

TRADE FACILITATION – WTO LAW AND ITS REVISION TO FACILITATE GLOBAL TRADE IN GOODS

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Abstract

The article provides an overview of trade facilitation and the relevant World Trade Organization (WTO) law. After introducing the subject, the article describes what trade facilitation entails and demonstrates its economic impact. The focus turns to the current WTO trade facilitation negotiations. In order to assess the potential for revision, relating panel and Appellate Body reports are analysed and the contents of the relevant GATT Articles – namely Articles V, VIII and X of the GATT – are clarified. Furthermore, other multilateral trade agreements are looked at. It is shown that they contain certain principles that are likely to set a trend for matters to be regulated by the WTO. Finally, the article looks at some of the Members' proposals submitted to the WTO Secretariat and gives an outlook on the future of the negotiations.

I. Introduction

The globalisation of the international supply chain in recent years has led to an immense increase in the volume of goods to be cleared by customs authorities. Due to growing competition, companies are producing components and accessories in countries with the highest cost-effectiveness and assembling them close to the delivery area. Furthermore, containers that used to be cleared as one transaction, now often contain a number of smaller shipments that need separate documents and procedures for customs clearance, because of the growth in e-commerce. This change in business environment requires Customs to adapt. In many parts of the world, though, governments have failed to react. With a view to controlling the flow of goods and the transfer of services to protect legitimate interests of parties involved, many countries have kept outdated procedures and extended documentation requirements rather than reduce them. At the same time, the number of customs officials has remained the same or decreased. The resulting delays are apparent. Even though developments in the IT-sector have led to facilitation and expedition of procedures relevant to international trade in many countries, problems still exist due to the lack of interoperability of different national systems. While developed countries have failed to agree on a common IT-system, in developing countries procedures are often still carried out manually.

For traders acting globally, and especially small and medium sized enterprises (SME), the number and complexity of national regulations alone constitute trade barriers. A greater concern is that not only the number of required documentation and applicable procedures is increasing, but that they vary substantially from region to region and from country to country. Both the measures that enterprises have to put in place in order to comply with national and foreign regulations as well as the long clearance time at borders are important cost factors.

Having realised that a reform of customs procedures is necessary and with the aim of cutting red tape, reducing costs and speeding up procedures, several international organisations, among them the World Trade Organization (WTO), have added trade facilitation to their agenda. Also, some countries and regions have introduced trade facilitation policies in recent years. However, due to the fact that a comprehensive international approach has been missing in the past, and that most of the international instruments dealing with the issue are non-binding recommendations, declarations or memoranda of understanding, a lot of governments have not yet taken action. After eight years of being on the WTO agenda as one of the Singapore Issues, Members finally realised the importance of the issue and commenced substantial trade facilitation negotiations in the summer of 2004. The outcome is yet to be seen, but negotiations are concentrating on specific trade facilitation measures. An agreement, even if not as comprehensive as envisioned in the beginning, is becoming more likely.

After describing what trade facilitation entails (sections II. a. and b. below) and demonstrating its economic impact (section II. c. below), this article focuses on the current trade facilitation negotiations being held at the WTO (section III). Relating panel and AB reports are analysed and thereby the contents of the relevant GATT Articles – namely Articles V, VIII and X of the GATT 1994 – are clarified. In order to shed some light on the potential outcome of the current trade facilitation negotiations of the Doha Round, other multilateral trade agreements are looked at in section III. d. It will be shown that they follow a certain pattern and imply certain principles that are likely to set a trend for matters to be regulated by the WTO. In conclusion, after having looked at some of the proposals submitted by Members (section III. e.), the future of trade facilitation in the WTO is assessed.

II. Trade facilitation

a. Explanation of the term

There is no uniform definition of the term ‘trade facilitation’. Rather, it is defined differently depending on the discussion forum. While, for example, in 2001 the OECD referred to it as a ‘simplification and standardisation of procedures and associated information flows required to move goods internationally from seller to buyer and to pass payments in the other direction’, the United Nations Economic Commission for Europe (UN/ECE) defined it as a ‘comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practises’. For the purposes of this article, the term will be used as understood by the WTO, the ‘simplification and harmonization of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade’ (WTO 2001).

b. Examples and explanation of measures applied

In order to better understand what trade facilitation is about, it is useful to look at some examples of trade facilitation measures. Typical measures can be entire concepts (Single Window), IT solutions (EDI), standardisation (electronic or paper-based) or simplified procedures (Authorised Economic Operator [AEO]). Furthermore, customs techniques such as risk analysis can speed up customs procedures and thereby facilitate global trade.

The Single Window, for example, is a concept based on the idea that a trader undertaking to move goods internationally needs to turn to one government agency only, either in person or via the Internet, which then forwards the required information provided by the trader to all other relevant government agencies. Such a single entry point simplifies the process for the trader who, in most countries, currently has to turn to several different agencies in order to comply with national trade regulations. Often, the trader has

to present the same information several times and in different forms, sometimes paper based, sometimes electronically. This results in a major bureaucratic effort. The Single Window has the advantage that it can be created in an e-environment as well as in a less advanced environment, for example, in a developing country where the window is not a web interface but a counter window in a (government) agency.

Another typical trade facilitation measure is the introduction of simplified procedures for traders who have acquired a special status, such as the AEO of the European Union (EU). The granting of such status usually depends on one's compliance record in the past or on the outcome of a risk analysis. In the case of the European AEO, a figure established within the framework of the European Commission's (EC) customs security program (CSP), the status is granted when certain criteria relating to the operators' control system, financial solvency and compliance record are met. Once conferred by one EU country, these criteria will not be re-examined in another member country, but this does not automatically confer the right to simplified procedures. It is possible that additional national criteria have to be met in order to benefit from them.

c. Economic impact of trade facilitation

It is said that the economic impact of trade facilitation has always been difficult to measure due to the lack of standard parameters. How, for example, should one measure the benefits resulting from the distribution of the United Nations (UN) layout key, the standard trade document developed by the UN/ECE which forms the basis for the majority of trade and transport documents worldwide? Just as there is no standard definition for trade facilitation, there is no standard concept of a trade facilitation policy. Furthermore, the customs environment in countries is so varied that improvements to certain aspects can bring immense savings in one country, while in another the same measures hardly change anything. However, economists have begun to assess the economic impact of trade facilitation. While in the past mainly country-specific studies have been carried out, newer studies are also trying to estimate the cost reduction potential of trade facilitation worldwide.

In 2004 the World Bank published an analysis of the correlation of trade facilitation and the movement of goods attributed to trade in finished products worldwide in 2000-01 (Wilson, Mann & Otsuki 2004). Having collected and evaluated data from 75 countries, the experts came to the conclusion that the four factors: port efficiency, customs environment, regulation environment and use of e-commerce by enterprises, have far-reaching effects on imports and exports of the individual country. An increase in efficiency in these areas is presumed to also have positive effects on the movement of goods worldwide. It is estimated that if the overall profit of trade facilitation for trade in finished products equalled 377 billion USD, imports and exports would increase in all regions of the world. According to the study, adherence to the provisions of Article V GATT (freedom of transit), represented by the indicator port efficiency, and to the provisions of Article VIII GATT (fees and formalities), represented by the indicator customs environment, would lead to an increase of trade in finished products in the amount of 107 billion USD (Article V) and 33 billion USD (Article VIII). If countries were to publish and apply trade regulations as prescribed by Article X of the GATT, an increase in trade volume of 83 billion USD is expected. With regard to different regions of the world, the study comes to the conclusion that through trade facilitation measures, most regions would increase their exports rather than their imports, whereby the exports would mainly go into the market of OECD countries. After the findings, Southeast Asia has the largest potential for an increase in imports and exports. In Africa and the Middle East, imports would rise more than exports due to the lack of integration into the market of finished goods and restricted market access to OECD countries. Furthermore, country-specific case studies exist. While in the past studies considered trade facilitation measures undertaken by trade partners in order to assess the benefits of a reform, countries have to start looking at their own level of trade facilitation in order to realise the potential gain of 377 billion USD worldwide. This potential for development has led many countries to initiate national trade facilitation policies.

III. Trade facilitation in the WTO

a. Political background

Trade facilitation as a comprehensive approach to facilitating global trade in goods by reforming customs procedure was added to the WTO's agenda at its 1st Ministerial Conference in Singapore in 1996. Attention was drawn to the subject again in 2001 when this somewhat broad mandate was specified in the Ministerial Declaration launching the Doha Round:

27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area (WTO Doha WT/MIN(01)/DEC/1).

However, the Cancun Ministerial passed without any results. While discussions mainly revolved around issues such as agriculture and the liberalisation of services, agreement was especially difficult on the Singapore Issues. Members persisted on their controversial positions regarding trade facilitation that were evident in the run-up to the Ministerial. Developing countries and least-developed countries (LDC) refused to take far-reaching obligations upon themselves which bore the risk of becoming defendant in a dispute settlement procedure. The breakthrough was achieved almost one year later, on 1 August 2004, when the 'July Package' was adopted. While other Singapore Issues were dropped, Members took note of the trade facilitation work done so far and agreed to start negotiations on the basis of modalities set forth in Annex D of the package. Besides committing themselves to clarifying and improving the relevant GATT Articles, Members recognised that the principle of special and differential treatment for developing and least-developed countries should extend beyond granting traditional transition periods for the implementation of commitments and that the extent and timing of entering into commitments should be related to the implementation capacities of such countries. Members would not be obliged to undertake investments in infrastructure projects beyond their means, and especially LDCs would only be required to undertake commitments to an extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

At its first meeting after the July session of the General Council, a Negotiating Group on Trade Facilitation was established and negotiations started as envisaged in the second half of 2004. Besides the aim of clarifying and improving relevant aspects of Articles V, VIII and X of the GATT 1994, provisions for an effective cooperation between customs authorities as well as between Customs and other government agencies are envisaged and customs compliance issues are looked at. Moreover, different international organisations have initiated programs in order to help countries to identify their trade needs and priorities. In July 2006, trade facilitation talks were suspended after they appeared to be one of the few issues of the Doha Round negotiations that were heading for agreement on schedule. Members still need to agree on which of the provisions for simplifying customs procedures and cutting trade-related red tape they want to include, and which to leave out.

b. Specific role of the WTO

What makes the approach within the WTO distinctive is that it embraces the work accomplished in other international organisations and thereby bundles their endeavours. The fact that the WTO's quasi-legal dispute settlement mechanism is unique in the enforceability of its decisions is important with regard

to the political value of a potential agreement. But it is not clear yet whether it will apply with regard to trade facilitation measures. It is certain that trade facilitation obligations will have to be customised and that they have to be in line with the capacity level of the individual Member.

c. Articles V, VIII and X of GATT 1994

In order to assess the potential for reforming WTO law to facilitate trade, an analysis is necessary of the existing provisions that are of relevance in this context. In the focus of discussion are the aforementioned Articles V, VIII and X of the GATT 1994, which have not undergone (substantial) reform since 1947. Against the background of the immense change that has taken place in international production and sale in the past 60 years, it is evident that the Articles do not meet the needs of today's world. WTO panels and the organisation's Appellate Body have clarified their meaning and scope in the meantime, but questions remain. The following overview sums up the findings from former disputes between Members that revolve around Articles V, VIII and X GATT and highlights some of the issues that will have to be addressed by Members.

Article V GATT – Goods in transit

Article V GATT defines comprehensively the meaning of transit, stipulates freedom of transit and allows Members to regulate traffic in transit through their territory, as long as the traffic is not unnecessarily delayed or restricted and as long as it is exempted from duties and other charges imposed in respect of transit. An exception is made only in regard to charges for transportation or those that are commensurate with administrative expenses entailed by transit or with the cost of services rendered. All charges and regulations imposed on traffic in transit have to be reasonable with regard to the conditions of the traffic. Also, Members are obliged to treat such traffic to or from the territory of any other Member no less favourably than traffic in transit to or from any third country with respect to charges, regulations and formalities in connection with transit. The interpretative note to the Article states that this applies only to like products being transported on the same route, under like conditions and thereby implies the risk of discrimination. It does not prevent a Member from discriminating against a third country as long as the type of consignment is different, even though there is no reason for the difference in transit procedure. Even if one could argue that the more burdensome customs procedure applied to one type of consignment – where there is no obvious reason – presents an unnecessary delay or restriction, it will be difficult for a complainant to prove the lack of necessity in a dispute.

Members have asserted violation of Article V GATT several times, but the parties to the disputes solved the matter before the establishment of a panel or shortly afterwards. For this reason, Article V GATT has never been interpreted either by a GATT/WTO panel or by the Appellate Body (WTO Secretariat 2002, G/C/W/408). Due to the lack of such guidance, the meaning and scope of the Article's provisions can only be clarified by applying the rules a panel would apply when interpreting the WTO provisions; these being the general rules of interpretation for treaties as stipulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

From the relating preparatory work on the Havana Charter, it can be drawn that in 1948 parties already saw the need to simplify customs regulations that applied to traffic in transit and to promote the equitable use of facilities required, as this was of great importance especially to landlocked countries (WTO Secretariat 2002, G/C/W/408). This leads the way to the issues that are still pressing today and that will have to be addressed in future trade facilitation negotiations. Discrimination among modes of transport and types of carriers where there is no obvious reason for differing transit procedures, and the special situation of landlocked countries, have to be dealt with. Furthermore, with regard to the requirement that all charges and regulations imposed on traffic in transit are to be reasonable, the term 'reasonable' should be made operational, for example, by defining the case in which a measure is not reasonable and therefore presents a violation of the provision.

Article VIII GATT – Fees and formalities

In contrast to Article V GATT, several disputes settled by a panel or the Appellate Body have revolved around Article VIII GATT, which addresses fees and formalities associated with the import and export of goods (WTO Secretariat 2002, G/C/W/391). The article explicitly limits fees and charges in connection with importation and exportation (other than import/export duties and internal taxes) of goods to the approximate cost of services rendered. In this context, Members also ‘recognise the need’ for reducing fees and formalities, and ‘recognise’ that certificates of origin should only be required to the extent that they are strictly indispensable. While panels have clarified the meaning of ‘cost of service rendered’ in several dispute reports, for example, that the cost of services rendered refers to the cost with respect to *each* importer and therefore hinders Members from calculating them on an ad valorem basis (for more see: *US – Customs User Fee*, BIDS 35S/245; *EEC – Minimum Import Prices*, BIDS 25S/68; *Argentina – Textiles and Apparel*, WT/DS56/R & WT/DS56/AB/R; *US – Tobacco*, BIDS 41S/1/131). The use of the expression ‘recognise’ itself makes clear that an obligation to reduce fees and formalities in connection with import and export is not intended (despite the panel in *EEC – Bananas II*, DS38/R (unadopted), para. 151). An interpretation along these lines would be clearly against the text of the provision and therefore violating the rules of interpretation. No other conclusion can be drawn from paragraph 2 of the Article, which requires a country, upon request by another country, to review the operation of its laws and regulations in the light of the provision of Article VIII GATT. The paragraph does not stipulate any obligation to take action, for example, reduce or align fees and formalities, even if the country comes to the conclusion that they are too numerous or diverse. Furthermore, Article VIII GATT requires Members not to impose penalties on traders that are out of proportion to the quality of the violation of customs regulations in question. Panel reports have clarified that the forfeiture of a security deposit, for example, in case an importation did not take place within the date specified in an import certificate, is not a charge falling within the Article’s paragraph 1 (a), but instead is part of an enforcement mechanism (*EEC – Minimum Import Prices*, BIDS 25S/68).

Article X GATT – Transparency and availability of information

The disputes revolving around Article X GATT are numerous (WTO Secretariat 2002, G/C/W/374). It has been clarified that a restraint that affects an unidentified number of economic operators is a ‘measure of general application’ to which the publication requirement of Article X GATT, paragraph 1 applies. The publication requirement extends to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases (*US – Underwear*, WT/DS24/AB/R; *Japan – Film*, WT/DS44/R). In another dispute, the panel found that no time limit or delay between publication and entry into force was specified by paragraph 1, but that it prohibits the use of backdated quotas. Also, one panel report states that Members do not have to make information affecting trade available to domestic and foreign suppliers at the same time, nor do they have to do so before they enter into force (*Canada – Alcoholic Drinks*, BIDS 39S/27). However, in a different case, the panel noted that paragraph 1 shows the importance of transparency to individual traders and therefore, paragraph 3 (a), stipulating a uniform, impartial and reasonable administration of measures, can involve an examination of the impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, etc. (*Argentina – Bovine Hides*, WT/DS155/R). If information does not have to be made available to different parties at the same time, as long as it is made available as soon as the measure is applied with a view to the disputes mentioned, the question arises concerning at what point the administration is no longer impartial. Because of those obscurities, clear wording, for example, stating the number of days would be helpful. In case of laws and regulations, it would be useful to require publication before their entry into force so that interested parties have the opportunity to comment on them.

With regard to the administration requirement of Article X, paragraph 3 (a) GATT, a panel found that ‘uniform’ is understood as uniformity of treatment in respect to persons similarly situated. Also,

panels have clarified that the requirement does not apply to the laws, regulations, decisions and rulings themselves, but to their administration, which has to be uniform. The obligation does not only apply to situations where traders or products from WTO Members are concerned, but also where traders or products from non-Member countries are at issue. This general requirement underlines the nature and goal of Article X GATT, which is focused on establishing transparency in Member's administration and not on abolishing discrimination among Members in this regard (*US – Stainless Steel, WT/DS179/R*; *EC – Bananas III, WT/DS27/AB/R*; *Argentina – Bovine Hides, WT/DS155/R*). With regard to impartiality, the panel in *Argentina – Bovine Hides* found that in cases where a party with a contrary commercial but no legal interest is allowed to participate in a customs clearance process, there is an inherent danger to a partial application of customs laws because this permits such party to obtain confidential information which it does not have a right to. Such participation would also qualify as unreasonable (*Argentina – Bovine Hides, WT/DS155/R*). This dispute shows that despite all transparency efforts, new trade facilitation regulations have to ensure protection of confidential information.

d. Others

Besides drawing on panel reports referring to Articles V, VIII and X GATT, Members' proposals are inspired by other multilateral trade agreements concluded in specific areas in the past. While the interpretation of the relevant Articles is important for their clarification and strengthening, the structure and principles of other multilateral agreements can lead the way to a comprehensive trade facilitation agreement.

Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Agreement (SPS), for example, aim at harmonisation and recognition of other Members' conformity assessment procedures. They are very comprehensive with regard to their subject matter and, besides transparency, harmonisation and non-discrimination, they reflect concepts such as least trade restrictiveness. Other agreements that should be taken into account are the ones on Pre-shipment Inspection (PSI), Import Licensing Procedures (ILP) and Rules of Origin (RO). The goal of the PSI, for example, is to make sure that pre-shipment inspections are carried out free of discrimination and without leading to unnecessary delays. The Agreement calls for transparent procedures and also for the protection of confidential information, for the application of international standards in cases where seller and buyer have not agreed on a standard (for example, quality standard) as well as for non-discrimination. It also sets forth an explicit time limit for the issuance of the report (or written explanation for non-issuance) in order to speed up the procedure. The overall aim though, is to phase out pre-shipment inspections. The establishment of transparency, again while confidential business information is protected, is the key purpose of the ILP. In cases where Members introduce new import licensing procedures or change existing ones, they are obliged to publish the relevant information before their entry into force so that traders can become acquainted with them. If possible, this period shall equal 21 days. The Agreement on Rules of Origin aims mainly to harmonise non-preferential rules of origin among Members. Until harmonisation is accomplished, Members have agreed on certain disciplines that also reflect principles such as transparency, non-discrimination, predictability, and expedition of procedures.

e. Proposals submitted by Members

The proposals submitted to the WTO's Secretariat by WTO Members are clearly drawing on these accomplishments and on instruments such as the WCO's Revised Kyoto Convention. They are now on the table for discussion. Many of them are linked to one of the three GATT Articles, while others are related to more broad concepts such as agency cooperation, customs compliance and cross-cutting issues. A comprehensive summary of proposals would go beyond the intended purpose of this article, but can be found on the WTO's website (TN/TF/W/43/Rev.10).

With regard to Article X GATT, which is the broadest of the three relevant GATT Articles, Members want to see the use of the Internet for publication, the establishment of a Single Window or at least enquiry points, a time period between publication and entry into force as well as consultations on new and amended rules and the provision of information on the underlying policy objectives. Furthermore, binding advance rulings in certain specific areas and the release of goods in case of an appeal are up for discussion. In order to maintain and reinforce integrity and ethical conduct among officials, the establishment of a code of conduct and technical assistance to build up capacities and thereby prevent misconduct have been proposed.

In the area of transit, many Members wish to extend the concept of non-discrimination to different modes of transport, types of carriers and types of consignments. Some Members would like to see national treatment applied to traffic in transit. Others see the need for mentioning explicitly the possibility of exceptions justified by legitimate policy objectives (even though Articles XX and XXI GATT apply). With regard to transit fees and charges – to which Article X, paragraph 1 GATT does not apply – proposals include their publication, the prohibition of unpublished ones, and time periods between publication and their entry into force. Also, Members are suggesting that they be reviewed periodically and treated like fees connected with import and export in regard to the fact that they have to be strictly linked to services rendered. The publication of all laws, regulations, requirements and procedures on or in connection with transit is another prominent proposal as well as a time period between the publication of transit formalities and documentation requirements and their entry into force. The use of international standards, improved cooperation (which is essential for landlocked countries) and coordination as well as the clarification of terms, such as ‘goods in transit’ or ‘unnecessary delays’ are also likely to form part of a future agreement.

For fees and formalities connected with import and export, the proposals are similar. Specific parameters for charges should be established. They should be published and notified and the collection of unpublished ones should be prohibited. In order to reduce fees and formalities, they are to be reviewed periodically. Furthermore, Members want to prescribe international standards and the acceptance of commercially available information and copies.

IV. Outlook

The proposals are on the table. Members will have to take up negotiations and decide which of them shall be part of a future agreement. Since those WTO decisions that are to become binding on all 150 WTO Members have to be taken by consensus, Members are facing the difficult task of balancing the different interests, not only with regard to trade facilitation but with regard to the Doha negotiations as a whole. An important issue that is still pending is whether future trade facilitation disciplines will be subject to dispute settlement under the Dispute Settlement Understanding (DSU). If this is not the case, an alternative enforcement mechanism will have to be agreed on. It is certain that technical assistance and capacity building for less developed countries are the key to the reform of WTO law. Looking at the potential that trade facilitation presents, especially for the developing world, it is more than desirable that Members manage to agree on an ambitious set of disciplines.

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Further reading

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