Article VIII

The existing commitments under GATT Article VIII concerning fees and formalities connected with importation and exportation are rather diffused and mostly couched in hortatory language. The Trade Facilitation negotiations aim to tighten the existing Articles VIII disciplines. Commitments have been proposed in areas of fees and charges, trade related procedures, documentation requirements and certain systemic reforms.

Disciplines on Fees and Charges

Fees and charges relating to import and export have at times been used as a method of indirect protection. The existing disciplines on fees and charges are that they be related to the cost of services rendered. This requirement is at times not observed, particularly when fees and charges are fixed as a percentage of the value of consignments (*ad valorem* charges). In order to make fees and charges more transparent and to prevent its misuse as a tool of protection for domestic industry or as a tool for raising

revenue, **European Communities, Korea** and **Switzerland** have proposed certain specific parameters for levying fees and charges. These parameters include:

(i) Fees and charges shall only be imposed for services provided in direct connection with the specific importation or exportation in question;

(ii) Fees and charges shall not exceed the approximate cost of services provided;

(iii) Fees and charges shall not be calculated on an ad valorem basis;

(iv) Fees and charges shall not be imposed with respect to consular services and equivalent measures;

(v) An adequate time period shall be agreed between the publication of information on new or amended fees and charges and their entry into force;

(vi) Each Member shall periodically review its fees and charges to ensure that they are in line with WTO commitments.

Proposals on Trade related Procedures

Cumbersome export and import procedures are recognised as a major barrier to trade. This subject is covered very broadly under existing GATT Article VIII. Several proposals have been made to tighten Article VIII disciplines to reduce the dwell time of cargo in ports, airports and land borders. Some such proposals include introducing a system of pre-arrival processing (clearance of documentation before arrival of goods at the customs station), separation of release of goods from final determination and payment of customs duties where they are not determined at or prior to arrival; introduction of a system of risk assessment to target high risk goods for examination at the border and allowing low risk goods to be cleared without physical inspection. The proponents of these proposals are **Chinese Taipei, Korea,**

Switzerland and **China**. **India** has proposed that a customs union shall generally apply a harmonized risk management system across the entire customs union.

Linked to the risk management system is a proposal to introduce post clearance audit on account books, vouchers, commercial documents, customs declaration forms and other trade related information maintained by enterprises. This proposal has been made by **China, Indonesia** and **Korea.**

In order to encourage better compliance with laws and regulations, it is proposed to reward more compliant traders with more trade facilitative procedures under a system of 'Authorized Traders'. Companies that can be given the status of authorized traders are those which have an appropriate track record of compliance, have a good system of managing records, are financially solvent and have an appropriate system of security and safety standards. Importers who qualify as authorized trader can have additional benefits like filing periodic declarations and paying duties periodically, reduce physical inspection, reduce documentary and data requirements including a right to submit a single document covering goods contained in a consignment and a more rapid release time. This proposal has been tabled by **European Communities** and **Mongolia.**

The time taken for goods clearance at the borders of a country is a barometer of its trade facilitation environment. It is proposed to institutionalize publication of dwell time data by each WTO Member by establishing and publishing its own average time for release of goods on a periodic basis. The World Customs Organization has developed tools to publish Time Release Study and it is expected that Members would use this tool. It is also proposed that Members shall strive to continuously reduce the average release time. These proposals have been made by **Korea** and **Japan.**

In order to provide a window to the trading community to clear goods expeditiously, **United States** has proposed far reaching customs procedures for expedited shipments. These envisage clearance of goods within three hours after submission of necessary customs documents, and to apply the procedures without any restrictions with regard to weight or customs value and to allow filing of a single document covering all the goods in an expedited shipment. The proposal also states that a Member may require an expedited shipment provider to provide adequate infrastructure and access fees which is limited to approximate cost of services rendered.

As there are multiple agencies at the border dealing with clearance of goods, their intervention at different points of time for checking the same consignment causes delay in the clearance of goods. Proposals have been made by **Canada** and **Norway** that all authorities and agencies involved in border control at the point of import or export should be coordinated in order to facilitate trade.

Documentation Requirements

Another potential barrier to international trade is documentation connected with import and export, in case they are too long and complicated and take time and resources to fill up. Accordingly, there are proposals to review and limit the documentation requirements and to align documents with internationally agreed documentation format like UN – Layout Key or its future updated electronic counterpart; National Data Element in Trade Document with the UN Trade Data Element Directory (UNTDED) and its future updated version and use of internationally accepted standard for Electronic Information Exchange and Interchange and inter-operability of electronic messages between custom administration and with other trade operators. The proponents of such commitments are **Hong Kong China, Switzerland, Mongolia, Norway** and **South Africa.**

In order to reduce paper work, there is also a proposal to accept commercially available information and copies of documents instead of insisting on the original documents like invoices, bills, etc. and particularly where one government agency already holds the original and multiple government authorities need the same document. This has been proposed by **Hong Kong China, Korea** and **Switzerland**.

In order to make the import and export formalities more in tune with the current reality, there is also a proposal by **Hong Kong China** and **Switzerland**, for periodic review of formalities and requirements at reasonable and regular intervals, taking into account relevant new information and business practices.

An ambitious proposal is to set up a single window for submitting documentation and/or data for export/import or transit one time only. The single window agency has to undertake onward distribution of the data and documentation to all other relevant authorities or agencies where clearance is required from multiple government agencies. This has been proposed by **Korea, Singapore** and **Thailand.**

Systemic Reforms

Some existing practices and systems which add to the transaction cost are proposed to be eliminated. Proposals in this category are to eliminate the system of pre shipment inspection (proposed by **EC** and **Chinese Taipei**); abolish the requirement of compulsory use of custom brokers (proposed by **EC, Mongolia, China** and **Switzerland**) and of consularisation[8] of documents (**US** and **Uganda**). In order to improve trade facilitation with respect to Customs Union, **India** has made

[8] The procedure of presenting authenticated trade related documents like commercial invoice, manifest, etc. from a consul of the importing country in the territory of the exporting country, as a requirement to permit import of goods by the importing country.

certain proposals like adoption of same border procedure within a Custom Union including same standard, certification, terminology and definitions, sampling and test methods. **India** has also proposed that there should be uniform documentation requirements for import clearance within a Custom Union. In order to curb the existing practice of destruction of food consignment on account of failure to meet certain standards, India has proposed that instead of outright destruction, an option should first be given to the exporters to return the rejected goods to them and only when such an option is not exercised within a reasonable period of time, a different course of action, including destruction of goods may be considered by the appropriate authority.

Existing commitments under GATT Article X

Article X of GATT 1994 deals with publication and administration of trade regulations. The existing obligations of the WTO Members under Article X are as follows:

(i) Laws, regulations, judicial decisions and administrative rulings of general application relating to various aspects of international trade like classification or valuation of products for customs purposes, rates of duty, requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly, so as to enable governments and traders to become acquainted with them;

(ii) agreements affecting international trade policy which are in force between two governments or governmental agencies shall be published;

(iii) no measure of general application taken by a WTO

Member which leads to increase in rate of duty or which imposes a new or more burdensome regulation, restriction and prohibition on imports or transfer of payments therefor shall be enforced before such measure has been officially published;

(iv) each WTO Member shall administer in a uniform, impartial and reasonable manner, all its laws, regulations, decisions and rulings on subjects as mentioned at points (i) to (iii) above.

(v) each WTO Member shall maintain a judicial, arbitral or administrative tribunal for permitting review and correction of administrative action relating to customs matters. Such tribunals shall be independent of the agencies entrusted with administrative enforcement and the decisions of the tribunal shall be implemented by such agencies unless an appeal to a superior court is filed within the prescribed time limit.

Proposed Improvements under GATT Article X

The proposals for improvement of Article X are largely to improve publication of laws, rules and regulations by their publication on website, to improve stakeholder participation in formulation of laws, rules and regulations; improvements in appeal mechanism in a Customs Union and creation of new institutions like Enquiry Point and Advance Ruling Authority to improve transparency and predictability of trade related laws, rules and regulations.

An important commitment proposed is that each WTO Member has to make available and to keep current on a website, full description of its customs procedures and forms and documents for importation and exportation. This proposal has been made, albeit, under different formulations, by countries like **US, Hong Kong China, Japan, Mongolia, Norway, Switzerland** and

Turkey. The aim of this proposal is to make relevant information on import and export more easily accessible, which would be a boon for small traders. However, value of this commitment can be potentially higher if notifications are made compulsorily in one of the three official language of the WTO, i.e., English, French or Spanish. Information available on the internet in Chinese, Japanese or Arabic language would be of little value to the traders of other countries.

The present commitment of GATT Article X on publication of laws, rules, regulations etc. before their enforcement is proposed to be widened to incorporate a requirement of a time interval between publication and entry into force of laws, regulations etc. The aim of this commitment is to allow traders to become acquainted with new laws in order to better comply with them. In order to make law-making more dynamic and collaborative with stakeholders, there is also a proposal on the table that Members shall offer appropriate opportunity to interested parties within their territories to comment on proposed introduction or amendment of trade - related laws, regulations and administrative rulings of general application. Another proposal of similar kind is that Members shall hold regular consultations between border agencies and traders within their territories. The main proponents of these proposals are **Hong Kong China, Japan, Mongolia** and **Switzerland**.

The existing commitment under Article X to provide an appeal mechanism against administrative decisions is proposed to be further refined. Proposed additional requirements in this regard are that appeal procedures should be non-discriminatory; traders be allowed to be represented at all stages of appeal procedures by independent legal counsel and that customs and other relevant border agencies shall adopt set time period for decisions under appeal procedures. The main proponents of this commitment are **China** and **Mongolia**.

Certain other transparency related proposals are in respect to Customs Union made by **India.** One such proposal is that appeals against findings of inspection authorities at the level of a Member State of the Customs Union shall be heard and decided at the Customs Union level and such appellate decisions shall be binding on the inspection authorities of all Member States of the Customs Union. Another proposal relates to disciplines on import alerts /rapid alerts maintained by some countries and Customs Union as a means of maintaining and ensuring quality of imported food products. The proposal is that import/rapid alerts be applied by a Customs Union only where it applies uniform standards and it shall not be maintained if circumstances giving rise to it no longer exists, or if changed circumstances can be addressed in a less restrictive manner. A proposed test of less trade restrictiveness is that six successive consignments of the subject country/exporter be found to be contamination free.

India has also made a proposal to improve transparency regarding status of uncleared good by proposing that where goods are detained for examination, information to this effect be provided to importer or his authorized agent. **India** has also proposed greater transparency for test procedures by providing for a right to second confirmatory test, setting a clear procedure for such confirmatory test, and providing a list of accredited laboratories which are authorized to carry out such confirmatory tests, and such confirmatory test shall be valid in all Members States of a customs union.

To improve transparency, there are also proposals to create new institutions, namely an enquiry point to answer all reasonable enquiries relating to import and export and of an advance ruling authority to give binding ruling on treatment of import with respect to tariff classification, application of customs valuation criteria, application of duty drawback and of quotas. The main proponents of the creation of enquiry point are **Hong Kong**

China, Mongolia, Norway, Switzerland and **Turkey** whereas proponents for advanced ruling authority are **Australia, Canada, Turkey** and **U. S.**

Existing Commitments under GATT Article V

Article V of GATT 1994 has obligations to ensure freedom of transit. It defines transit for goods and the means of transport of such goods as passage across a WTO Member's territory with or without tran-shipment, warehousing, etc., where such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the WTO Member across whose territory the traffic passes. Certain disciplines are prescribed for transit of goods and means of transport in Article V. An important exception is that these disciplines do not apply to operation of aircraft in transit (which are subject of bilateral agreements)but apply to air transit of goods. The present disciplines under this Article are:

(i) freedom of transit through the territory of a WTO Member via the routes most convenient for international transit;

(ii) no distinction is to be made for transit based on the flag of vessels, the place of origin, departure, entry, exit or destination; or upon any circumstances relating to the ownership of goods, of vessels or of other means of transport;

(iii) a WTO Member country may require that the traffic in transit through its territory be entered at the proper custom house;

(iv) the transit traffic shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duty and from all transit duties or other transit charges. The only exception provided in this regard is charges for transportation or those commensurate with

administrative expenses entailed by transit or with the cost of services rendered;

(v) all charges and regulations imposed by WTO Members on transit traffic shall be reasonable;

(vi) all charges, regulations and formalities relating to transit shall apply equally to all WTO Members with respect to like products.

Proposed Improvements under GATT Article V

Several proposals have been put on the table to improve and clarify Article V of GATT. An important proposal (by **Macedonia, Mongolia, Switzerland** and **Swaziland**) is to expand the definition of traffic in transit to include movement of goods via fixed infrastructure such as pipelines and electricity grids. Another new proposed addition in the definition is that baggage and the personal belongings of a person operating the means of transport will also be covered under the definition of traffic in transit. A third new addition to the proposed new definition is a clarification that movement of goods will continue to be regarded as "traffic in transit" even if:

i) goods undergo certain processes like trans-shipment, warehouse, short-term storage, breaking bulk or change in mode of transport;

ii) whether the goods or means of transport, after passing across a territory of a Member, return to the territory of a Member in which they originate.

A fourth new addition to the definition is a clause that means of transport shall be deemed to be traffic in transit if they carry exclusively goods in transit even if the means of transport are not themselves in transit.

In order to improve the regime of non-discrimination and transparency, there are proposals (by **Cuba, Georgia, Moldova,**

Paraguay and **Turkey**) that traffic in transit shall not be subject to any restriction unless a Member takes a measure in pursuance of objectives laid down in Articles XX (General Exceptions) and XXI (Security Exceptions) of GATT, 1994. Another proposal is that each WTO Member shall accord to traffic in transit a treatment no less favourable than that accorded to its own export and import traffic.

The disciplines proposed on fees and charges on transit formalities and documentation requirements are largely similar to those proposed under GATT Article VIII such as prior publication and periodic review of transit formalities, use of risk assessment methods, establishment of single window and authorised trader schemes. However, some proposals are specific to transit, such as to provide, to the extent practicable, physically separate transit infrastructure such as lanes, berths etc. Reasonable security be permitted to prevent diversion of goods in transit and there should be prompt release of such security on completion of transit operation.

There are also proposals to encourage regional transit agreements to reduce trade barriers. This can in particular take the form of adoption of common simplified documents, or electronic messages, or allow the same set of documents or electronic messages to accompany the consignment from the country of departure to country of destination and to mutually recognise authorised trader schemes.

Customs Cooperation

India has been in the forefront in arguing that customs cooperation for enforcement of violation of laws is another facet of trade facilitation. It played a leading role in getting this subject included as the third aim of negotiation in the modality for negotiation under Annex D. India along with South Africa, Sri Lanka and Brazil have made a proposal as to how such a cooperation mechanism will be put into practice. It is proposed

that information and documentation will be exchanged on matters such as HS classification, description, quantity, country of origin and valuation of goods in identified cases of import and export where there is reason to doubt the truth or accuracy of a declaration supplied by the importer or exporter. In order to ensure that the request is not made in a casual manner, it is proposed that all appropriate internal verifications would be carried out before making the request.

In order to address the concern that the cooperation mechanism should not be very burdensome, it has been proposed that the Members from whom information has been requested shall provide such information only to the extent it is available in the import and export declaration; provide documents in the form in which these have been filed with the authority; the format of export and import declaration and procedures related to import and export is not modified; the period of retention of information or document is not modified and the request for information or document shall not be made later than two years after the importation or exportation of goods. The request shall be made either in one of the three official languages of the WTO or in a language mutually acceptable to the two Members. In order to make the mechanism efficient and predicable, it is proposed that information, to the extent possible, shall be provided within a period of 90 days from the date of receipt of request. It has also been proposed that any information or document exchanged shall be treated as confidential and shall not be disclosed to any third party except to the extent required in judicial proceedings. It has further been proposed that such information or document shall not be used in criminal proceedings unless specifically authorised by the Member from whom information has been received. Number of requests for information made by a Member in a calendar year is also proposed to be capped.

Canada has made an alternate proposal on Customs Cooperation but has limited the scope of information exchange only to declared value of imported goods. It has got vocal support of some countries like **Hong Kong China, Singapore, Korea** and **Australia**. This is regarded as a potentially divisive issue in the negotiation as the Canadian proposal seeks to have very limited and weak commitments in the area of Customs Cooperation.

Special and Differential Treatment

Discussions are also under way regarding how the agreement on Trade Facilitation will be eventually implemented. The most animated discussion has been with respect to Special and Differential Treatment. On this, there are rival proposals on the table. One set of countries propose that after signing the Trade Facilitation Agreement, the developing countries shall carry out capacity self assessment in relation to the provisions contained in the Trade Facilitation Agreement. On this basis, each developing country shall notify to other Members regarding those obligations on which it needs technical assistance and capacity building and also additional time period, beyond the prescribed period, to implement the commitments. These are to be made available on the WTO website. Members shall also notify to other Members the measures they are ready to implement from the date of entering into force of the agreement and the measures they have already implemented.

For obligations which are identified by the Members to be requiring technical assistance and capacity building, the developing countries shall enter into discussions with the donors and will prepare a plan accordingly. The capacity building plan so prepared shall indicate the implementation period and the identified donors, and this would be notified to the WTO. At the end of each implementation period related to

the provision of capacity building, the implementing developing country shall assess whether capacity building and technical assistance has been effectively provided. If the Members come to the conclusion that the capacity has not been entirely acquired, then the developing country Member and the donor Members involved shall so report and make recommendations to the WTO. On the other hand, if the Members have successfully acquired capacity, it shall notify this at the latest six months after the capacity acquisition and the obligation shall apply after this notification. This proposal has the support of 24 countries including **EC, Canada, China, Sri Lanka, Switzerland** and **Pakistan**.

On the other hand, the Core Group of developing countries have proposed that while all obligations shall be immediately implemented by developed countries at the time of entering into force of the agreement, the developing countries will be obliged to implement only those commitments which are covered under a Core List of commitments. All other commitments not covered under the Core List shall be deemed to require capacity acquisition by developing countries and these provisions will be implemented only after they have received necessary technical assistance and capacity building support.

Developing countries are to prepare their capacity building plan and to submit their request for technical assistance. The developed country Members and donors shall extend assistance and developing countries shall commence the implementation of the capacity building plan within a defined time frame. The verification of capacity acquisition shall be done by the concerned developing country and where it concludes and that the capacity has not been satisfactorily acquired, it will notify the same to the WTO. Concerned WTO Committee shall then assist the Members in taking necessary steps to satisfactorily acquire the capacity as soon as possible. If the developing countries thereafter also feel that it has not acquired the capacity, the

matter will be referred to the concerned WTO Committee which will decide the issue on a case by case basis.

Perspectives on negotiation on Trade Facilitation

In the preceding sections, the evolution of the subject of Trade Facilitation in WTO and its coverage under a proposed new Agreement in WTO has been discussed in detail. The question that arises is whether the Trade Facilitation Agreement is likely to meet the needs and aspirations of all sections of the WTO membership.

Balanced Commitments

The subject of Trade Facilitation has been brought into WTO primarily on account of the push given by the European Communities supported by few other developed and developing countries. However, it cannot be denied that Trade Facilitation is by now a global agenda and no WTO Member can afford to be disconnected with this subject. There is an ever increasing global integration of international Trade. This integration is also fuelled by increasing number of global supply chains, growth of electronic communication and increased movement of capital in the form of Foreign Direct Investment. All this requires a facilitative environment at the borders. At the same time, border control measures also have to meet important policy goals like preventing smuggling, improving revenue collection through better compliance, and to meet newer challenges like addressing security related concerns, ensuring safety of human, animal and plant life and health, preventing entry of hazardous goods, enforcement of intellectual property rights, etc. The Trade Facilitation negotiations have to strike a fine balance in order to enable the countries to meet these competing goals.

On the whole it can be said that proposals on the table are such that they enable the governments to create an enabling

environment for efficient border clearance of goods without compromising their concerns on aspects like adequate control for compliance, security, health etc. Some proposals that threatened to compromise some of these aspects have been modulated by the proponents to meet the concerns raised, mostly by developing countries. This shows that the developing countries have been actively shaping the Trade Facilitation negotiations to suit their needs and concerns. Some proposals in this category are discussed herein below.

Originally **Canada** had proposed a commitment that release of goods should be separated from its clearance. This proposed commitment implied that countries would be required to release the goods at the border immediately upon arrival, and the documentary clearance regarding validity of imports and of duty payment would be indicated after a few days after completing documentary checks. This proposal was objected to by many developing countries, including India, as it threatened to weaken the system of checks at the borders. On account of consistent opposition by the Members, the present proposal by **Canada** and **Switzerland** has been modified and it is now proposed that such release will take place only in cases where duties or taxes are not determined at or prior to arrival. This implies that this commitment will apply only where there is a delay in duty determination possibly on account of some discrepancy in documentation, declaration, etc. However, further refinement in the language of this proposal is desirable so that the meaning of the commitment is beyond any doubt.

In order to improve transparency of rules and regulations, some countries like **Korea** and **Japan** had suggested the creation of a Single National Focal Enquiry Point to respond to reasonable queries from interested parties. Several developing countries, including India, objected to the proposal on the ground that it

was too prescriptive and would lead to creation of another layer of bureaucracy. An alternative proposal made was that enquiry points could be located in each Ministry that had a border trade interface. Taking note of these suggestions, the latest suggestion on the table (by **Hong Kong China, Japan, Mongolia, Norway, Switzerland** and **Turkey**) is that each WTO Member shall ensure that at least one or more enquiry points exist.

On the transit issue, an initial proposal by **European Communities** was that freedom of transit would mean a freedom for the operator to choose the most convenient route for transit. Several countries, including India, objected to this proposal on the ground that the proposal would tilt the balance of commitment in favour of the operator, whereas commitment for transit required a balance of convenience between transit giving and transit receiving countries. It was pointed out that some transit routes might be convenient for the operator, but the transit giving country might not be in a position to permit transit on this route on account of lack of adequate customs infrastructure to prevent diversion of goods *en route*, existing high volume of internal traffic or some other such consideration. Keeping into account these objections, the latest proposal on the table (by **Macedonia, Mongolia, Switzerland** and **Swaziland**) is a modified one which provides that there shall be freedom of transit through the territory of each Member via the routes most convenient for international transit.

Despite these welcome modulations of some of the objectionable proposals, there are still some potential problematic areas. For instance, a prescriptive time line is proposed by US (within 3 hours of filing goods declaration) for allowing clearance of goods through express shipment mode and that too for all categories of goods. Express shipment is a mode of clearance normally permitted for low risk goods or for goods of urgent nature like life saving drugs. Clearance procedures under express shipment mode are more liberal. It is a concern for many

countries, including India, that extending such a procedure for clearance of all types of goods can compromise control and compliance mechanisms and a time line of 3 hours would be difficult to adhere to.

It is important that the developing countries continue to bestow careful attention to the finer details of the proposed legal texts in order to ensure that no new onerous commitments are slipped in at the last minute. It is worth noting that the prescriptive time element of the US proposal on Express Shipment is a rather late development as this was not a part of the US proposal on Express Shipment till 2008.

Trade Facilitation needs of Developing Countries

Another important aspect of negotiation on Trade Facilitation is that it provided an opportunity for all countries to seek to address trade facilitation related problems faced by their traders in markets abroad. This obviously needed large scale consultation with stakeholders through surveys and studies. There is also a specific mandate in Annex 'D' modalities that Members shall, in particular, seek to identify trade facilitation needs and priorities of developing countries. Some developing countries have made an effort in this direction. For instance, **India** has put on the table certain proposals with regard to border clearance procedure and transparency measures in the context of a Customs Union which have been discussed in detail in the previous Sections on GATT Article VIII and X. These proposals largely derive from the problems reported by the Indian trading community with respect to exports to the European Union. Furthermore, India is also attempting to redress a long standing issue of improving customs compliance through an effective multilateral cooperation mechanism between customs administrations.

Cuba has attempted to address its transit related problems with USA by tabling a proposal that Members shall not apply

discriminatory measures to goods in transit, or to vessels or other means of transport of other Members, for non-commercial reasons.

Uganda has highlighted the problem of substantial increase in transaction cost because of a requirement of consularisation followed by some countries. Uganda, along with USA, has made a proposal that WTO Members shall not require consular transaction.

Despite these proposals on the table, it is felt that the opportunity provided to developing countries to try to address their trade facilitation problems in a more focussed and systematic manner, by undertaking studies to identify needs and priorities of individual developing countries, has not been fully exploited.

Capacity Building and Special and Differential Treatment

Another major concern in the negotiations in the WTO is with respect to resource implications for developing countries in taking new commitments. Larger developing countries like India, Brazil and China are better placed to take commitments which largely revolve around use of modern information technology like setting up of website, establishment of risk management systems, establishing a scheme for authorised traders, publication of release time for goods etc. However, this will be a challenge for several other developing and the least developed countries. Some proposals like establishment of a single window system to lodge goods declaration will be difficult to undertake for larger developing countries at present, though in the long run, it would be beneficial for their trading community.

It is, therefore, important that provisions for capacity building and technical assistance should be built in a substantial manner in the commitments. The post-negotiation mechanism to

evaluate a country's readiness to take on commitments needs to have sufficient flexibility to meet its concerns. The mechanism should also be such that it enables WTO to truly act as a coordinator to assist the country concerned in getting full support in terms of finance, infrastructure building, and acquiring sufficient ground level expertise and experience to be able to fulfil the new procedural commitments.

It is also desirable to have clear earmarked funding for implementing Trade Facilitation commitments, preferably managed by the WTO with contributions from various donors. It is to be remembered that the modalities for negotiations on Trade Facilitation under Annex D is quite porous as lots of flexibilities have been built in for developing countries to not to undertake commitments on grounds of lack of capacity and infrastructure. In order to ensure that developing countries are not tempted to escape through such gaps, strong incentives need to be built into the system of implementation of commitments. For this, the Committee in WTO which handles the implementation of Trade Facilitation commitments needs to be highly proactive and has to play the role of an active coordinator and should be able to collaborate with other institutions actively in the field of trade facilitation like the World Bank, the World Customs Organisation, IMF, UNECE and such developed and developing countries which are in a position to bilaterally assist the needy Members. Large scale assistance will be required for establishing systems like Electronic Data Interchange, Risk Management System, e-payment of duties, single window system, authorised trader regime, publication of goods release time, advance ruling authority and websites containing comprehensive information on trade related rules and regulations.

Application of WTO Dispute Settlement Mechanism

One of the objections of developing countries in taking

commitments on Trade Facilitation was the fear of being dragged to dispute even where commitments could not be undertaken on account of financial constraints. This was discussed extensively while negotiating the Annex D modality. The Core Group supported by the LDC Group, Africa Group and the ACP Group, proposed to keep open the subject of applicability of the WTO's Dispute Settlement Understanding (DSU) to the agreement on Trade Facilitation. However the developed countries had strong reservation in agreeing to any formulation which would dilute the applicability of DSU in WTO. Some countries pointed out that non-application of DSU in certain circumstances was implicitly provided for in the draft negotiating text presented by the WTO Secretariat where it was laid down that "in developing new disciplines, the extent and timing of entering into commitments shall be related to the implementation capacities of developing and least developed countries."

In the final Annex D modality, there is no explicit reference to the applicability of DSU. However, a revised version of the formulation quoted in inverted commas in the preceding paragraph does form part of the Annex D modality and reads as follows: "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." This indicates that application of DSU for developing countries member is conditional to the commitments that they undertake and that they will be able to exercise a degree of flexibility in undertaking commitments.

During the negotiating process, in a joint paper filed by China, India, Pakistan and Sri Lanka[9] in 2006, it was proposed to

[9]TN/TF/W/62

establish an agreement specific process of consultation or mediation. The proposal envisaged that any dispute would first be brought to a dedicated body, such as a Committee on Trade Facilitation, to be discussed and mediated there. The dispute settlement mechanism should only be the last resort when there is no hope of settling the dispute within the Committee.

A somewhat similar idea is expressed in the proposals of the Core Group of Developing Countries[10] and the joint proposal of the Core Group, ACP Group, African Group and LDC Group[11] for Implementation Mechanism for Special and Differential Treatment and Technical Assistance and Capacity Building Support.

The proposal has broadly two components. The first is that developing and the least developed countries shall not be subject to dispute settlement proceedings, under the DSU which they are not yet obliged to implement. The second component is that to resolve any dispute, Members shall first exhaust mechanisms like consultations, good offices, conciliation or mediation and that the DSU shall be resorted to only as a last resort. An interesting feature of these two proposals is that the commitment of developed countries to provide support for Technical Assistance and Capacity Building is also to be subject to DSU.

It is important that in the final outcome of negotiation, concerns of the developing countries regarding use of DSU for enforcing Trade Facilitation commitments be suitably addressed. It is desirable to have a provision regarding non-application of DSU for not taking commitments under the circumstances as mentioned in Annex D. This will include commitments which they are not yet obliged to implement or those which require

[10] TN/TF/W/142

[11] TN/TF/W/147

development of infrastructure for which investment is beyond the means of the concerned developing country and for which necessary financial and technical assistance is not forthcoming from the developed countries.

Coalition Dynamics

Till the negotiation of Annex D modalities, there were two clear cut coalitions of countries which engaged in negotiation. One was a grouping of countries called the Core Group[12] that did not agree to launching of Trade Facilitation negotiations and the other was the Colorado Group[13] which strongly supported negotiations on Trade Facilitation. Many other countries[14] had a moderate stand but largely supported negotiations on Trade Facilitation. There were other regular country Groupings like the Africa Group, Least Developed Country (LDC) Group and the African, Caribbean and Pacific (ACP) Group that presented common positions and mostly supported the stand of the Core Group.

After modalities for negotiations were finalised as Annex D of the July Framework Agreement of 1st August 2004, the coalition based negotiation slowly became less pronounced. The Core

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12 Initially the Core Group members included Bangladesh, Botswana, China, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Zambia, Zimbabwe, Uganda and Venezuela. China, however left the Core Group after the Cancun Ministerial Conference in 2003.

13 The Colorado Group members included Australia, Canada, Chile, Colombia, Costa Rica, EC, Hong Kong China, Hungary, Japan, Korea, Morocco, New Zealand, Norway, Paraguay, Singapore, Switzerland and US

14 This included Pakistan, Turkey, Chinese Taipei, Sri Lanka, Croatia, El Salvador, Iceland, Israel, Nicaragua, Peru and Uruguay

Group continued to coordinate its position and presented common stand on several issues, including on modalities for Special and Differential Treatment, but the Colorado Group did not present joint statements or proposals. As the negotiations progressed, some interesting issue-based country coalitions emerged and they made joint negotiation proposals. This includes US – Uganda proposal on abolition of consularisation, US – India framework proposal on Custom cooperation, Switzerland, Swaziland and Mongolia proposal on transit issues. On the whole, Trade Facilitation negotiation has progressed in a collaborative and cooperative mode and countries that have made proposals have shown willingness to accommodate the concerns expressed by other countries.

As mentioned in the introductory section of this paper, it is also important to remember that trade facilitation agenda goes far beyond the WTO mandate on the subject. Trade facilitation requires building of infrastructure like port, road and railway network. Studies indicate that port congestion in East Asia raised trade costs and it is projected that a 10% increase in capacity would lower costs by 9%.[15] Similarly improved roads in Eastern Europe and Central Asia could expand trade by 50 %[16]. 'Behind the border' regulatory reforms, improvement in infrastructure and greater transparency of trade related laws and regulation need continuous attention for full opertionalisation of trade facilitation.

Where does India Stand?

India has a substantial programme on Trade Facilitation particularly by the Ministry of Finance. Several Information Technology related initiatives have been undertaken by the Department of Revenue under the Ministry of Finance to speed

[15] Abe Wilson (2009)

[16] Shepherd and Wilson (2007)

up clearance of goods at the border. India has an advanced programme on electronic data interchange called Indian Customs EDI Systems (ICES) which was initiated in 1995. ICES is running at 40 locations and covers over 85 percent of country's international trade[17]. It works with an electronic commerce/Electronic Data Interchange Gateway called ICEGATE which provides a common electronic window. It facilitates e-filing, e-payment and help desk services to the customs users.

A significant new addition to ICES is the Risk Management System (RMS) introduced in 2005 which enables the customs formations to identify high risk consignments on real time basis. RMS has been implemented at 23 locations[18].

It is pertinent to remember that an effective Risk Management System also requires a good system of post-clearance audit on which much work still needs to be done in India. Post Clearance Audit provides a more holistic system of examining a company's entire trade operation and considerably strengthens the compliance systems, if it is carried out effectively and professionally. Further progress is also desirable to make all border customs stations electronically enabled. The challenge is considerable as India has altogether 66 functional Land Customs Station, 155 Inland Container Depots (ICDs) and Container Freight Stations (CFS), 12 major ports, 187 minor ports and 37 international airports. In addition, of late, several private ports have also come into operation.

Another facet of Risk Management is the development of an Indian version of the Authorised Trader Programme called the Accredited Client Programme (ACP). This provides for assured facilitation for traders who opt for it and who are found to be

[17] CBEC write-up of 2009

[18] Source: CBEC write-up of 2009

fulfilling the criteria laid down to qualify as an ACP operator. This is a welcome step. However the qualifying criteria in terms of volume of imports and duty payment are too high for Small and Medium Enterprises to benefit from it. One of the expected benefits of trade facilitation is that it will lead to cost savings for SMEs. It is important to ensure that schemes like these also provide an opportunity to SMEs to reap its benefits.

Another important mechanism to reduce physical check of goods in India is introduction of scanners. In India, both Mobile Scanners and Fixed X-ray Scanners have been introduced, albeit in very limited way. Their coverage would need to be expanded over time. This is not part of the agenda of trade facilitation within WTO, but it is a necessary component of introducing a more non-obtrusive compliance mechanism which will help to reduce the dwell time.

India has transparent systems with respect to rules and regulations. It hosts trade related rules and regulations on the relevant Ministry's websites. However further steps will be needed to meet the standards of transparency being discussed in WTO. For instance, India will have to move towards a consultative process of rule making by providing for a mandatory publication of rules and regulations in a draft form and seeking comments on them before their finalisation. Such transparency is desirable. A point of caution is that such a transparency system cannot be extended, at the present stage, to the annual Budget formulation exercise. However as rates of customs and central excise duty are being lowered, and India is signing more and more FTAs which further lowers and freezes customs duty rates, there is possibly a need to have a rethink on the need for maintaining secrecy in the process of Budget preparation.

The legal system in India is very strong. Two layers of appeals are provided for to redress wrong administrative decisions. The

first appellate level is administrative and the second is judicial. In the Customs matters, administrative appeals are heard by senior officers of the rank of Commissioner, and at judicial level, it is heard by a Tribunal called Customs, Excise, Service Tax Appellate Tribunal (CESTAT) and orders of the Tribunal are appelable before the High Courts of the respective states and thereafter to the Supreme Court of India. Therefore on legal front, Indian institutional mechanism will not need any major overhaul on account of any new WTO commitments. However, if a WTO discipline develops that Members shall adopt set time periods for deciding appeal, this will require amendment in several legislations.

Transparency can be further enhanced by institutions like enquiry point, based in each Ministry. However it will be desirable to have a focal point, possibly in customs, where all queries are lodged, for a follow-up in cases of delay.

Another proposed leg of transparency in the WTO is the system of Advance Ruling. In India, Advance Ruling has been functioning since April 2003. Presently, this mechanism is available only to certain identified categories like Joint Venture companies. There is a need to further broad base advance ruling mechanism so that any domestic interested party can obtain a ruling regarding tax treatment of its goods at the border prior to its import. However, an element of caution also needs to be exercised with regard to coverage of subjects under Advance Ruling. In WTO negotiation, the proposed areas are tariff classification of goods; application of customs valuation criteria for a particular case; the application of duty drawbacks, deferral or other relief from customs duties and the application of quotas. This appears to be too broad a coverage and it is desirable to narrow its ambit to tariff classification and application of customs valuation criteria. In case all areas mentioned above are covered, then duty relief schemes of DGFT and quota

application under the Foreign Trade Policy will also become a subject of Advance Ruling.

In order to enhance transparency, it is also important that India starts publishing dwell time of import and export of goods for all its major customs ports and airports at fixed intervals. It is a good indicator of trade facilitation environment at the borders. In fact it can lead to competitive benefits as major customs stations will attempt to reduce dwell time in order to encourage importers to use a particular customs station. Such information will also be useful for the trading community to decide as to from which port it will like to conduct its import/export operations.

The fees and charges relating to imports and exports are by and large reasonable. However, certain fees and charges which are levied on *ad valorem* basis would need to be changed to specific rates, in case the proposed commitments in WTO become a reality.

An important aspect of Trade Facilitation is that it does not deal only with customs procedures. All agencies dealing with clearance of goods at the borders need to modernise their procedures and systems. There is a need to enhance transparency and simplify procedures with respect to checks conducted for sanitary and phytosanitary, health and other reasons. In this regard, a study[19] indicates the need felt by the field level operatives like the Custom House Agents for automation of several other agencies dealing with trade and their linkage with customs like Plant and Quarantine Office (PQO), Central Food Laboratories, Additional Drug Controller, Textile Committee, respective Municipal corporations, Stamp

[19] Impact of IT related Trade Facilitation Measures on SMEs: An Overview of Indian Experience Sachin Chaturvedi, Artnet working Paper series no. 66, May 2009

Authorities, Directorate General of Foreign Trade (DGFT) and Agriculture and Processed Food Products Export Development Authority (APEDA). They have also stressed the need for a system of online debit of various import licenses issued by DGFT (like EPCG, DEPB etc.) for faster clearance of goods.

Developing electronic interface between various agencies has been recommended by an Inter-Ministerial Group (IMG) constituted in 2006 by the Committee on Infrastructure chaired by the Prime Minister. The e-trade initiative of Ministry of Commerce of 2003 has also focussed on interagency coordination for facilitating e-filing and e-payment as per international standards. Despite these initiatives, development of a single window through electronic interconnectivity of various agencies has still not materialised. While it is an important domestic agenda and needs to be pursued vigorously, in WTO, such a commitment is best taken in terms of a best endeavour clause.

Another dimension of trade facilitation in India is to implement the existing procedures more efficiently and effectively. It is seen that at the ground level, trade facilitation issues raised by the trading community relates both to systemic issues as well as ground level problems.

In order to get an idea regarding ground level trade facilitation problems, the websites of important Custom Houses in India were surveyed[20]. It was seen that some of the major custom houses like Mumbai Customs, Nhava Sheva Customs and Ahmedabad Customs publish records of the meeting with stakeholders concerning Trade Facilitation issues. This is a

[20] The websites of the following Custom Houses/Commissionerates were surveyed during January 2010: Ahmedabad, Bangalore, Chennai, Kochi, Delhi, Hyderabad, Kolkata, Mangalore, Mumbai, Nhava Sheva and Visakhapatnam

welcome move and it needs to be institutionalised for other major Custom Houses as well. A survey of the record of meetings of the Public Grievance Committee and Trade Facilitation Committee of the above mentioned three Custom Houses indicate the following field level problems with respect to trade facilitation: late refund of drawback/other refunds; late clearance of consignments; delay in test sample reports; procedural problems regarding verification of duty free scrips like DFIC/Advance Licence; problem in registration of EPCG licence; lack of online information regarding pending refund claims; levying of unreasonable penalty amounts for delay in filing IGMs/amendments to IGM; lack of proper connectivity between Bank and ICD leading to delay in updating duty payment details of challans at ICD; problems relating to e-payment of customs duty; delay in electronic transmission of Release Advice/Transfer Release Advice; difficulty in electronically transmitting shipping bill to DGFT; and need to devise simplified procedure for temporary import and export of Mafi Trailers (used for importing large machinery).

A Study[21] involving a survey of the private sector has indicated some further areas of difficulty in the existing procedures, namely customs valuation: inspection and release of goods; tariff classification and submission of documents for clearance. The same study also points to problems with non-customs areas, which in order of priority are: technical or sanitary requirements, obtaining of import licence, identification of origin of goods and payment of fees and penalties.

[21] An Evaluation of the Need and Cost of Selected Trade Facilitation Measures in India: Implications for the WTO Negotiations by Sachin Chaturvedi, published as Artnet Working paper Series No. 4, March 2006.

Field level interactions at some major ports have also revealed certain ground level needs for trade facilitation[22]. For instance, at Chennai port, release of food consignment gets delayed because samples are sent for testing to Central Food Technological Research Institute (CFTRI), located in Mysore which is 470 kms from Chennai. This delays a consignment clearance by 5-6 days. This adds to transaction cost in many other ways like high container detention charges and electricity charges to keep the containers in refrigerated condition. Several stakeholders voiced difficulties in testing of drug samples because laboratories are located at long distances and expressed the need to have laboratory testing facility at each port. At field level, a need has been voiced in general to locate all agencies connected with importation and exportation within one premises to reduce lag time in according various clearances.

Several stakeholders voiced a need to further improve computer connectivity, such as between customs EDI and testing laboratories, and between various other agencies with the ultimate aim of having a single window system for clearances.

It has also been reported that while Customs Freight stations have been expanded substantially, there has been no commensurate increase of Customs staff strength, leading to man power shortages and consequent delays in processing the declarations.

The cargo charges at CFSs in Chennai are reported to be high for certain goods categorised as special and valuable and charges are also levied on ad valorem basis. It was felt that certain objective parameters needed to be evolved to levy such charges.

[22] Author's interaction with CHAs, Air Cargo Agents, and other stakeholders in Chennai, Bangalore and Mumbai in January-February 2010.

As the volume of trade is growing, it is also reported that there is considerable load on the existing infrastructure which leads to frequent break downs. This has been particularly so for EDI and ICEGATE infrastructure. The stakeholders in Nhava Sheva expressed that more resources needed to be spent to improve and upgrade hardware and software of customs processes linked to EDI and ICEGATE.

Some other important problems identified during interaction with various stakeholders in Nhava Sheva port are as follows:

i) Lack of choice for importers to decide the particular Container Freight Stations (CFS) to which the container landed from a ship should be taken. It was reported that there would be substantial reduction of costs (almost to the tune of 40% per container) if this facility was allowed. Presently this choice was exercised by the Shipping Agent. This is an interesting aspect of Trade Facilitation discourse where actions of private players are also having adverse impact on Trade Facilitation enviornment. Another alternative suggested in this regard was that the importers should get the specific custom yard for unloading declared in the Bill of Lading itself;

ii) Additional cost to the importer because of charging of merchant overtime for the normal duties carried out by the customs officers (e.g. export stuffing) during the second shift of the customs working hours which starts after 6 p.m;

iii) Cumbersome procedures in amending the Import General Manifest (IGM)[23] which causes delays in clearance of

[23] IGM is a declaration to be filed under Section 30 of the Customs Act 1962. It is known as Import Report in case of import by land, and Import General Manifest in case of import by sea .This is a statutory declaration which every ship, that enters Indian waters with the intention of discharging cargo, is bound to deliver to the Port authorities.

consignments. To overcome this problem, one suggestion was that importers should themselves be permitted to carry out minor amendments to IGM online;

iv) Lack of a facility to carry over the duty paid in advance for goods under an advance Bill of Entry to the next consignment of the importer in case where goods did not arrive at the port on account of some unforeseen circumstances. It was pointed out that such a facility under advance Bill of Entry procedure would encourage payment of duty in advance of cargo arrival. Presently recovery of duty paid in advance for a consignment which does not arrive at the port is through a refund procedure which is reported to be time consuming and cumbersome.

v) Need for improvement of infrastructure like augmentation of export sheds at the air cargo complexes and better road connectivity for Nhava Sheva port.

vi) Delays in movement of cargo (up to 57 hours) on account of formalities relating to octroi and N-Forms of Brihanmumbai Municipal Corporation;

vii) Lack of adequate infrastructure for allied agencies like testing laboratories which creates delay in getting test reports. It was suggested that at least for big ports, like Nhava Sheva, all allied agencies (like quarantine, health, Textile Committee offices) should be housed in the port area itself in order to reduce time taken in travelling to obtain the necessary clearances;

viii) Mismatch in the EDI platforms for imports and exports through Customs ports and through Special Economic Zones. It was pointed out that creation of two different platforms was costly for the users and it was desirable to develop the SEZ EDI platform on the same basis as the Customs EDI platform.

ix) To address lack of knowledge of the stakeholders with regard to available tools of Trade Facilitation like advance filing of bills of entry, correct use of INCO[24] terms etc., it is desirable that customs department should hold training programmes for them;

x) Need to introduce a Risk Management System on export side on the same lines as in import side.

xi) Need to do away with the requirement that factory-sealed export containers should be first taken to the Customs Freight Station for examination before loading on vessel. It was pointed out that this practice was introduced on account of some malpractices noticed with respect to a few operators, but this had increased the dwell time across the board and created a risk of missing the ships altogether;

xii) Need to reduce delays on account of filing of bonds for temporary importation of containers. It was suggested to exempt customs duty on containers so that the existing procedures could be done away with.

The above cataloguing of ground level issues clearly indicates that the agenda of Trade Facilitation is much deeper and broader than what is being discussed in WTO. They would need to be addressed through a domestic reform agenda. It is noteworthy that there is already a substantial programme of simplification and modernisation of procedures underway and these issues can also be taken up as part of ongoing reforms.

[24] Incoterms or International Commercial Terms are a series of international sales terms, published by International Chamber of Commerce (ICC) and widely used in international commercial transactions. They are used to divide transaction costs and responsibilities between buyer and seller and reflect state-of-the-art transportation practices.

It needs to be noted that some key issues related to high transaction cost of trading in India are infrastructure related. Trade Facilitation agenda is equally important for non-customs agencies. CII has identified some key areas of high transaction cost for export which cover issues largely not related to Customs. These are summarised in Table 2 below:

TABLE 2
KEY ELEMENTS OF TRANSACTION COSTS FOR EXPORTS FROM INDIA-ISSUES UNRELATED TO CUSTOMS

Infrastructural Bottlenecks	Administrative Processes
· Poor and insufficient rail and road infrastructure · Bad connectivity between port and hinterland · Shortage of Rail wagons/rakes · Inadequate capacity/facility at ports, airports and roads · High equipment downtime at ports · Shortage of storage space · Less evacuation routes at ports	· Remittance through banks takes 2 to 25 days · License issuance takes 2 to 30 days · Transportation cost: 0.5 to 5 per cent for 45 per cent firms. Maximum of 20 per cent · Multiplicity of rules and regulations · Information constraints: Poor access and information on rules, administrative procedures · Lack of information and proper availability of laboratories for standards assessment

Source: Confederation of Indian Industry (CII), Report on Export Related Transaction Costs (2009)

On the whole it can be said that while India is moving in the right direction in respect of Trade Facilitation, considerable distance still needs to be covered. This requires resources and commitment, both of which are not lacking. It is therefore, hoped that there will be constant incremental progress on Trade Facilitation agenda.

It is important to keep in mind that India's expertise and capacity in the field of trade facilitation, makes it well placed as a provider of technical assistance particularly to countries within South Asia and in Africa. This can help in evolving a common trade facilitation platform at least for trade within South Asia. India's contribution can be in terms of manpower expertise. This can be supplemented by funding from multilateral donors to help in building the required infrastructure and institutions.

Conclusion

Trade Facilitation has a wide meaning. Bringing this subject in WTO has brought more focus and clarity regarding common steps that the WTO Members need to take to provide a more trade facilitative environment at their borders. The proposed new commitments stem from the subjects already covered under GATT Articles V, VIII, X, namely transparency of trade related laws, trade related procedures and documentation and transit. The existing commitments on these subjects are generalised and in the ongoing negotiations, effort is to impart more specificity to these commitments and also to broaden the commitments.

An analysis of the proposals on Trade Facilitation in the WTO indicates that a large number of them require application of Information Technology, and their implementation will reduce the dwell time of the goods at the borders. The new proposals would improve transparency of rules and regulations and would also lead to more facilitative procedures relating to transit of goods.

The negotiating dynamics in WTO on trade facilitation is more collaborative than seen in other areas of negotiation. The proposals have also been modulated to meet the concerns of several developing country Members. Yet there are many areas of difficulty which need to be resolved in the spirit of the Annex D modality which accords far reaching special and differential treatment for developing countries. It is also necessary to be watchful that burdensome proposals are not slipped in at the closing phases of the negotiation.

India has a substantial autonomous programme of trade facilitation which can easily be dovetailed into the proposed commitments in WTO. While India has already implemented or is in the process of establishing several institutions or processes proposed in the WTO, it will need to create new institutions and establish new procedures with regard to some of the proposals on the table. India will also need to exercise caution with regard to proposed commitments on some subjects like Single Window System, deeper commitments for Express Shipments, Advance Ruling System etc.

An important agenda for trade facilitation is the need for a continuous improvement of processes and procedures already put in place. Some trade facilitation steps such as improvement of road and rail infrastructure, setting up of container scanners etc. go beyond the WTO agenda, but need to be pursued vigorously, to sustain increasing volumes of trade as Indian economy further opens up and integrates globally. This has to be irrespective of the final outcome in the WTO on Trade Facilitation. Similarly, while certain proposals in WTO need to be looked at with caution in the context of an international commitment, they need to be vigorously pursued autonomously like creation of a Single Window.

As India has substantial experience in implementing modern IT related processes like EDI, Risk Management, Accredited Client

Programme etc, it can also consider becoming a provider of technical assistance and capacity building for other developing and least developed countries. It can offer its human resources for such programme particularly for South Asia with adequate support from other donors to finance development of infrastructure. This can help in building a common trade facilitation platform for the subcontinent.

Useful Web Links

- www.commerce.nic.in
- www.wto.org
- www.unctad.org
- www.worldbank.org
- www.wipo.int
- www.fao.org
- www.unescap.org
- www.artnetontrade.org
- www.ictsd.org

Other Publications of the Centre for WTO Studies

- FAQ on WTO Negotiations in Agriculture
- FAQ on WTO Negotiations in Non Agriculture Market Access (NAMA)
- FAQ on WTO Negotiations in Services
- FAQ on Geographical Indications
- FAQ on WTO Agreement on Subsidies and Countervailing Measures
- FAQ on WTO Agreement on Safeguards
- FAQ on WTO Compatibility of Border Trade Measures for Environmental Protection
- Review of Trade Policies of India's Major Trading Partners
- ***Discussion Paper 1:*** India's Duty Free Tariff Preference Scheme: Case Study for Select LDCs
- ***Discussion Paper 2:*** Cotton Production, Exports and Price: A Comparative Analysis of India and USA
- ***Discussion Paper 3:*** Study on Identification of Select Textile and Wool and Woollen Products Having Export Potential to Chile, Colombia and Peru
- Bimonthly newsmagazine titled 'India, WTO and Trade Issues'

All the above publications are available on the website of the Centre for WTO Studies, ***http://wtocentre.iift.ac.in***

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Shri Shashank Priya belongs to 1988 batch of Indian Revenue Service (Customs and Central Excise) of Government of India. He handled varied responsibility in the Department of Revenue and in the Department of Commerce. He regularly represented India in WTO negotiations on Trade Facilitation, Regional Trading Agreement and Non Preferential Rules of Origin during his five-year stint in the Commerce Ministry. He was also associated with negotiations on Regional Trading Agreements of India with Mercosur and Chile. He was part of the Indian delegation to the WTO Ministerial Conferences in Cancun (2003), Hong Kong (2005) and the Geneva Ministerial Meeting of 2004 which led to the WTO Framework Agreement of August 2004.

He has done his Bachelors and Masters in History from St. Stephen's College and Delhi University respectively and holds a Diploma in Trade Policy from WTO, Geneva. He is presently pursuing a Degree in Bachelor of Law from Delhi University.

About the WTO Centre

The Centre for WTO Studies has been functioning since November 2002 at the Indian Institute of Foreign Trade. The major objective of the Centre is to provide research and analytical support to the Department of Commerce on identified issues relating to the World Trade Organisation.

The Centre has recently undergone considerable strengthening. It has now a wider mandate and is tasked to carryout research activities, bring out newsletters on WTO related subjects, organise outreach and capacity building programmes through seminars, workshops, subject-specific meetings etc. and to be a repository of important WTO documents in its Trade Resource Centre. A Steering Committee has been constituted to guide the work of the Centre.

The Centre is currently engaged in research activities on following WTO related subjects:

- Agriculture
- Intellectual Property Rights
- Agreement on Sanitary and Phytosanitary Measures
- Agreement on Technical Barriers to Trade
- Trade Facilitation
- Technology Transfer
- Issues relating to Environment and Trade
- Subsidies including Fishery Subsidies

More information about the WTO Centre and its activities can be accessed on its website: http://wtocentre.iift.ac.in

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