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Trade Facilitation in the Multilateral Trading System **- An Analysis of the Doha Round Negotiations on Trade Facilitation**

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ABSTRACT

The World Trade Organization (WTO) as the world trading system is at a “cross roads”. Following the failure of ministers to reach an agreement on the WTO negotiations at their meeting in Geneva in July 2008, the WTO Members have retreated for serious reflection on the continued efforts to conclude the Doha Round. WTO Members, NGOs and scholars have raised concerns that if the Doha Round is not concluded then the WTO will exhaust its legitimacy and lead to a myriad of unequal and diverse bilateral or regional trade agreements.

International studies confirm that trade facilitation, by means of improving administrative trading processes and harmonizing regulations and laws, can result in greater economic growth than tariff reductions that are on the negotiation table. In light of these findings, those favoring bilateralism argue that trade facilitation should move forward without waiting for a multilateral agreement. However, the multilateral trade system offers an institutional platform, which no other international organization or its bilateral counterparts can provide. Regardless of its shortcomings, the WTO still has a strong support among its members and many of them are taking initiatives to resume the Doha Round. Proponents for a multilateral system also argue that great problems can arise when important trade topics, like trade facilitation, under the WTO framework are taken from the multilateral trade agenda and settled in bilateral agreements.

Trade facilitation, regulated under Articles V, VIII and X of the GATT, is not a divisive subject in the WTO, being added only in 2004. Still, trade facilitation has widely been recognized as bringing benefits to the WTO Members, particularly to developing countries, and has caused relatively few disagreements between the WTO Members. However, the special and differential treatment and the technical assistance that are being offered to the developed countries in order to ease the implementation process, have been and will continue to be the difficult issues to be settled in future negotiations. These implementation issues, that entail additional negotiation time and political effort, become more complex since the aid instruments have the nature of soft law. The main reason for the state of affairs is that many developing countries lack the economical and administrative platforms to implement trade facilitation, and consequently they require guarantees that go beyond non-binding commitments.

Against this background, the aim of this thesis is - besides scrutinizing the institutional, judicial and political implications and benefits of trade facilitation - to examine if there are any more efficient implementation alternatives than the multilateral approach. The main conclusion of this thesis is that although trade facilitation will result in some implications for the developing countries the advantages exceed the disadvantages. Moreover, the WTO even with its democratic deficit and institutional shortcomings is the preeminent legal institution to implement trade facilitation. This thesis recognizes the difficulties ahead for the multilateral trading system, but believes the Doha Round in the near future will be resumed and hopefully results in an agreement, which not only launches trade facilitation, but also restores WTO's legitimacy as an international trading system.

PREFACE

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Pegah Sheikhan
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LIST OF ABBREVIATIONS

AB	Appellate Body
DDA	Doha Development Agenda
DDAGTF	Development Agenda Global Trust Fund
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECOSOC	United Nations Economic and Social Council
EIF	Enhanced Integrated Framework
EU	European Union
GATT	General Agreement Trade and Tariffs
GDP	Gross Domestic Product
IF	Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries
IMF	International Monetary Fund
ITC	International Trade Centre
ITO	International Trade Organization
LDC	Least Developing Country
LLDC	Land-locked developing country
MFN	Most-favored-nation treatment
MNC	Multinational Company
MTS	Multilateral Trade System
NAMA	Non-Agricultural Market Access
NIC	Newly Industrialized Country
NGO	Non-governmental Organization
NGTF	Negotiation Group on Trade Facilitation
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SME	Small and Medium Size Enterprises
SDT	Special and Differential Treatment
TA/CB	Technical Assistance and Capacity Building
TBT	Technical Barriers to Trade Agreement
TPR	Trade Policy Review
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
U.S.	United States
USD	United States Dollar
WCO	World Customs Organization
WTO	World Trade Organization

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1. INTRODUCTION

1.1 Background and Current Trends

In the past 60 years, the World Trade Organization (WTO) and trade liberalization have had an important role in achieving economic revenues, business opportunities and employment safeguard generally in the world. Developing countries, on the other hand, often lack the necessary capacity to manage their role in international institutions, their production capacity is low and many of them are trapped in unbalanced trade agreements. However, free trade has come a long way from David Ricardo's theory of comparative advantages and it has become increasingly clear a more balanced trade is needed for economical growth, development and peace. Trade facilitation regulated under Articles V, VIII and X of the GATT, can if correctly implemented becomes the balanced and fair tool for economic growth and development that the world community needs.

It is not only tariffs and other market-access barriers that limit international trade, but also inefficient and outdated border administrative and judicial procedures have contributed to the constraints. In fact, trade facilitation which seeks to solve inefficient administrative and judicial procedures, has possibly the biggest potential for developing countries in the Doha Round, but it is the least talked about. Moreover, trade facilitation can generate more economical growth than tariff reductions. The aim of the current negotiations on trade facilitation in the Doha Round is to promote improvements on the judicial and administrative international trade procedures.

The general opinion before the Ministerial meeting in Geneva, July 2008, was that if the negotiations stagnated it would be the starting point of the termination of the Multilateral Trading System (MTS). However, although the collapse of the Doha Round has not affected the world trade notably the situation is sensitive. The Doha Round has missed one deadline after the other and now the interruption of the negotiations and the prospect of resumed talks collide with outbreak of the subprime mortgage financial crisis a long with a new era of the American and European administrations, which might affect both the time schedule and the outcome of the Round.

After the collapse in Geneva, there is a general discussion concerning regional trade agreements (RTAs) and preferential trade agreements (PTAs) role in international trade. The approach of turning to bilateralism to implement trade facilitation in specific is argued to be more prosperous than wasting time on whether or not a successful agreement can be reached under the Doha round. When bilateral agreements are being discussed, a division has to be made between a general concern that bilateral agreements will substitute the multilateral system if the Doha Round fails and the role of bilateral agreements on trade facilitation. Both scenarios are examined in this thesis with emphasize on RTAs consequences on trade facilitation. However, there is another discourse stating the importance of multilateral trade agreements under an international organization. The interesting question is thus, which discourse, if any, is the most appropriate for implementing trade facilitation?

During the last years every now and then, closely linked to the Doha Rounds failures, politicians and economists¹ argue that trade facilitation should shift from a negotiation plan to a “development plan” or “development package” together with Aid for Trade.² The argument is that trade facilitation is a positive aspect of the Doha negotiations but that it has been stuck because of lack of progress in other areas. Since trade facilitation is said to cut costs of trade far in excess of those imposed by tariffs and other trade barriers, it is argued that there is no point in waiting for an overall Doha agreement. Instead, efforts should be made to find an agreement on trade facilitation. This is another interesting aspect concerning trade facilitation as an independent topic in relation to the Doha Development Agenda (DDA) and worth examining along with other alternative approaches, such as bilateral and plurilateral agreements, in relation to a multilateral agreement.

1.2 Definition of the Main Issues of Trade Facilitation

The importance of trade facilitation as a tool for economic development is especially vital for economic growth for least developing countries (LDCs), developing countries and smaller developed countries. The main reasons for this is the large increase in international trade, the explosive IT-development, which has led to faster, cheaper and more efficient transport systems (such as Just in Time-management and e-business), and the development in the nature of internationally trade goods going from complete goods towards sub-assembled products in different countries.

The WTO defines trade facilitation as “the simplification and harmonization of international trade procedures” where international trade procedures are defined as the “activities, practices, and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade.”³ To this end, the main objectives for trade facilitation, according to the WTO, are in summary:

- (a) To simplify formalities and procedures related to import, export and transit of goods
- (b) To harmonize applicable regulations and laws
- (c) To standardize and integrate definitions as well as requirements of information, the use of information and communication technologies.⁴

1.3 Definition of the International Trading Parties

The WTO does not have any definitions regarding the categories but uses international established definitions. Developed countries are countries with a high income per capita, strong human capacity and high GDP. The category of newly industrializing country (NIC) is an economic classification on a country that has made a switch from agricultural to manufacturing economy, fosters large national corporations and is recipients of strong capital investment from foreign investors.

¹ World Bank President Robert Zoellick and the recent former EU Trade Commissioner Peter Mandelson are both strong advocates for this approach. For more information see *Washington Trade Daily*, 1 October 2008, pp1-3.

² See section 3.5.2.

³ Cosgrove-Sacks et al, *Trade Facilitation: the Challenges for Growth and Development*, p 10.

⁴ As identified by the participants at the WTO Symposium on Trade Facilitation in March 1998, see “WTO Trade Facilitation Symposium – report by the Secretariat.”

The WTO recognizes as LDCs those countries, which have been designated as such by the UN. This category of States is deemed highly disadvantaged in their development process, facing low income, weak human asset and economic vulnerability. Out of the current 50 LDCs on the UN list, 32 of them have to date become WTO members.⁵ Developing countries in the WTO are based on self-selection although this is not necessarily automatically accepted in all WTO bodies. Another category land-locked developing country (LLDC), exist under even harsher conditions with poor physical infrastructure, weak productive capacities, small domestic markets, and limited access to world markets. This group especially will get economical advantages through the success of trade facilitation.

1.4 Theoretical Approaches

This thesis examines the main discourse in the field of trade facilitation from the WTO Members' perspective, especially from the developing countries' standpoint, simply because they are the main beneficiaries of trade improvements and those who face difficult implementation and enforcement issues.

When studying International Trade Law, there are mainly two discourses regarding the multilateral trading system (MTS) and its *raison d'être* that are imperative to bear in mind. On one hand, there is the multilateral discourse that encourages cooperation between states under the WTO and on the other hand, there is the bilateral discourse that promotes various forms of bilateral agreements as an alternative.⁶ Regarding trade facilitation, the multilateralists usually argue that the WTO is the best-positioned organization to administer, implement and enforce trade facilitation. Since the nature of trade facilitation is to harmonize juridical and administrative procedures, the framework should be of an international magnitude and of binding nature. The bilateralists, on the other hand, argue that RTAs or PTAs are more appropriate to handle the specific needs of every country or region, and that the scope of the free trade agreement can be wider but also more efficient since governments usually express additional political will when they have a more active role.⁷

Bilateralists argue that RTAs collaborate instead of clash with the WTO and that RTAs are a sign of the MTS's shortcomings. It is true that RTAs are not contradictory to WTO law, however, their judicial status is becoming more complicated and has become subject for different academic discourses. This thesis is not going to examine the discourses any further while it settles to state that the new movement seem to be of a somewhat anarchical situation - a "bowl of spaghetti" to quote the famous economist Jagdish Bhagwati. Consequently, it is not the WTO, which determines and enforces the legitimacy of the RTAs, but it is the RTAs themselves, which determine the degree of their adherence to WTO law. It is not argued that the WTO is flawless, however, the fundamental question is whether multilateralism can effectively temper the negative effects of power politics better than bilateral agreements.

Another theoretical approach influencing the discourse of International Trade Law is the judicial force behind hard law and soft law and their interaction in international governance.

⁵ <http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1>. [23.10.08 at 3:14].

⁶ Kreuger, *The WTO as an International Organization*, pp. 334-343.

⁷ The multilateral discourse is often represented by LDCs, NGOs, and, scholars representing a more Keynesianism approach. See de Vylder et al, *The Least Developed Countries and World Trade*, Sida Studies no 5, Sweden, 2001, for a summarization of the discourse. The bilateral discourse is usually represented by neo-liberals, traditionally the U.S. and some Western European countries, but mainly by scholars of the neoclassical school of thought. See this recognized report for deeper comprehension of the discourse; Ikenson, *While Doha Sleeps – Securing Economic Growth through Trade Facilitation*, Center for Trade Policy No 37, the US, 2008.

Hard law generally refers to legal obligations of a formally binding nature and soft law to law that is not formally binding but may nonetheless exercise significant influence on the contracting parties' behaviour. Soft law norms can strengthen hard WTO law, by supplementing it or by filling gaps in the law. It can also make WTO law more accessible and easier to comprehend in offering solutions to seemingly intractable problems. However, soft law can be in opposition to hard law and degenerate its aims. Against this background, the question is if the most prominent soft law instruments in the field of trade facilitation can complement, oppose and/or even become an alternative to WTO law.⁸

1.5 Purpose

Although Sweden is a strong advocator for trade facilitation, few information sources summarize the progress of trade facilitation in the MTS through an interdisciplinary perspective.⁹ The aim of this thesis is thus to examine and analyze the institutional, judicial and political advantages and disadvantages of implementing trade facilitation under the WTO mainly for those with little or no prior knowledge of the subject. However, references are made throughout the thesis to reports, studies and publications for further revision on the subject.

The primary questions examined are of three dimensions:

I) The Institutional Dimension

Is the WTO the accurate organization to continue developing and implementing trade facilitation?

The WTO, as a multilateral trading institution itself, will be examined a long with other international organizations. In order to provide a deeper understanding of trade facilitation's position in the WTO, the negotiations regarding trade facilitation are being studied in relation to key topics that have been discussed at the Ministerial Conferences.

II) The Judicial Dimension

Is the legal framework of the WTO adequate for trade facilitation or are there alternatives that are more suitable?

Another aim, besides explaining the provisions regulating trade facilitation, is to describe some of the implementation proposal that have influenced the negotiations in the Doha Round. A closer examination is made of the judicial rights and duties, a long with the possible implications that might arise when implementing trade facilitation. The interaction between hard and soft law in the field of trade facilitation is scrutinized in addition to alternative approaches to the implementation issue, which are examined in relation to the multilateral system.

III) The Policy Dimension

What are the benefits and implications of implementing trade facilitation for the WTO Members, especially the LDCs?

⁸ Shaffer et al, *How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists*, Society of International Economic Law Inaugural Conference 2008 Paper.

⁹ However, the Swedish National Board of Trade has published several publications on the progress of trade facilitation in the EU and the WTO. For more information, see www.kommers.se.

Trade facilitation, although it can generate benefits, means essential adjustments in the judicial and administrative trade systems of the developing countries. Although, the grade of the implications varies for the individual developing countries depending on their financial and political situation, the question is whether the advantages exceed the disadvantages in practice.

1.6 Method and Material

In an attempt to keep the focus on trade facilitation in the Doha Round, international trade law has been the primary source in this thesis, disregarding the examination of regional regulations due to the space limitation. Thus, a traditional legal dogmatic approach has been used and the main sources have been legal text, official WTO documentations, WTO case law and legal doctrine.

Since the nature of this thesis is interdisciplinary, second-hand sources in the field of economy and policy have also been revised. References have been made to studies completed by the WTO and the World Bank simply because they have the most accurate and reliable data. This thesis relies on the thoroughness and correctness of the scholars and observers that have debated trade facilitation and the WTO in books and articles throughout the years. Additionally, information gained from interviews and seminars held at various think tanks during my internship at the Swedish Embassy in Washington D.C. as well as interviews carried out afterwards have served as sources in order to explicate the different dimension of trade facilitation.

Each chapter starts with a descriptive part of the issues concerned and finishes with the writer's conclusions. However, a clear distinction between descriptive and analytic parts is consciously not obtained when it could enhance reading comprehension. Standpoints of the WTO Members, Non Governmental Organizations (NGOs) and scholars representing the different discourses are continuously discussed and evaluated with the ambition to uphold objectivity when assessing the opposing sides.

1.7 Disposition

The questions directing this thesis are also the structure of the thesis, dividing it in institutional, judicial and policy analysis of trade facilitation in the Doha Round. The first Chapter starts with a historical background of the creation of the WTO. To understand the institutional structures of the WTO essentials fact about the Organization in terms of the relevant decision-making bodies and mechanisms of enforcement are briefly studied. The rest of the Chapter concentrates on decomposing the outcomes of the Ministerial Conferences in relation to the progress trade facilitation have made under the negotiations. This is carried out as an attempt to scrutinize the possible success of trade facilitation in future negotiations.

The second Chapter examines the legal texts and case law of Articles V, VIII and X of the GATT, which regulates trade facilitation. The accurate proposals regarding modalities, submitted by the WTO Members, are also studied. General issues on the subject of technical assistance, SDT and DSM are being scrutinized in order to understand the extension of rights and duties connected to trade facilitation for developing countries and LDCs.

The third Chapter focuses on the economical and political benefits that trade facilitation can produce such as economical growth, promotion of democratic institutions, and international collaboration between organizations and governments. In addition, implications like administrative corruption, security in the supply chain and environmental concerns are being examined. This thesis finishes with final remarks of the writer.

Due to the complex nature of the modalities under negotiation, the submitted proposals and the Members States behind the initiatives are summarized in the appendix, in order to give the reader a fundamental knowledge of the areas central for trade facilitation.

1.8 Delimitations

First, the aim of this thesis is to study the harmonization of custom formalities in the relevant GATT Articles; put differently, how trade facilitation can “cut through the red tape”.¹⁰ Although, trade facilitation harmonize the administrative and logistical procedures of international trade it should not be mistaken for the Technical Barriers to Trade Agreement (TBT). The TBT, which standardize product requirements by e.g. certification, inspection and labelling in order to ensure that regulations and standard procedures do not create unnecessary obstacles to trade, is thus outside the scope of this thesis.

This thesis recognizes the existence of other decisive issues than trade facilitation, e.g. agriculture or NAMA that will determine the outcome of the Doha Round, but it put emphasis on trade facilitation as the catalyst it can be for international trade and development.

Due to the limited scope of this thesis, no case studies have been examined to calculate the potential gains that LDCs have made by implementing various trade facilitation measures. Only when it is deemed necessary specific cases are brought to the reader’s attention.

Regional and national initiatives are important; however, since they are not of international character their contribution is limited. Regional incentives, e.g. SOLVIT, and existing WTO agreements - such as Agreement on Customs Valuation, Agreement on Import Licensing Procedures and Agreement on TBTs - which are in some parts relevant for trade facilitation, are excluded from the scope of this thesis.¹¹

¹⁰ This is a concept frequently exploited when trade facilitation is under discussion since the red tape commonly was used to tie official papers. The red tape was, and perhaps still is, an expression of the inflexible application of regulations and routines, causing delays and obstacles in getting business done.

¹¹ See National Board of Trade’s publication *Trade facilitation and Swedish experiences*, 2008, p 19, for further reading.

2. THE INSTITUTIONAL FRAMEWORK OF TRADE FACILITATION

Several international organizations have implemented trade facilitation under various forms since the 1960s. The WTO is the largest organization of them all, representing the majority of the economies of the world, and thus argued to be the best integral institution to organize the necessary work for trade facilitation. However, since some economists and scholars have argued that international efforts should be made away from the MTS, it is of interest to examine whether there is an equivalent international organizational that can implement trade facilitation in the same extent as the WTO. Moreover, in order to understand the position of trade facilitation in the international trade system a historical background and assessment of the WTO as an institution is necessary.

2.1 Trade Facilitation and International Organizations

Although, trade facilitation negotiations within WTO's framework are the largest of its kind, there are two other major multilateral international agreements currently existing regarding trade facilitation. These are two established conventions; the United Nations Economic Commission for Europe's (UNECE) Convention on the International Transport of Goods Under Cover of TIR Carnets¹² and the World Custom Organization's (WCO) Revised Kyoto Convention. Both Conventions have influenced the existing proposals made by the WTO Members on trade facilitation modalities.¹³ Although the Conventions have influenced the negotiation work in the WTO they have shortcomings and limitations. Other organizations that play an increasingly important role in trade facilitation are the International Chamber of Commerce (ICC). ICC that works closely with the WCO, WTO and other international organizations has published both recommendations and guidelines. Another active organization is International Maritime Organization (IMO), which mainly address trade facilitation and safety in the maritime field. However, only the first two are discussed here as regards to their extensive acceptance as trade facilitation promoters.

2.1.1 Trade Facilitation and the United Nations

Many of UN's bodies are involved directly or indirectly in trade facilitation. Two of the most established being United Nations Conference on Trade and Development (UNCTAD) and UNECE. UNCTAD was established in 1964 as a permanent intergovernmental body with the goal to maximize the trade, investment and development opportunities of developing countries by providing technical assistance a long with research and policy analysis. UNCTAD has of today, 193 members. In April 2003, UNCTAD and WTO signed a

¹² Carnets are international customs documents that simplify customs procedures for the temporary importation of various types of goods.

¹³ WCO and UNCTAD, but not UNECE, have direct mandate under the WTO July package 2004, para 8, to collaborate with the WTO on the technical assistance and capacity building issues. Together with IMF and OECD they constitute the well-known Annex D organizations.

Memorandum of Understanding providing for cooperation and consultations on their technical assistance activities.¹⁴

Although, UNECE is a regional commission - the four other regional commissions also working with trade facilitation - the UNECE's TIR Convention is the oldest and most successful of existing multilateral trade facilitation agreements. The TIR Convention provides the legal basis for expediting the international movement of goods by road transport in Europe, the Middle East, North Africa and Central Asia. The current TIR Convention came into force in 1978 and has 68 contracting parties as of today.¹⁵

The TIR Convention was devised to minimize delays and expenses when goods transit the territory of other nations by road by providing transit countries with required guarantees to cover the custom duties and taxes at risk. The TIR Conventions key elements to solve the duplicated measures are the application of risk management, simplified procedures for qualified traders and the availability of customs guarantees, which have proved successful in the facilitation of road transport.¹⁶ Although the TIR Convention has been expanding, it is of limited scope since it solitary regulates road transport procedures. Furthermore, it is currently not used in LLCs, nor or does it have an efficient dispute settlement system, which makes the Convention unproductive if there is a case of non-compliance.¹⁷

2.1.2 Trade Facilitation and the World Customs Organization

The WCO, developed the International Convention on the Simplification and Harmonization of Customs Procedures, known as the Kyoto Convention, which entered into force in 1974. However, radical revisions to the Convention were required to reflect modern customs administration practices, why revisions to the Convention were adopted in 1999. The WCO has today has 175 Members and as of September 2007, 54 countries have acceded to the Convention with members including both developed countries and NICs. Nevertheless, the same issues exist like the TIR convention; most developing and LCDs have not acceded the soft law instrument.¹⁸ This having been said, the WTO has acknowledged many of the basic principles in its frame work for trade facilitation.

The Revised Kyoto Convention sets forth some "general principles". First, the provisions must apply to customs procedures and practices. Customs formalities must be specified in national legislation and be as uncomplicated as possible. Moreover, customs must maintain formal consultative relationships to increase cooperation and facilitate the most effective methods of work ethics. Other important provisions are that customs control systems must include audit-based controls and that customs must ensure that all relevant information is readily available to any interested person.¹⁹

¹⁴ <http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>. Consult webpage for more information: <http://www.unctad.org/Templates/Page.asp?intItemID=3357&lang=1>. [27.9.08 at 10:11].

¹⁵ Creskoff, *The WTO Trade Facilitation Negotiations: It's Time to Agree on Basic Principles*. p149 and <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSO&tabid=1&id=256&chapter=11&lang=en>. [23.9.08 at 8:54].

¹⁶ See for example, Article 6, Article 19 and Article 39 of the TIR Convention.

¹⁷ Creskoff, *The WTO Trade Facilitation Negotiations: It's Time to Agree on Basic Principles*. p152.

¹⁸ *Ibid*, pp 152-153.

¹⁹ *Ibid*, pp 153-154.

Although, the Convention has been effective and given concrete result as a tool for trade facilitation it is narrow for mainly three reasons. First, the Kyoto Convention was primarily the work of developed countries' customs administrations. Approximately two-thirds of the 54 countries that have acceded to the Kyoto Convention are, as mentioned developed countries or emerging countries. Therefore, there has been an inadequate political support for accession to the Kyoto Convention in most LDCs. Second, in contrast to the WTO no binding dispute resolution mechanism exists in the Kyoto Convention. Third, the extensive TA/CB necessary for many developing countries to implement cannot be provided by the WCO. After all, WCO is a diminutive international organization of customs specialists with an incredibly limited budget and staff.²⁰

2.2 World Trade Organization

The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), was established after World War II in the wake of other new multilateral institutions known as the Bretton Woods institutions; the World Bank and the International Monetary Fund. The international institution for trade, the International Trade Organization (ITO), was successfully completed 1948. The same year the negotiations on the Havana Charter - that was to guide the basic rules for international trade and other international economic matters - started. The Havana Charter, however, never *de facto* became operational. The countries feared that the organization would devolve into a large bureaucracy that would in the end have institutionalized and sanctioned state regulation of international commerce. As governments negotiated the ITO, 15 negotiating states began parallel negotiations for General Agreement on Tariffs and Trade (GATT). When the ITO failed in 1950, GATT became the focus for international governmental cooperation on trade matters.²¹

GATT entered into force 1 January 1948, when the 23 participating countries signed the agreement. From 1948 to 1994, a strong MTS was developed through "rounds" of trade negotiations. In the early years, the GATT rounds concentrated on further reducing tariffs whereas tariff reductions was considered to be the most powerful trade barrier. Then, the Kennedy Round in the mid-sixties other issues such as anti-dumping and development issues became more important. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs but its achievements were limited.²²

Due to its institutional structure where as GATT was a part of a charter with no solid regulations concerning organization, GATT needed to be reformed. That effort resulted in the Uruguay Round and the creation of WTO. The WTO entered into force on the 1 January 1995 and replaced GATT as the international multilateral trade organization. Up to this date, the organization has 153 Members and 30 observer governments. The GATT still exists as the WTO's umbrella treaty for trade in goods, as the revised GATT 1994, distinct from the original agreement 1947. The WTO Agreement, serves as an umbrella agreement while annexed are the agreements on goods, services and intellectual property, dispute settlement, trade policy review mechanism and the plurilateral agreements.²³ One of the major organizational improvements is the fact that the WTO framework ensures a "single

²⁰ Creskoff, *The WTO Trade Facilitation Negotiations: It's Time to Agree on Basic Principles*. p153.

²¹ Irwin, *The GATT in Historical Perspective*, pp 323-326.

²² Das, *Debacle at Seattle – The Way the Cookie Crumbled*, pp188-191.

²³ http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement. [23.9.08 at 8:54].

undertaking approach” - thus, membership in the WTO entails accepting all the results of the rounds without exception.²⁴

2.2.1 Principles of the World Trade Organization

The GATT was created on a limited number of principles and objectives, which are essential to the application of the different trade areas under the DDA. In essence, these are most-favoured-nation treatment (MFN), national treatment and reciprocity. Article I of the GATT, states that the MFN-treatment means that every time a Contracting Party lowers a trade barrier or opens up a market, the Contracting Party has to do so for the same goods or services from all its trading partners. However, the MFN principle is subject to some important exceptions. The most important exception, Article XXIV of the GATT, permits the formation of Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs). It is under the provision that the custom unions EU and North American Free Trade Agreement (NAFTA) find their legitimacy.²⁵ PTAs are usually among few states while RTAs cover entire regions.

The principle of National Treatment set out in Article III of the GATT, addresses another form of discrimination, namely where a Contracting Party adopts internal or domestic regulation or requirement designed to favor its domestic products *vis á vis* foreign producers of a given product. The rule is very wide in scope as it applies to all kinds of taxes and other internal charges. However, the importance of the provision is limited for trade facilitation since custom duties and other border measures are outside the scope of the provision.²⁶

The most central provision for the Doha Round is the principle of reciprocity. Although reciprocity as a legal concept has not been defined by the Contracting Parties, it is a fundamental principle occupying a central position in the General Agreement.²⁷ However, under Article XXVI:8 of the GATT there is an amendment in favor of developing countries regarding the principle of reciprocity of concessions. It is stated, “the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.”²⁸

The Special and Differential Treatment (SDT) that has come to influence especially the trade facilitation negotiations in the Doha Round, is in some part based on the theory of reciprocity.²⁹ The “enabling clause” was adopted under GATT in 1979 in order to permit trading preferences targeted at developing and least developed countries, which would otherwise violate Article I of the GATT. It allows developing countries to enter into agreements which may be non-reciprocal, or cover a very limited range of products, which otherwise would have contravene the GATT. SDT takes the form of special provisions in agreements giving developing countries special rights such as longer time periods of implementation and lower tariff cuts in some products.³⁰

²⁴ http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Agreement. [23.9.08 at 9:21].

²⁵ Kreuger, *The WTO as an International Organization*, pp. 246-47. See section 3.7.2 for more information.

²⁶ Long, *Law and its Limitations in the GATT Multilateral Trade System*, p 9.

²⁷ Article XXVIII bis in the context of tariff negotiations and Article XXVIII on modification of schedules.

²⁸ Long, *Law and its Limitations in the GATT Multilateral Trade System*, p 13.

²⁹ Article XVIII, to be read in conjunction with the Decision on Safeguard action for Development Purposes.

³⁰ http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm. [29.9.08 at 9:43].

2.2.2 The Formal Structure of the World Trade Organization

The WTO is a diverse organization with no permanent authority, e.g. the Security Council in the UN system. On the contrary, the Ministerial Conference, which is the highest authority in the WTO, is participated by all the WTO Members.³¹ Through its Ministerial Declarations, the content of the Ministerial Conferences that all Members States have to accept is stated. The next important level is the General Council, which is responsible for the work in between the Ministerial Conferences. The General Council consists according to the WTO Agreement of three bodies and they consist of all WTO Members: the General Council, the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB). They report to the Ministerial Conference and the General Council acts on behalf of the Ministerial Conference on all WTO affairs. The third level consist of three more councils, represented by all WTO Members, each handling a different broad area of trade.³² As regards trade facilitation, the Council for Trade in Goods (Goods Council) is responsible for the trade area and reports to the General Council. On this level, the WTO offers its Members transparency and democratic representation within the institutional framework.

The rounds, that position the trade agenda for numerous years, offer as many advantages as disadvantages. Due to the political and economical issues that are in stake for the WTO Members the rounds ends up in delays in negotiation and deadlocks. However, the time consuming and expensive trade rounds can have an advantage when it comes to creating incentives for the WTO. They offer a package approach that can sometimes be more fruitful than negotiations on a single issue while the participants can seek and secure advantages across a wide range of issues and through trade-offs.³³

Settling disputes is the responsibility of the DSB, which consists of all WTO members. The DSB has the sole authority to consider a possible breach under the WTO Agreement, to accept or reject the panels' findings or the results of an appeal to the Appellate Body (AB), and it has the power to authorize retaliation when a country does not comply with a ruling.³⁴ In the WTO system there is another control system, Trade Policy Review (TPR), which role is to increase transparency regarding the WTO Members trade policies or laws through information collection, reassess and reports.³⁵

2.2.3 The Informal Structure of the World Trade Organization

There is, however, an informal decision culture within the WTO. One phenomenon where the disapproval is widespread is the "Green Room" meetings.³⁶ The Green Rooms meetings are

³¹ According to the Marrakesh Agreement the Ministerial Conference is required to meet at least once every two years.

³² The Council for Trade in Goods (Goods Council) is responsible for Trade Facilitation. The other two councils are the Council for Trade in Services (Services Council) and the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council).

³³ WTO, *Understanding the WTO*, p 17.

³⁴ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm. [16.9.08 at 9:33].

³⁵ All WTO Members are to come under scrutiny, but the frequency of the reviews depends on the country's size. The Quad are examined approximately once every two years and most other WTO Members are reviewed every six years, with the possibility of a longer interim period for the LDCs. WTO, *Understanding the WTO*, 2007, p 53.

³⁶ The Green Room meetings are used to refer to meetings of 20–40 delegations, usually at the level of heads of delegations. These meetings usually takes place under the Ministerial Conferences and can be called by the minister chairing the conference as well as the director-general.

the forums for the major trade powers to agree among themselves so that they together can apply pressure on the other WTO Members to accept their proposals. Green Rooms meetings have been criticized for not being transparent enough while there has been lack of information to the other WTO Members that have not been participating and that they have few opportunities to provide with alternative opinions and information.³⁷ Those favoring the system argue that through the formed coalitions WTO Members are being represented, whilst getting information by those representatives that are attending the meetings. Moreover, in the end, the decisions have to be taken by all WTO Members and it is almost impossible to achieve consensus on hard-solved issues among all 153 Members.³⁸ After years of criticism, the WTO has made more efforts for securing transparency and disclosure although it has a long way to become more democratic.

In the same rate as the WTO expands, the alliances in the WTO increases, reflecting the broader spectrum of bargaining power in the WTO. The most powerful group has traditionally been the “Quad” represented by the U.S., the EU, Canada and Japan. The remaining WTO Members have organized themselves in various groups. The launch of the Doha Round has changed the traditional positions, giving the developing countries a voice. The last years the negotiations have revolved around the Quad, Australia, India and Brazil, also called the “Quint”.³⁹ Another group that has seen as an political symbol for developing countries is G-33, which includes Uruguay, Malaysia, Philippines and Indonesia to name a few.

Finally, in reflecting upon the institutional role of the WTO, it is necessary to address some of the deep scepticism that accompanies the organization. The developing countries have since the beginning of GATT/WTO criticized the system for being a key part of the globalization process and that it together with IMF and World Bank through political and economical pressure, institutionalized corporate access to the markets and recourses of the developing world.⁴⁰ The political structure of the WTO offer the developed countries more negotiation power to set the agenda as well as the negotiation conditions during the rounds, giving the developing countries limited prospects of influencing the multilateral system. Thus, the democratic deficit can continue distressing the legitimacy of the WTO and the MTS as whole. One way of making the WTO more inclusive and transparent are through equitable negotiation processes and increasing NGO accessibility so all WTO Members can be given adequate and fair access to the institutions for exchange of information and consultation.⁴¹

2.3 The Rounds and Ministerial Conferences

2.3.1 The Uruguay Round and the following Ministerial Meetings

The Uruguay Round, 1986 -1994, covered almost all form of trade such as trade in service, intellectual property, agriculture and textiles. By the end as 123 countries were taking part in the Round, at times it seemed doomed to fail. Despite several collapsed negotiations, a deal was signed by ministers from most of the participating governments at a meeting in

³⁷ Dilip K. Das, Debauch at Seattle - *The Way the Cookie Crumbled*, pp 189-191.

³⁸ Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, pp 363-364.

³⁹ For more information concerning the groups and alliances see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm. [3.10.08 at 5:13].

⁴⁰ Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit*, pp 347-348.

⁴¹ Singh, *The World Trade Organization and Legitimacy: Evolving a Framework for Bridging the Democratic Deficit* p 364.

Marrakesh, Morocco, thus called “the Marrakesh agreement”.⁴² Although, the Uruguay Round faced several delays due to the political environment the postponement had some merits. It allowed some negotiations to progress further than would have been possible in 1990, not to mention the creation of the WTO itself.

The first WTO Ministerial Conference in Singapore 1996,⁴³ established permanent working groups on four issues referred as “Singapore issues”; transparency in government procurement, trade facilitation, trade and investment, and trade and competition. The issues were initiatives from the U.S., EU, Japan and Korea, and opposed by most developing countries. The developing countries meant that the issues were about removing domestic legislation in the developing world that favored local companies over foreign companies. The industrialized countries, on the other hand, argued that the issues should be covered by the WTO system because of the principle of national treatment and the MFN-principle.⁴⁴ Nevertheless, it was first when the Singapore Issues was adopted that trade facilitation became a topic to be further discussed on the multilateral trade agenda.⁴⁵

At the Second Ministerial Conference in Geneva 1998,⁴⁶ no agreement was reached on whether the next round of multilateral trade talks would cover mainly the Singapore issues or a wider range of issues. The EU called for incorporation of new issues beyond the agenda but several developing countries stressed that they would not accept negotiations on new issues unless their concerns about implementation of the existing agreements was taken into account. The “implementation issues” included: correcting imbalances in individual agreements that have institutionalized existing trade imbalances, ensuring that developed countries implement their commitments to developing countries in good faith and adaption of provisions regarding SDT for developing countries.⁴⁷

The Ministerial Conference in Seattle 1999,⁴⁸ became an internationally noticed conference because of the massive demonstrations and the collapsed negotiations. The background factors were that many developing countries felt that the Uruguay Round became too extensive with diminutive accomplishments, given the amount of time, energy and resources deployed. Many developing economies also wanted some relief from the obligations of the Uruguay Round, which they found difficult to meet with their ill-equipped financial institutes. The negotiations collapsed as a majority of developing countries did not participate in the Green Room process and found themselves marginalized. The final issue that created bad blood was agriculture since it remained, and still does, subject to profound and costly misrepresentation that the developing countries face.⁴⁹

2.3.2 The Launch of the Doha Round

The fourth Ministerial Conference in Doha 2001,⁵⁰ became the starting point of the ninth round. At this conference, ministers from all WTO members launched the DDA, mandating

⁴² Jawara et al, *Behind the Scenes at the WTO*, pp 35-42.

⁴³ The Ministerial Conference was held in Singapore, December 9-13.

⁴⁴ Jawara et al, *Behind the Scenes at the WTO*, p 39.

⁴⁵ Paragraf 22, Ministerial Declaration WT/MIN(96)/DEC, 18 December 1996.

⁴⁶ The Ministerial Conference was held between 18 and 20 May in Geneva, Switzerland.

⁴⁷ Jawara et al, *Behind the Scenes at the WTO*, pp 44-45.

⁴⁸ The Ministerial Conference was held during November 30 to December 3, Seattle, the U.S..

⁴⁹ Das, *Debate at Seattle - The Way the Cookie Crumbled*, pp 185-188.

⁵⁰ The Ministerial Conference was held in Doha, Qatar from November 9-13.

further trade liberalization and new rule-making. The Ministerial Declaration launching the DDA lists 21 subjects, e.g. agriculture, Non-Agricultural Market Access (NAMA), services, the Singapore issues, WTO rules (anti-dumping, subsidies, regional trade agreements) and trade and environment. The DDA's objective to lower trade barriers around the world, to improve the revenues and trade advantages for the developing countries, establishes the principle of SDT as central issue and an integral part of all elements of the negotiations.⁵¹ The aim was to conclude the Round with an Agreement by 2005, but was later prolonged to 2006.

The issue that caused discussions between the WTO Members was the failure to reach consensus on modalities - such as formulas, regulation schemes, targets, timetables - for some of the issues involved in the Doha Round. Because the meeting took place just two months after the 9/11 attacks, the U.S. and EU, called for greater political collaboration in the international trade society by linking terrorism and trade together. Security in the international supply chain was especially emphasized.⁵² Another important factor, which would later come to some extent modify the political balance in the WTO, was that the economic important China became a member after 15 years of negotiations.⁵³

The fifth Ministerial Conference in Cancun 2003,⁵⁴ ended without an agreement after Green Room meetings since consensus could not be reached on the Singapore issues. The lack of consensus on the Singapore issues' investment and competition was the immediate cause for the deadlock, while the countries could agree on trade facilitation modalities. There was also an absence of greater commitments by the developed countries to reduce agricultural subsidies and lower import barriers on agricultural products.⁵⁵

After the Ministerial Conference ended in deadlock in Cancun, the WTO Members representatives in Geneva began efforts to put the negotiations and the rest of the work program back on track. Thus, a package of framework agreements was reached in the first half of 2004.⁵⁶ The "July Package" of 2004 consists of clarification and strengthening of the initial work program which provides broad guidelines for completing the Doha round negotiations. The agreement contains guidelines for agriculture, NAMA, and services. For the first time, trade facilitation was recognized as an independent topic no longer linked to the Singapore Issues.

At the Ministerial Conference in Hong Kong 2005,⁵⁷ the Ministerial Declaration highlighted the importance to attach the development dimension in every aspect of the DDA. A package of measures for the LDCs on trade-related intellectual property rights, and on capacity building was adopted. Aid for Trade was also the subject of consensus as to build the supply-side capacity and trade-related infrastructure that LDC countries need to implement and benefit from the agreements. Although a quantity of progress was made, the WTO Members were unable to make much progress beyond agreeing to eliminate export subsidies in the agricultural trade negotiations.⁵⁸

⁵¹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm. [16.9.08 at 08:21].

Read more under section 3.5.1.

⁵² Jawara et al, *Behind the Scenes at the WTO*, pp 62-66 and 122-123.

⁵³ *Ibid*, p 93.

⁵⁴ The Ministerial Conference took place on Cancun, Mexico, on September 10-14.

⁵⁵ Evenett, *Systemic Research Questions Raised by the Failure of the WTO Ministerial Meeting in Cancun*, pp 1-3.

⁵⁶ http://www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm. [17.09.08 at 3:04].

⁵⁷ The Ministerial Conference took place during December 13 -18 in Hong Kong.

⁵⁸ Evenett, *The World Trade Organization Ministerial Conference in Hong Kong: What Next?*, pp 223-224.

2.3.3 The Stagnation of the Doha Round

Several informal Ministerial meetings with the main goal to find consensus on the key issues, mainly agriculture and market access, marked the years after the Ministerial Conference in Hong Kong. On July 21, 2008, a Mini-ministerial meeting was held at the WTO's headquarter in Geneva. Around the world politicians, economists, NGOs and State representatives said there was a 50-50 % chance for success or total failure. Under nine days, 18 out of 20 issues were settled by some thirty key states in Green Room meetings. Director General of the WTO, Pascal Lamy, made an informal compromise agreement, which was approved by many WTO Members but firmly criticized by the US. Although there were significant efforts made on all sides throughout the negotiations the stagnation of the Doha Round was expected. Officially, the Doha Round stagnated over the refusal over primarily agricultural issues, more specifically the Special Safeguard Mechanism (SSM).⁵⁹ Other issues that had some saying in the collapse of the negotiations were NAMA, cotton and agricultural subsidiaries.⁶⁰ Trade facilitation was not discussed under the Green Room meetings since trade facilitation negotiations have been progressing without any major disagreements that could risk impeding future negotiations.⁶¹

The distinguishing phenomenon at the ministerial meeting in July from the previous negotiations was the structural change in negotiating tactics among the WTO Members. LDCs and developing countries had gone from having delimited positions based on their historical background of being "South" countries to focus on economic issues that were of interest to their own country. For example, countries like Uruguay, Paraguay and Sri Lanka, did not automatically sympathized with India and China as they had done previously. Instead, they gave their support to the U.S. in certain positions.⁶² However, the importance of the changed positions is limited since there is still a strong division between the developed and developing countries.⁶³ In other words, although the bargaining positions are starting to be modified as India and Brazil gain more power along with G-33, the majority of the developed states are still being marginalized in the international trading system.

Even though, progress was made Pascal Lamy could in the end not bridge differences between emerging economies lead by India, Brazil and the fairly newcomer China, on one side and the U.S. and EU, on the other. The U.S. blamed India and Brazil for the collapse of the negotiations. The EU had a more nuanced standpoint and saw shortcoming from both U.S. and India. However, from the developing world perspective the Quad has been subjects for criticism. The developing countries complaints was that extensive U.S. subsidies squeeze their farmers out of the domestic and international market, reducing food supplies and contributing to the recent spike in global prices.⁶⁴

⁵⁹ SSM means if there is an import surge, countries have the right to increase protective tariffs. This is especially important for LDCs so they can keep the right to maintain protective tariffs on certain agricultural products that are essential for food security, rural development, and farmers' livelihoods.

⁶⁰ Speech by USTR General Counsel Warren H. Maruyama, "The Collapse of the WTO Doha Round Trade Talks: Implications and Future Options", American Enterprise Institute, August 6, 2008, Washington D.C., the U.S.. To be more specific the issues concerned were special products, sensitive products, cotton, market access and domestic support.

⁶¹ Sofia Persson, expert on trade facilitation, National Board of Trade, telephone interview December 2, 2008.

⁶² Matthew Rohde, Assistant US Trade representative, Office of the United States Trade Representatives, personal interview in August 7, 2008, Washington D.C., the U.S..

⁶³ Speech by USTR General Counsel Warren H. Maruyama, August 6, 2008, Washington D.C., the U.S..

⁶⁴ Ibid.

2.4 Future Outlook

As efforts to step up the positions for safeguarding the conclusion of the Doha Round, Lamy made political approaches to the U.S. and India, during the third week of August 2008. After several talks with respective state representatives, new exceptions rouse that the negotiations could be resumed during the end of 2008. There were signs from the WTO Members indicating that another mini-Ministerial Meeting should be hold around the middle of December to reach a breakthrough on the key issues, e.g. agriculture and NAMA. However, there has also been a widespread skepticism, especially from the U.S., that it would be to early to hold a new meeting before the installation of the new American administration.

The new approach seems to be to suspend the negotiations until the new American administration is in place⁶⁵, with fresh perspectives from the new administrations in India and the European Commission in order to find a bridge over the yawning negotiating gaps that defeat compromise today. Although, the financial crises have also been pointed out to hold back negotiations for the near future, there is a widespread political support for a multilateral agreement with a new urgency and importance to conclude the Doha Round. In times of difficulties, the WTO Members realize that international cooperation is beneficial - the same phenomenon happened after the 9/11 attacks when the launching of the Doha Round was hastened - which can work as an incentive to conclude the round.⁶⁶ It has become clear that international business needs secure and improved market access to emerging countries and developing countries. Although, the Doha Round seem not to be the first priority at the time being there is a will to restore the negotiations when the economy is more stabile. There seem to be an understanding among the WTO Members that although the financial crisis might dictate the economical politics for now, better times are to come and the economical costs for e.g. trade facilitation will be an investment for the future.⁶⁷

The timetable the observers have foreseen of a draft agreement in the end of 2010 and a final agreement in 2011 will be difficult, but not impossible, to hold. The WTO Members would like to see some kind of agreement after years of negotiations, however, the topics covered and the degree of ambitious outcome might fluctuate. If same difficulties are imminent then there is a risk that a “package solution” is made where some crucial issues, such as agriculture and NAMA, are omitted while issues that are considered less complex, e.g. WTO rules and Aid for Trade, will be included.⁶⁸

2.5 Conclusions

Concerning the introduction of trade facilitation in the WTO, it was an issue driven by the developed countries under the Singapore Issues, especially by the U.S. and the European countries. The developing countries and especially the LDCs showed modest interest on the subject with the arguments that they did not have the economical or technological means to

⁶⁵ The importance of the American administration is because not only is the U.S. the most powerful economy, but Barack Obama’s skepticism to free trade can affect the progress of the Doha Round if protectionism is going to influence the future American trade policy.

⁶⁶ Telephone interview with Nora Neufeld, Legal Affairs Officer, WTO Trade and Finance and Trade Facilitation Division, December 2, 2008. The importance of the American administration is not only is the U.S. the most powerful economy, but Barack Obama’s skepticism to free trade can affect the progress of the Doha Round if protectionism will become, or rather continue, to influence the future American trade policy.

⁶⁷ Telephone interview with Tobias Lorentzson, Second Secretary, Permanent Mission of Sweden in Geneva, December 3, 2008.

⁶⁸ Telephone interview with Christina Rahlén, director, Ministry for Foreign Affairs Sweden, December 5, 2008.

facilitate the improvements required under GATT. Some of their reluctance depended on the other Singapore Issues, and since it was more or less a “package offer”, trade facilitation became less important. However, the more pressure that was put on the developing countries to focus on trade facilitation, the more important became the “implementing issues” which the outcome of the Ministerial Conference in Geneva 1998 demonstrated. The developing countries stated that although they were willing to discuss trade facilitation they needed guarantees of assistance in form of SDT and technical assistance.

In fact, although there was an initial reluctance, judging by the Ministerial Conferences to come, the WTO Members agreed on the benefits of trade facilitation, while the implementation issues was still to be discussed. After the collapse of the Cancun Ministerial Conference in 2003, it became apparent that trade facilitation needed to become an independent issue on the DDA. In 2004, under the July Package, trade facilitation was finally launched as an autonomous trade topic.

When the history of trade facilitation is studied, it becomes evident that the collapses and shortcomings of the Ministerial Conferences revolved around other issues, which illustrates the fact that trade facilitation - as an independent issue - is not one of the subjects that hampers the negotiations. On the contrary, the benefits of trade facilitation seem to be one of the questions that the WTO Members can agree on although there are implementation issues that need to be solved. Moreover, it is true that at length, there is no guarantee that the Doha Round will be finalized in 2011 as foreseen but there are several factors pointing to new and successful negotiations; seven years of negotiations and implemented working programs will otherwise be of waste. Moreover, the multilateral conviction construct a mandate where many WTO Members are not prepared to give up the WTO up although they from time to time strongly criticize the MTS.⁶⁹

The WTO is the second largest intergovernmental organization after the UN and its position as an important trade developer in today’s globalized world is difficult to question, although it has obvious deficiencies. The trade organization is an institution based on rules and offers transparency to its members. The organization cannot claim to make all countries equal but it does reduce some inequities between the States and offers special treatment to the developing countries. Moreover, the WTO administers trade agreements, offers DSM for handling disputes, monitors national trade policies by its TPR and cooperate with other organizations. However, there is an evident limitation to the democratic legitimacy role of the WTO, naming the Green Room meetings as an example. The WTO does not exist beyond the commitment of its members and unfortunately, there is an obvious imbalance in the negotiation powers between the developing countries and the developed countries. The developing countries comprise 2/3 of the WTO but still the developed countries, or rather the Quad, sets the trade agenda. However, in all fairness, the WTO has been better received than IMF or the World Bank among the developing countries and there is still a belief that the organization, with some future improvements, can promote economic growth more than any of its counterparts.⁷⁰

Other issues that the WTO face as an organization is the difficulty of gathering 153 countries, and more countries to come, under consensus without involving the need of alliances and Green Room meetings. In addition, the size of a trade round can be questioned; perhaps it would be simpler to concentrate negotiations on fewer sectors? Although it is a legitimate question, have in mind, that at some stages, the Uruguay Round was so burdensome that it

⁶⁹ Sofia Persson, expert on trade facilitation, National Board of Trade, telephone interview December 2, 2008.

⁷⁰ Kreuger, *The WTO as an International Organization*, pp 59-79.

seemed impossible to find consensus on the subjects between all participants but then again, the round did end successfully. In other words, the outcome of the Doha Round can be successful although the talks have stranded at the moment.

The examination of the soft law instruments in the field of trade facilitation demonstrates that, contrary to what some have argued, there is no better institutional substitute than the WTO present today. Neither the Revised Kyoto Convention nor the TIR Convention can guarantee the same institutional benefits, such as SDT, or technical assistance like the WTO due to its voluntary nature.⁷¹ However, since the Conventions have influenced trade facilitation in the WTO and since the Conventions provisions are not contrary to the GATT, it can safely be said that the soft law instruments can continue complementing but not replacing WTO law.

Although, it is not the main purpose of the thesis to examine the institutional changes that need to be done in the WTO, it is important to point out some issues that can affect the outcome of the Doha Round. WTO must be subject for reformation and amendments to become a more democratic organization; otherwise, it can backfire on future negotiations. More transparency and equal involvement is required if the WTO is to keep its legitimacy. Actual decision-making should not be confined to major powers acting in the Green Room meetings, without giving the developing countries an opportunity for genuine participation. If those WTO Members that feel excluded from the process are given a fair opportunity to shape the trade agenda, the legitimacy of the WTO can be secured. There have been discussions concerning future institutional changes in the General Council, which could have a positive outcome when implemented.

⁷¹ Sofia Persson, expert on trade facilitation, National Board of Trade, telephone interview December 1, 2008.

3. THE LEGAL FRAMEWORK IN THE MULTILATERAL TRADE SYSTEM

As illustrated, trade facilitation has developed from being a down-prioritized component of the Singapore Issues to becoming an independent trade topic on the DDA. The negotiations have mostly been characterized by the modalities around trade facilitation, based on the proposals that have been submitted by the WTO Members. In course of the negotiations, the scope of the SDT and technical assistance, have been intensively discussed and the advancement of these discussion are essential to analyze. The DSM's role for serving trade facilitation has also been widely discussed. For enhancing reader comprehension, an examination of the legal provisions regulating trade facilitation together with the proposals submitted is to be examined. Lastly, the alternative approaches to a multilateral agreement are scrutinized.

3.1 Trade Facilitation's Negotiation History

Several fundamental trade facilitation principles in Articles V, VIII and X were contained in the GATT from its foundation in 1948. For almost 50 years, the further development of trade facilitation principles within the multilateral system was undeveloped while other customs related provisions of GATT 1948 were in focus. Then, shortly after the WTO came into existence, proposals were made for trade facilitation commitments at the WTO Ministerial Conference in Singapore in 1996:

The technical cooperation programme the Secretariat will be available to developing and, in particular, least-developed country Members to facilitate their participation in this work.⁷²

Trade facilitation as one of four Singapore Issues, was specifically assigned to the Council for Trade in Goods. Thus, trade facilitation was the only one of those issues that did not have an independent working group for discussions and negotiations. However, a great deal of preparations and investigations came to follow the coming years. Between 1997 and 1999, the Council for Trade in Goods gathered information on various aspects of trade facilitation from several regional and multinational organizations such as WCO and UNECE. Information was also gathered from private enterprises and industry groups that reported the experiences they had in their work on trade facilitation.⁷³ During this time, several WTO members presented papers on their experiences with various aspects of trade facilitation. The main concerns concluded was excessive documentation requirements, lack of transparency, inadequate procedures and a lack of modernization of customs and other government agencies.⁷⁴

During the preparations for the 1999 WTO Ministerial Conference in Seattle, several WTO Members from the developed world – lead by the EU, Japan and US - made official submissions to WTO. They advocated the launch of negotiations on trade facilitation as part of the new WTO Round, despite the insistence by some members that more research was needed. However, the meeting was unable to agree on the new agenda for the Doha Round and the negotiations were not started. There was, nevertheless, one notable development for trade facilitation in the Seattle Ministerial Conference. The range of discussions on trade

⁷² Singapore WTO Ministerial 1996: Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, para 22.

⁷³ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1998_e.htm. [15.9.08 at 11:04].

⁷⁴ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1998_e.htm. [16.9.08 at 5:23].

facilitation was reduced and concentrated on the three mentioned Articles. Import and export procedures and requirements along with technical cooperation and development issues were also discussed.⁷⁵

3.1.1 Trade Facilitation excluded from the Doha Development Agenda

During the Ministerial Conference in Doha 2001, attempts were once again made to include trade facilitation, together with the other Singapore Issues in the agenda for the new round of negotiations. However, the WTO Members could not reach consensus. Reportedly, some WTO Members objected to treating some of the Singapore Issues individually rather than collectively. Nevertheless, the WTO Members could agree on the magnitude of trade facilitation and decided to continue with the progresses made. The Doha Ministerial Declaration stated that:

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 [...] 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.

The same year the WTO Members proceeded to carry out the Doha mandate by adopting a work program for 2002 addressing three core agenda items. Firstly, continued reassessment and submission of proposals regarding Articles V, VIII and X of the GATT. Secondly, trade facilitation requests and priorities of WTO Members particularly of developing and LDCs. Thirdly, to find a solution on the notorious technical assistance and capacity-building program (TA/CB). Several delegations continued underlining the importance of TA/CB for facilitating trade, as they had done before.

There were many developing countries, while supportive of the objectives of trade facilitation, did not want to take on new legal obligations in the WTO at this point in time. The concern was that additional rules would exceed their implementation capacities and expose them to dispute settlements. Some also expressed their preference for trade facilitation work to be undertaken at the national, bilateral or regional level.⁷⁶ Regarding TA/CB, WTO Members emphasized the importance they attached to this subject and to the work being carried by bilateral donors and international organizations in the area. It was stressed that work concerning trade facilitation should progress in parallel with the substantive part of the discussions in the Goods Council. This in order to develop a technical assistance work program directed both to providing guidance and to building capacity to implement the eventual results.

In 2003, the WTO Members continued their work on trade facilitation under the DDA mandate. The TA/CB program was in focus for several WTO Members, especially the LDC:s. In the course of those meetings, the WTO Members continued to submit proposals and continued their previous discussions regarding the improvement and clarification of Articles V, VIII and X of the GATT.⁷⁷

⁷⁵ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1999_e.htm. [17.9.08 at 15:04].

⁷⁶ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview2001_e.htm. See section 3.7.2 for more information. [17.09.08 at 17:13].

⁷⁷ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview2003_e.htm. [19.9.08 at 17:47].

3.1.2 Trade Facilitation on the Doha Development Agenda

The “July package”, that was adopted 2004 after the Ministerial Conference in Cancun, included measures that was going to be taken in the field of trade facilitation. In line with the modalities for the negotiations set out in Annex D of that decision, the Trade Negotiations Committee appointed the Negotiating Group on Trade Facilitation (NGTF).⁷⁸ For the first time in WTO’s history, trade facilitation had become an independent issue and now part of the DDA. Regarding STD and TA/CB it was decided that they are integral parts of the negotiations and linked to the outcome. The WTO Members gave emphasis to the fact that LDCs will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.⁷⁹ Moreover, the mandate encourages the WTO Members to:

As an integral part of the negotiations, Members shall seek to identify trade facilitation needs and priorities, particularly those of developing and least-developed countries related to cost implications of proposed measures.⁸⁰

In 2005, the Hong Kong Ministerial Declaration declared a list of proposed measures to improve and clarify Articles V, VIII and X of the GATT as well as provisions for effective cooperation between customs and other authorities on trade facilitation.⁸¹ The NGTF recommended that relevant international organizations to be invited to continue to assist Members in this process.⁸² The importance of TA/CB was stated in the Ministerial Declaration as follows:

Work needs to continue and broaden on the process of identifying individual Member's trade facilitation needs and priorities, and the cost implications of possible measures. The Negotiating Group recommends that relevant international organizations be invited to continue to assist Members in this process recognizing the important contributions being made by them already, and be encouraged to continue and intensify their work more generally in support of negotiations.⁸³

Recognizing the valuable assistance already have being provided in this area, the NGTF recommended that the WTO Members, in particular the developed ones, continue to intensify their support in a comprehensive manner and on a long-term and sustainable basis and continue working for a successful TA/CB program.⁸⁴

The July 2008 package was created as a stepping-stone on the way to conclude the Doha Round by the end of 2008. Although, it is evident that the aim has failed the package sets the agenda for the months to come. The NGTF announced in the July Package 2008 that:

⁷⁸ In some official WTO documents, the Negotiating Group on Trade Facilitation is referred as the Negotiation Group.

⁷⁹ WT/L/579 – Annex D. Read more at

http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview2004_e.htm. [18.9.08 at 10:17].

⁸⁰ WT/L/579 – Annex D, Paras. 3 and 4.

⁸¹ Para. 33, WT/MIN(05)/DEC, 22 December 2005 and Annex E, para. 4.

⁸² Para. 5 in Annex E.

⁸³ WT/MIN (05)/DEC, Annex E, para. 5.

⁸⁴ Annex E in para. 7.

Work will continue to take place in a variety of configurations, combining NGTF sessions with complementary activities by the Membership in various formats (bilateral, plurilateral, open-ended). In this context, I particularly encourage delegations to intensify their ongoing informal, open-ended process of negotiations on SDT and capacity-building. The outcome of these initiatives will be reported back to the NGTF on a regular basis with the Negotiating Group equally reporting on the state-of-play of its work to the TNC.⁸⁵

Trade facilitation was never under discussion during the Mini-Ministerial meeting in July 2008, nevertheless, the NGTF have been continuing with its meetings to further refine the latest proposals under Articles V, VIII and X of the GATT, as well as on the issues of SDT for developing countries and on TA/CB support were made.⁸⁶ There have been concerns raised regarding the financing of technical assistance due to the financial difficulties many developed countries are facing. However, the costs for technical assistance that the developed countries might come to share are donations that will be completed, first after a future agreement is reached. Thus, there is a hope that the financial crises have recovered until then and diminished the reluctance that these governments might have at the time being when central banks and regulatory authorities are adopting financial help packages, injecting liquidity, and restructuring financial institutions.⁸⁷

Some months after the stagnation of the negotiations in July in Geneva, the importance of technical assistance for the implementation of trade facilitation became observable when Spain offered a donation about EUR 350,000 to the DDAGTF. The donation was made to continue finance technical assistance programs and training activities for Latin American and Caribbean countries for 2008.⁸⁸ The Doha Round might have stagnated for the moment, however, the work within the WTO and the international organizations continue until it is decided when the Doha Round is going to be resumed.

The outlooks for trade facilitation are positive although the negotiations are moving forward in a slow pace. Trade facilitation has developed a stable negotiation foundation even if several crosscutting issues such as SDT and TA/CB, are yet to be solved. These issues together with two additional factors can affect the degree of success in a trade facilitation agreement. First, the issues around modalities are still very detailed and complicated which makes the negotiation process time-consuming. Second, at present there is still no final textual proposal on trade facilitation, only submitted proposals on the modalities. In conclusion, these circumstances will with the highest probability, yield the possibilities to reach a commanding agreement in the future.⁸⁹

Regarding the suggestions to lift trade facilitation from the DDA, and make it a separate agreement as a development plan or development package together with Aid for Trade, the reception seems to be rather cold among the trade representatives in the NGTF. Although, the issue has been discussed in the NGTF there is a consensus that they are not real options since the negotiations are progressing relatively well. These alternative suggestions can become

⁸⁵ TN/TF/6, 18 July 2008, para 5.

⁸⁶ See e.g. TN/TF/M/25, Summary Minutes of the NGTF meetings held July 14 - 18 2008. Some of the proposals were revised versions of earlier recommendations but one new proposal concerning the elimination of consularization requirements was adopted (TN/TF/W/156 submitted by Uganda and the U.S.).

⁸⁷ Telephone interview with Tobias Lorentzson, Second Secretary, Permanent Mission of Sweden in Geneva, December 3, 2008.

⁸⁸ WTO Press/539, 16 September 2008.

⁸⁹ Telephone interview with Christina Rahlén, director, Ministry for Foreign Affairs Sweden, December 5, 2008.

accurate options when there are no other ways left to reach consensus on trade facilitation. For now, they are no dependable options and thus further not examined in this thesis.⁹⁰

3.2 Implementing Trade Facilitation - Legal Rights and Duties

3.2.1 Article V of the GATT – Goods in Transit

Article V of the GATT has never been interpreted either by a GATT/WTO panel or by the AB. 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.⁹¹

(1) Traffic in transit

Paragraph 1, considers only goods (including baggage), vessels and other means of transport to constitute traffic within the meaning of the paragraph. Whether freedom of transit should also extend to goods transferred to a country in bond without a final destination, has been under discussion, however, no agreement have been reached so it was decided not to pursue the matter any further.⁹² Clarification is needed in future negotiations so discrimination among modes of transport and types of carriers where there is no obvious reason for differing transit procedures is dealt with.

(2) Freedom of transit

Freedom of transit, paragraph 2, requires each Member State to allow free transition through its territory for traffic in transit to or from the territory of another Member State. However, the freedom of transit has one important restriction; “*via the routes most convenient for international transit*” means that the duty to grant free transit does not extend to all routes.⁹³ How the restriction should be interpreted in practice has not yet been challenged and is thereby difficult to apply on real transport cases.

(3) No unnecessary delays or restrictions

Except in cases of failure to comply with applicable customs laws and regulations, traffic coming from or passing through the territory of another Member “*shall not be subject to any unnecessary delays or restrictions*”.⁹⁴ Charges and regulations imposed by a Member State on traffic in transit to or from the territories of another Member, shall be “*reasonable, having regard to the conditions of the traffic.*”

(4) Reasonable charges and regulations

According to paragraph 4, “*all charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic*”. The word ‘charges’ should be interpreted including charges for transportation by government-owned railroads or government-owned modes of transportation.”⁹⁵

⁹⁰ Validated by both Nora Neufeld (Legal Affairs Officer, WTO Trade and Finance and Trade Facilitation Division, telephone interview December 2, 2008) and Christina Rahlén (see supra note 88).

⁹¹ WTO Secretariat 2002, G/C/W/ 408.

⁹² U.N. Doc. E/PC/T/A/SR.20 p. 3; U.N. Doc. E/PC/T/109.

⁹³ Negotiating Group on Trade Facilitation, TN/TF/W/2, p 6.

⁹⁴ Article V of the GATT, para. 3.

⁹⁵ Article V of the GATT para. 4 and U.N. Doc. E/PC/T/C.II/54/Rev.1, p. 10.

(5) *MFN- treatment*

The paragraph states “no less favourable than the treatment accorded to traffic in transit to or from any third country” of traffic in transit with respect to all charges, regulations and formalities in connection with transit.

(6) *Products in transit through other territories*

Each WTO Member has to treat products, which have been in transit through the territory of another Member State, “no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party”.⁹⁶

(7) *Air transit*

The Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods.

3.2.2 General about the Proposals

Between the Ministerial Conferences, the NGTF has discussed the proposals that have been submitted concerning the modalities for trade facilitation. Under the “July Package 2004” modalities for negotiation on trade facilitation was finally reached. They have, however, been modified during the years as WTO Members’ textual proposals have increased, counting 70 proposals as of today. A quick examination of the submitted proposals demonstrates that a few countries are involved in the work but the groupings go beyond economic divisions of developed and developing countries. On the contrary, it appears to be a mixture of coalition between mainly the developed countries signified by the U.S., the EU, Hong-Kong, Switzerland and Korea on one hand and the developed countries e.g. Uganda and Rwanda on the other hand.⁹⁷ Some of the developing countries that are active in the negotiations are perhaps not as involved in other topics of the Doha Round negotiations. When the proposals are being negotiated in the NGTF there are still traces of a division between developed and developing countries and the main concerns for the developing countries are to get the right amount of assistance while for the developed countries they are to meet the demands in an appropriate way. Since the discussions of the modalities are in some ways more detailed and complex, compared to trade subjects where perhaps percentages of market share are being bargained upon, the negotiations are going slowly but forward.⁹⁸

3.2.3 Proposals regarding Article V of the GATT

The measures involve among other things are strengthening non-discrimination, disciplines on fees and charges and most importantly improved co-ordination and co-operation amongst authorities and the private sector. One of the proposals to make the process of goods in transit more efficient is publication of fees and charges but also prohibition of unpublished ones. In practice, the published information shall include the reason for the transit fee or charge (the service provided), the responsible authority, the transit fees and charges applicable, and when and how payments have been made. Moreover, WTO Members shall make this information readily available to all interested parties and inform other WTO Members where this

⁹⁶Article V of the GATT, para 6.

⁹⁷ Compare with the Appendixes on pp 56-58.

⁹⁸Interview with Nora Neufeld, Legal Affairs Officer, WTO Trade and Finance and Trade Facilitation Division, December 2, 2008.

information is available. To guarantee that the information is disclosed the necessary data can be published via an officially designated medium, e.g. official website.⁹⁹

Another suggestion concerns periodic review of fees and charges, which offers WTO Member to periodically review its transit fees and charges to ensure that they are in line with WTO commitments along with reducing their number and diversity.¹⁰⁰ An additional suggestion is more effective disciplines on charges for transit. This advocates the exemption of traffic in transit from customs duties, transit duties and other fees, except transit fees and charges that are commensurate with the cost of the service rendered.¹⁰¹

3.3 Article VIII of the GATT - Fees and Formalities connected with Importation and Exportation

In contrast to Article V of the GATT, several disputes settled by a panel or the AB have revolved around Article VIII of the GATT. The Article explicitly limits fees and charges in connection with importation and exportation of goods to the approximate cost of services rendered.

(1) Reducing the number of fees and minimizing the incidence complexity of formalities and services rendered

In addition to defining the remaining category of fees connected with importation and exportation to which Article VIII of the GATT applies, paragraph 1(a) contains the principal legal obligations imposed pursuant to that provision. WTO Members are directed to limit all fees and charges “*in amount to the approximate cost of services rendered*”. The phrase “*services rendered*” refers to governments’ regulatory activities performed in connection to the customs entry processes, e.g. processing and clearing of documents and goods, along with inspections.¹⁰² It is crucial that such fees and charges does not “*represent an indirect protection to domestic products or a taxation of importations or exportations for fiscal purposes.*”

In *US - Customs User Fee*, the panel summarized the nature of Article VIII:1(a) of the GATT as rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes. The provision prohibits all such charges unless they satisfy the three criteria listed in that provision:

- a) it must be limited in amount to the approximate cost of services rendered,
- b) it must not represent an indirect protection to domestic products,
- c) it must not represent a taxation of imports for fiscal purposes.

The panel noted that consular fees, customs fees, and statistical fees had been treated as falling within the scope of Article VIII:1(a) of the GATT. Also, the panel found that a merchandise processing fee for imports was covered by the same paragraph.¹⁰³

⁹⁹ Proposal M. 2 (a), TN/TF/W/133, p 30. See also Appendix p 56.

¹⁰⁰ Proposal M. 2 (b), TN/TF/W/133, p 31. See also Appendix p 56.

¹⁰¹ Proposal M. 2 (c), TN/TF/W/133, p 31. See also Appendix p 57.

¹⁰² Panel Report, *US – Custom User Fee*, BISD 35S/245, paras. 76 and 77.

¹⁰³ Panel Report, *US – Customs User Fee*, BISD 35S/245, para. 69.

The panel in *EEC - Minimum Import Prices* considered whether a fine that was demanded, when no importation took place within the date specified in an import certificate, was a penalty or not. Such form of a penalty should be considered as part of an enforcement mechanism, and not as a fee or formality “*in connection with importation*”, within the purview of Article VIII of the GATT.¹⁰⁴ The potential fine of security deposit was also at issue in *EEC – Bananas II*, where the panel agreed that the potential fine did not, as such, fall within the Article.¹⁰⁵

Paragraph 1(b) does not contain specific legal requirements and neither does paragraph 1(c). The provisions are rather, recognitions from the WTO Members to “*recognize the need for reducing the number and diversity of fees and charges*” and “*for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*” The panel in *EEC – Bananas II* examined the last part. The question was whether the banana import licensing procedures at issue were consistent with Article VIII:1(c) of the GATT or not. According to the panel, the article refers to import formalities and documentation requirements, not to the trade regulations, which such formalities or requirements enforce. The complaining parties had criticized the complexity of the banana import regulations but the panel found that they had not submitted any evidence substantiating that the formalities and documentation requirements, by themselves, were more complex than necessary to enforce the regulations. The panel therefore found that the requirements were not inconsistently with the Article.¹⁰⁶

(2) Review of laws and regulations

A Member State is according to paragraph 2, required to review the operation of its “*laws and regulations in the light of the provisions of this Article,*” at the request of another Member or the relevant WTO body. The paragraph does, however, not stipulate any direct and unconditional obligation to take action, for example reduce fees and formalities, even if the country comes to the conclusion that they are too numerous or diverse.

(3) Prohibition for substantial penalties for minor breaches

The imposition of “*substantial*” penalties for minor breaches of customs regulations or procedures are prohibited in paragraph 3. Specifically, when customs documentation contains mistakes that are “*obviously made without fraudulent intent or gross negligence*”, then the penalties imposed as a consequence of such mistakes or omissions may not exceed what is “*necessary to serve merely as a warning.*”¹⁰⁷

(4) The applicable fees, charges, formalities and requirements

The last paragraph of Article VIII of the GATT sets forth an illustrative list of the types of fees, charges, formalities and requirements that fall within the scope of the Article. These include fees, charges, formalities and requirements relating to consular transactions, licensing, exchange control, statistical services, documentation and certification, as well as analysis and inspection.¹⁰⁸

¹⁰⁴ Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* (“*EEC – Minimum Import Prices*”), adopted 18 October 1978, BISD 25S/68, para. 4.3.

¹⁰⁵ Panel Report, *EEC – Import Regime for Bananas* (“*EEC – Bananas II*”), 11 February 1994, unadopted, DS38/R, para. 150.

¹⁰⁶ TN/TF/W/3, p 32.

¹⁰⁷ Bolhöfer, *Trade Facilitation – WTO Law and its Revision to Facilitate Global Trade in Goods*, p 389.

¹⁰⁸ Article VIII of the GATT, para. 4.

3.3.1 Proposals regarding Article VIII of the GATT

The textual proposals, which have been submitted to the NGTF, regarding fees and formalities connected with importation and exportation are mostly regarding specific parameters for charges, prohibition on collection of unpublished charges and periodically revision of charges and fees.¹⁰⁹ The measures are proposed as an effort to establish principles for fees and charges connected to importation and exportation with the aim of reducing their number and diversity.

Measures have been proposed to make formalities connected with importation and exportation as least trade restrictive possible while ensuring countries' legitimate control.¹¹⁰ One of the recognized proposals is reduction/limitation of formalities and documentation requirements".¹¹¹ The WTO Members are according to the proposal obliged to minimize the complexity of formalities, and simplify import and export documentation requirements to ensure that such formalities are no more administratively burdensome or trade restrictive than necessary and thus not constitute unnecessary obstacle to trade.¹¹²

The most effective and important proposal, that several WTO Members from the developed and developing world have agreed upon, is the "Single Window" system.¹¹³ The system allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export and transit related regulatory requirements. Since all information is electronic, then individual data need only to be submitted once. Some of the benefits for the governments are efficient deployment of resources, improved trader compliance, enhanced supply chain security and transparency. Benefits for industry include predictable application and explanation of rules, as well as faster clearance and release.¹¹⁴ Due to the different technical level of the WTO Members it is allowed to implement the single window in a progressive way and there are propels made that the LDCs should get technical assistance so they can comply with the regulations.¹¹⁵

Border agency cooperation is another proposal in order to facilitate the improvements, e.g. by aligning opening hours and sharing customs facilitates.¹¹⁶ Several measures proposed are regarding simplifying release and clearance of goods. Pre-arrival processing is one of the concrete examples, which means that the WTO Members should maintain or introduce, depending on their financial status, administrative procedures of customs to accept and examine import documentation by traders prior to the arrival of the goods.¹¹⁷ In cases where it is decided that no further examination or documentation is required, goods should be cleared immediately upon arrival. Like most other proposal, STD is applied; LDCs should not be required to apply these provisions under the same period as their wealthier counterparts.¹¹⁸

¹⁰⁹ Bolhöfer, *Trade Facilitation – WTO Law and its Revision to Facilitate Global Trade in Goods*, p 390.

¹¹⁰ National Board of Trade's publication *Trade facilitation and Swedish experiences*, p 62.

¹¹¹ Hong Kong, China and Switzerland, TN/TF/W/124/Rev.1, H 1(c). See also Appendix p 57.

¹¹² TN/TF/W/43/Rev.13, p 18.

¹¹³ Korea, TN/TF/W/138/Rev.1. H 1. (h).

¹¹⁴ TN/TF/W/43/Rev.13, p 22.

¹¹⁵ TN/TF/W/43/Rev.13, p 23.

¹¹⁶ TN/TF/w/128. See also Appendix p 57.

¹¹⁷ Hong Kong, China, Japan, Korea, Mongolia and Switzerland, TN/TF/W/117, K 1. (a). See also Appendix p 57.

¹¹⁸ TN/TF/W/43/Rev.13, p 23.

3.4 Article X of the GATT- Publications and Administration of Trade Regulation

Article X, has just like Article VIII of the GATT, been the subject for both panels' or the AB's assessment. However, there are still some legal question marks that need to be clarified in future negotiations.

(1) Publication of laws, regulations, rulings and agreements of general application

Laws, regulations, judicial decisions and administrative rulings of general application regarding e.g. rates of duty, taxes or other charges, or affecting their sale, distribution shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. The paragraph does not require any contracting party to disclose confidential information, which would impede law enforcement, or otherwise be contrary to the public interest.

The AB upheld in *US – Underwear* the panel's interpretation “of general application” and explained the scope of “administrative rulings”. The fact that it is a country-specific measure excludes the possibility of it being a measure of general application. If a restraint is addressed to a specific company or is applicable to a specific shipment, it will not qualify as a measure of general application. However, to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers, it must be recognized as a measure of general application.¹¹⁹ In *EC – Poultry*, the AB upheld the panel's finding that the withholding of information regarding a specific shipment was not inconsistent with Article X of the GATT because it was outside its scope. Although, any measure of general application will always have to be applied in specific cases, the specific treatment, nevertheless, accorded to each individual shipment cannot be considered to be within the meaning of Article X of the GATT.¹²⁰

In *Canada – Alcoholic Drinks*, the panel held that Article X of the GATT: did not require the WTO Members to make information affecting trade available to domestic and foreign suppliers at the same time. Nor did it require the WTO Members to publish trade regulations in advance of their entry into force.¹²¹ The AB in *EC - Poultry* recognizes the scope of Article X of the GATT as to the publication and administration of “laws, regulations, judicial decisions and administrative rulings of general application”, rather than to the substantive content of such measures, which fall outside the scope of the Article.¹²²

(2) Abstain from enforcing measures of general application prior to their publication

No Member State is allowed to enforce certain measures prior to their official publication. The measures that are prohibited are two, starting with “measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice.” Nor is it sufficient with “imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments” before such measure has been officially published.

According to the AB in *US – Underwear*, the provision embraces the principle of transparency. It depends on the disclosure requirements of national legislation affecting WTO Members, private persons and enterprises, whether they are of domestic or foreign nationality. The

¹¹⁹ Panel Report, *US – Underwear*, WT/DS24/R, adopted 25 February 1997, para. 21.

¹²⁰ Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, paras. 111 and 113. .

¹²¹ Panel Report, *Canada – Alcoholic Drinks*, DS17/R, adopted on 18 February 1992, para. 5.34.

¹²² Appellate Body Report, *EC – Poultry*, WT/DS69/AB/R, adopted 23 July 1998, para. 115.

essential implication is that WTO Members and other parties affected by governmental measures imposing requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to adjust their activities so they become righteous.¹²³

(3) Administration in a uniform, impartial and reasonable manner

The WTO Members' are called upon to administer "all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." This process should be dealt with in a "uniform, impartial and reasonable manner."¹²⁴ Certain guarantees are made with respect to their independence, as the provision obliges those tribunals or procedures to be independent from the agencies in charge of the administrative enforcement.¹²⁵ The importance behind the provision lies in the insurance that it is not the same entity that makes the decision that also takes care of its implementation. However, an exception is made in subparagraph 3(c) for procedures, which "in fact provide for an objective and impartial review of administrative action," if they have already been in force "on the date of the Agreement."¹²⁶ If a party wishes to employ such procedures it is, however, required to notify them to the other parties upon request.

The AB stated that the requirements of "uniformity, impartiality and reasonableness" of Article X:3(a) of the GATT clearly indicates that the provision do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of them. This was stated in *EC – Bananas III*,¹²⁷ and reaffirmed by a later panel, *US – Corrosion-Resistant Steel Sunset Review*. The panel hold that it is well established that only the administration of laws and regulations can be challenged under Article X:3(a) of the GATT and emphasized again that it is not the laws and regulations themselves.¹²⁸ In other words, if a contracting party find the contents of laws and regulations discriminatory or burdensome they can be challenged under relevant provisions of the covered agreements and not under the Article X:3 of the GATT.

When the panel interpreted in *US – Hot-Rolled Steel* the definition of "in a uniform, impartial and reasonable manner" the conclusion was that for a Member State's measure to violate the provision, it would have to have a significant impact on the overall administration of that Member State's law - as opposed to a mere impact on the outcome in the individual case in question.¹²⁹ Moreover, the panel in *Argentina – Bovine Hides*, reaffirmed what it had said earlier by explaining the term "uniform" as the provision should not be read as a broad anti-discrimination provision. That would be putting far too much importance into the provision, which in turn would make the day-to-day application of customs laws, rules and regulations impossible.¹³⁰

¹²³ Appellate Body Report, *US – Underwear*, WT/DS24/R, para. 21.

¹²⁴ Article X:3 (b).

¹²⁵ This exception requires "that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."

¹²⁶ According to Article XXVI:1; "The date of the Agreement shall be 30 October 1947".

¹²⁷ Panel Report, *EC – Bananas III*, WT/DS27/R/GTM, adopted 25 September 1997, para. 200.

¹²⁸ Panel Report, *United States – Corrosion-Resistant Sunset*, WT/DS244/R, adopted 9 January 2004, para. 7.289.

¹²⁹ Panel Report, *US – Hot-Rolled Steel*, WT/DS184/R, adopted on 23 August 2001, para. 7.268.

¹³⁰ Panel Report, *Argentina – Bovine Hides*, WT/DS155/R, para. 11.94.

3.4.1 Proposals regarding Article X of the GATT

Prominent proposals have been submitted concerning the Article's application on publication of all laws, regulations, requirements and procedures in connection with transit. Other proposals are concerning time period between the publication of transit formalities and documentation requirements and their entry into force. The use of international standards, improved cooperation and coordination, a long with clarification of terms are also likely to form part of a future agreement.¹³¹ Regarding the first area of application all proposals are pertaining to transparency since official sources are designed to be available for traders in a non-discriminatory manner. The proposal about Internet publication¹³² means that WTO Members shall provide a copy of all laws, regulations, and administrative rulings of trade-related procedures, which are entered into force through official means such as national website.¹³³

Regarding the second area of application, the proposal is about ensuring that a reasonable time is left between the publication of new or amended trade regulations and their entry into force. Such a time period would enable traders to become acquainted with the new rules and well prepared for compliance with the rules. Since the importance of cooperation with the business community is well established, one of the proposals declares that governments should consult with traders, through regular consultations between traders and border agencies. These consultation mechanisms can help the government to avoid excessive costs for the beneficial of the traders, which result in assistance from the traders with e.g. technology assistance to facilitate the required adjustments.¹³⁴

Another proposal is the right of appeal¹³⁵ where each of the Member State's legalization shall ensure that traders have the right of appeal, without penalty, against decisions by customs and other relevant border agencies.¹³⁶ Lastly, measures to ensure consistency and predictability in the administration of rules and procedures - by uniform administration of trade regulations, establishment of a code of conduct, and education for the personnel - have been submitted. Efforts to restrain corruption are thereby addresses by the proposals.¹³⁷

3.5 Soft Law Instruments Relating to Trade Facilitation

3.5.1 Special and Differential Treatment

Like discussed earlier, in all Ministerial Declarations time after time the importance of SDT has been recognized in order for the developing countries to benefit from trade facilitation. Thus, the WTO Members committed themselves to providing their support for SDT. The WTO Agreement's special provisions regarding SDT include:

- i) provisions aimed at increasing trade opportunities through market access,
- ii) provisions requiring WTO Members to safeguard the interest of developing countries,
provisions allowing flexibility to developing countries in rules and disciplines governing trade measures

¹³¹ Bolhöfer, *Trade Facilitation – WTO Law and its Revision to Facilitate Global Trade in Goods*, p 390.

¹³² Turkey, TN/TF/W/132/Rev.1, A, 2 (a). See also Appendix p 58.

¹³³ TN/TF/W/43/Rev.13, p 9.

¹³⁴ Bolhöfer, *Trade Facilitation – WTO Law and its Revision to Facilitate Global Trade in Goods*, pp 390-391 and National Board of Trade, *Trade facilitation and Swedish experiences*, pp 61-62.

¹³⁵ Japan and Mongolia, TN/TF/W/116, E (1). See also Appendix p 58.

¹³⁶ TN/TF/W/43/Rev.13, p 13.

¹³⁷ National Board of Trade's publication *Trade facilitation and Swedish experiences*, p 61.

- iv) support to help developing countries build their infrastructure, handle disputes, and technical assistance, and
- v) provisions allowing longer transitional periods to developing countries.¹³⁸

On trade facilitation, LDCs will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities. Regarding technical assistance the negotiations have been focused on the implementation on two steps; first, the assessment of the LDCs necessities and second, the capacity of the LDCs. SDT mandate different obligations under three classes when measuring the capacity and thus the assistance required:

Category A - the agreement will enter into force when executed without extended time frames or technical assistance. NICs are usually considered under this category.

Category B - the agreement will be implemented a certain period after the agreement has come into force. The extended time frame is generally required by the developing countries.

Category C - the implementation of the agreements depends on the amount of TA/ CB and thus extended time frames. In general, developing countries and especially LDCs are in need of special treatment.¹³⁹

The WTO Members have been discussing the degree of help required under the assessment program in line with the overall progress in the negotiations, having focused mainly on Category B and C assistance. The developed countries have expressed strong willpower particularly on the second part of the technical assistance scheme; the actual implementation of trade facilitation. The negotiations are sensitive especially since a balance has to be found between the degree of accurate assistance for the developing countries and the costs for the developed countries to provide the required technical assistance. Otherwise, because of the SDT mandate, the developed countries will have no obligation to implement trade facilitation. This leads to sensitive and complex issues regarding the nature of SDT as a soft law instrument.

The most significant difficulty with the SDT is their non-binding character. Several existing SDT provisions are of a truly mandatory nature, nevertheless, the general state of the language of the obligations cause both judicial and political implications. The substantial majority of existing SDT provisions is either discretionary or *de facto* non-binding in nature. Legally, this means that most of the provisions upon which developing WTO Members seek to rely are either unenforceable (“may”), or employ vague or undefined standards (“take account of”). Hence, the GATT Articles that regulate trade facilitation proclaims duties from its Members by using the mandatory language “shall”.¹⁴⁰ Politically, this has contributed to the sense, expressed by many developing countries, that what they believed they had been promised as part of the Uruguay Round package of negotiated agreements has in fact not been delivered. The fact that the developing countries felt increasingly frustrated, in the end caused to derail the Seattle Ministerial and now the fear of some LDCs are that even if the Doha Round is successfully concluded, history will repeat itself.

¹³⁸ WT/COMTD/W/135, 5 October 2004, Committee on Trade and Development, p 1. For an overview of the implementation of STD provisions of the WTO agreements and decisions see WT/COMTD/W/77/Rev.1.

¹³⁹ JOB (08) / 44/Rev. 1, *Issues Emerging from the Informal Exchange on SDT*.

¹⁴⁰ Garcia, *Beyond special and Differential Treatment*, pp 311-313.

In order to improve SDT some developing countries and scholars argue that implementation of SDT should be flexible as to fit the needs of specific countries, issues, and sectors, it should be implemented on “case by case” basis and most importantly, SDT should be mandatory. A binding commitment (“require” or “shall”) is then not only being composed by developed countries but also on developing and emerging economies regarding beneficial commitments toward LLDCs. Such countries risk being held hostage to their territorial boundaries in the absence of fair, transparent and non-discriminatory rules providing for rights of transit.¹⁴¹ Binding rules would allow those rights to be enforced for the benefit of all WTO Members in the long run, however, it is a sensitive question for developed countries that feel that the current “obligations” are enough without making them mandatory. Moreover, although binding commitments could guarantee the LDCs to get the technical assistance needed, binding commitments are impossible from a legal and political perspective. Legally, it is not achievable to bind other international organizations, e.g. World Bank or IMF, involved in the TA/CB programs since they are not members of the organization. The only tools that the WTO has are to invite the organizations to cooperate with the WTO. Politically, although assessment programs are carried out, it is impracticable for the Member States to bind themselves to conditions when the amount of technical assistance, both economically and personnel wise, is uncertain.¹⁴²

Another sensitive issue is regarding the selective political requirements that the donor countries might have on the LDCs in relation to the level of SDT and TA/CB delivered to them. There is a concern among the developing countries that some regions might get better technical assistance or financial deals depending on the donor’s interest in the region. The division being made regardless of the grounds it is based on; historical (e.g. colonial), political (e.g. participation in the war on terror), judicial (e.g. greater degree of deregulated business environment) or economical (e.g. in exchange for natural resources). Since the system of SDT is voluntarily, the risk is that the selective regional investments are implemented in opposition to the MFN-principle, which put the legitimacy and efficiency of the whole system at risk. This is another reason to why many developing countries, whether they will be subject for selective political requirements or not, argue for binding SDT provisions. In this way, although the prerequisites and delivered assistance will be customized for the specific country in question, there will be different dimension of openness and auditing in addition to political and judicial assessment of the agreements.¹⁴³ This form of regionalism and selective political undertakings is a dire discourse since it improves some of the peaceful and emerging regions to the better, but leaves others with political or social difficulties e.g. some African regions, to their own destiny. Thus, regionalism from a developing perspective regarding the amount of SDT and technical assistance, can work as a “building block” or “stumbling block”, depending on the region and donor/s involved as well as the political, economical and judicial requirements involved.¹⁴⁴

3.5.2 Technical Assistance

The weight of TA/CB have also been emphasized, in the DDA, Ministerial Conferences and other important WTO official documents, in order for the developing and LDCs to fully participate in and benefit from the negotiations and a future agreement.¹⁴⁵ When it comes to

¹⁴¹ Garcia, *Beyond special and Differential Treatment*, pp 314-316.

¹⁴² Interview with Nora Neufeld, Legal Affairs Officer, WTO Trade and Finance and Trade Facilitation Division, December 2, 2008.

¹⁴³ Ibid.

¹⁴⁴ Compare with Park, *Increasing Sub-regionalism within APEC and the Bogor Goals: Stumbling Block or Building Block?*, especially pp 12-16.

¹⁴⁵ Ministerial Declaration 2001, para 27. (WT/MIN(01)/DEC/1), Ministerial Declaration Hong Kong 2005, Annex E, para 7. (WT/MIN(05)/DEC) and July Package 2004, Annex D, para 27. (WT/L/579).

trade facilitation usually technical assistance, rather than capacity building is under discussion. The following elements have been identified as essential for the successful execution of trade facilitation-related technical assistance programs:

- i) the political willpower of governments to undertake reforms and improvements,
- ii) cooperation and coordination among the providers of technical assistance,
- iii) transparency of reform programs and the national legal systems,
- iv) the involvement of governments, business community, customs and other governmental authority in the execution of trade facilitation measures,
- v) the responsiveness of trade assistance programmes to particular needs of recipients,
- vi) the use of agreed benchmarks.¹⁴⁶

Since the start of the negotiations on trade facilitation, LDCs seem to have been increasingly devoting more attention to the mechanisms of SDT and technical assistance as regards to trade facilitation.¹⁴⁷ Technical assistance program, which is offered in co-operation with the IMF, OECD, UNCTAD, World Bank and WCO, is a two-step program. First, under “WTO Trade Facilitation National Needs Assessment Project”, which is the result of LDCs proposals, the LDC can upon request from the WTO Members conduct a national self assessment of their individual trade facilitation needs and priorities. The purpose of the program is to contribute to more effective participation of Members in the negotiations. Thus, the assessment will provide detailed information on technical assistance requirements of recipient countries and will provide a valuable basis for the eventual implementation of any results of the negotiations. Until today, 80 requests have been made and 35 assessments conducted. The aim is to finalize the remaining requests by 2009. Second, when an agreement is reached on trade facilitation, another program will enforce the modalities set by the WTO Members under the negotiations.¹⁴⁸ The negotiations for now revolve around the first step of the program since a final agreement has not yet been reached.

The main concerns of LDCs are modalities for self-assessments and modalities to be used when providing technical assistance. However, the developing countries’ concern is that they will have difficulties with implementing the measures and that the promised assistance will be absent. Other fears are that technical assistance will be delivered unhurried and inadequate to address their problems.¹⁴⁹ The same concerns are also raised regarding the non-binding nature of the program; many LDCs require some kind of guarantees before they endorse an agreement.

To assist LDCs to meaningfully gain on the benefits of the rules-based trading system and to participate effectively in the ongoing negotiations, the WTO Secretariat continues to give priority attention to technical assistance for LDCs. This is both in terms of numbers of activities to be offered (LDCs can have up to three national activities compared to two for

¹⁴⁶ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview2001_e.htm. [22.9.08 at 8:47].

¹⁴⁷ UN-OHRLLS, *LDC Briefing Book – Brief on Trade Facilitation*, p 1. [22.9.08 at 10:03].

¹⁴⁸ Multimedia presentation on conducting a WTO Trade Facilitation Needs Assessment on <http://www.swisslearn.org/wto/module33/>. [23.9.08 at 9:13].

¹⁴⁹ Bagai et al, *Trade Facilitation; Using WTO Disciplines to promote Development*, p 5.

others) as well as in terms of the closer consultative process they are to benefit from, for example the assessment program for their needs.¹⁵⁰

In addition to the technical assistance provided by the WTO, LDCs also benefit from the Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries (IF), which was endorsed in the DDA 2000. The IF is a partnership initiative between among the LDCs, multilateral agencies¹⁵¹ and bilateral donors aimed at assisting the LDCs to increase their participation in the multilateral trading system and global economy. The IF is mainly responsible for awareness building on the importance of trade for development, strategy plan of action for integrating trade facilitation into the global trading system and integrating the working program for trade facilitation into the national development plan.¹⁵² The IF program has according to its sceptics several shortcomings; budgetary constraints, initial program requirements are difficult to reach and limited impact as opposed to its expected achievements. In other words, there have not been enough recourses to follow up or extend the program for those countries who have faced complications during the process.¹⁵³ At the Ministerial Conference in Hong Kong 2005, it was decided to enhance the program to suit the programs to the LDCs needs and to ensure that the initial goals are reached. The Enhanced Integrated Framework (EIF) is in the process of being finalized.¹⁵⁴

Nevertheless, both advocates and opponents believe that, although there have been severe implications with some parts of the technical assistance program/s, special attention must be given to the LDCs, especially the LLDCs. It is imperative that the developed countries and the emerging countries will continue making special efforts to strengthen the supply of assistance to LDCs. Further efforts are necessary in terms of efficiency, effectiveness and sustainability for the economic growth of LDCs.¹⁵⁵

Lastly, the link between trade facilitation and Aid for Trade needs to be made since the EIF is the main mechanism through which least-developed countries access Aid for Trade. Although the volume of Aid For Trade-related TA/CB has been increasing steadily since the launch of the Doha Round, the need for further assistance has been widely recognized by the international community. In December 2005, at the Ministerial Conference held in Hong Kong, the EIF was endorsed and a WTO work programme on Aid for Trade was created. WTO Members gave mandate to create a Task Force to provide recommendations on how to operate Aid for Trade and to consult with Members, international organizations and development banks on mechanisms to secure additional financial resources.¹⁵⁶ In conjunction with trade facilitation measures, the development of infrastructure, including roads, railways, ports, bridges and border posts, is needed to successfully build efficient trade systems.¹⁵⁷ However, it is recognized that although Aid for Trade can be a valuable complement to the

¹⁵⁰ WT/COMTD/W/135, 5 October 2004, Committee on Trade and Development, p 6. Note that the WTO Secretariat also organizes short-term introduction courses specifically for trade officials from LDC representatives twice a year.

¹⁵¹ The WTO, IMF, UNCTAD, World Bank, the International Trade Centre (ITC) and the UN Development Programme (UNDP).

¹⁵² http://www.integratedframework.org/files/non-country/IF_explained.pdf. [3.10.08 at 11:37].

¹⁵³ Saner et al, *Technical Assistance to Least-Developed Countries in the Context of the Doha Development Round: High Risk of Failure*, pp 474-476.

¹⁵⁴ http://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm. [28.9.08 at 13:52].

¹⁵⁵ Ibid, p 490.

¹⁵⁶ WTO Members mandated work on Aid for Trade in paragraph 57 of the Hong Kong Ministerial Declaration. For more information see http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm. [2.10.08 at 15:17].

¹⁵⁷ UN-OHRLLS, *LDC Briefing Book – Brief on Trade Facilitation*, p 3.

DDA, it cannot be a substitute for the development benefits that will result from a successful conclusion of the Doha Round.¹⁵⁸ Even though, the link between trade facilitation and Aid for Trade is acknowledged the NGTF does not focus on the subject since there are other forums where the issue is negotiated and therefore Aid for Trade will not be further discussed.¹⁵⁹

3.6 Enforcing Trade Facilitation

3.6.1 The WTO Dispute Settlement Mechanism

As the examination of the Articles have illustrated, the WTO Members have in theory equal rights to use the benefits from trade facilitation but the burden of duties are different depending if the Member is a LDC e.g. regarding time frames for implementation. However, the burdens are different since the WTO Members have uneven preconditions for implementing trade facilitation. One debated topic concerning this has been whether a future agreement should mandate the use of the DSM. The DSM is in first place favored by advocates of trade facilitation with the argument that all WTO Members regardless of their financial status have the right to bring a case to the DSM. However, many LDCs believe that the use of DSM will result in unacceptable burdens, since they not yet have the economical or technical means to establish platforms for trade facilitation. Furthermore, developing countries are less well equipped to participate in the process because they have fewer lawyers with the appropriate training and knowledge of regulations, they are less experienced, and they can bear fewer financial resources.¹⁶⁰

Firstly, a quick review demonstrates that the DSM has some inherent predicaments. When dispute arises, or failures to live up to obligations, the complaining party must first request bilateral consultations (Article 4 of the DSU). If consultations fail to settle the dispute, the complaining party may request the establishment of a panel, which will conduct a report, with the exception that the Dispute Settlement Body (DSB) decides by consensus not to take action (Article 6 of the DSU).¹⁶¹ Within 60 days, the panel report must be adopted, unless a party to the dispute formally notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report (Article 16 of the DSU). The special decision-making procedure where the DSB must approve the decision unless there is a consensus against it is known as “negative” consensus. At first glance, it can seem undemocratic since some developed countries can use their bargain power to persuade WTO Members to vote to their favor.¹⁶² However, to be able to block the decision to adopt report(s) requires all Member States to join the opposition or at least stay passive. Hence, in practice it is impossible for an individual Members State to block important trade issues. On this point, the DSM is “law” regulated rather than “power” regulated which give the LDCs, at least in theory, the same equal chance of bringing a Member State to court, indifferent to that country’s economical power.¹⁶³

Appeals to the AB, are limited to issues of law and legal interpretations covered in the panel report. When a panel or the AB after examination concludes that a measure is inconsistent

¹⁵⁸ http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm. [11.11.08 at 9:33].

¹⁵⁹ Interview with Nora Neufeld, Legal Affairs Officer, WTO Trade and Finance and Trade Facilitation Division, December 2, 2008.

¹⁶⁰ Hoekman et al, *Development, Trade, and the WTO - A Handbook*, p 79.

¹⁶¹ *Ibid*, p 71.

¹⁶² Articles 6.1, 16.4, 17.14 and 22.6 DSU.

¹⁶³ http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm. [11.11.08 at 10:17].

with a covered agreement, it must recommend that the member concerned bring its measures into conformity with the WTO agreement (Article 19 of the DSU). Article 22 of the DSU states that if a measure inconsistent with the WTO agreement is not corrected than compensation can be obtained. Wealthy complainants can use threat of countermeasures in order to induce compliance towards weaker countries that do not have the finance to compensate the complainants.¹⁶⁴ When acting as defendants, the wealthier part will have the possibility of weighing the advantages and disadvantages between changing the domestic policies at stake (in order to avoid imposition of countermeasures) or simply keeping the domestic policies at stake intact (and see countermeasures imposed against them).

3.6.2 Dispute Settlement Understanding and Developing Countries

There are a number of provisions in the DSU relating to developing countries, as an effort to reduce the imbalances within the DSM. For example, according to Article 4.10 of the DSU, WTO Members have to give special attention to the particular problems and interests of developing countries in consultations. When considering the appropriate actions that should be taken, the DSB is to take into account not only the trade coverage of the measures complained of but also their impact on the economy of the developing country that is the defendant (Article 21.8 of the DSU). In addition, legal advice to developing countries should be facilitated by the WTO secretariat when needed (Article 27.2 of the DSU). Article 24 of the DSU states "at all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least developed country Members." This is one of the most important provisions, which calls for restraint in invoking the DSU against LDCs, when it comes to asking for compensation or in seeking authorization to suspend the application of concessions.¹⁶⁵

Article 12.11 of the DSU stipulates that where a developing country Member is involved in a dispute, the Panel Report is to indicate how SDT provisions have been taken into account. This provision, although apparently dependent upon it being raised by the developing country Member, nevertheless arguably contains elements that advocate the factor of development being taken into consideration in judicial matters.¹⁶⁶

The developed countries and those in favors for settling trade facilitation disputes in the DSM, usually argue that the actual cases where LDCs have to face the DSM are exaggerated. In fact, developed countries are the claimants and respondents in the majority of cases.¹⁶⁷ One of the strongest reasons for this is because litigation is politically expensive for many high-income nations since there is a huge reluctance internationally when wealthier governments "pick on" poorer countries, accusing them for WTO violations.

In the practice of WTO dispute settlement, developing Members have invoked the "developing condition" or SDT, particularly as a shield as respondents while developed

¹⁶⁴ Hoekman et al, *Development, Trade, and the WTO - A Handbook*, p 72.

¹⁶⁵ Ibid, p 73.

¹⁶⁶ Qureshi, *Interpreting World Trade Organization Agreements for the Development Objective*, p 855.

¹⁶⁷ According to a study from the WTO (2000), the number of DSU cases from 1995 through 2000 proves the latter. Altogether 89 complaints were filed against industrial countries by industrial countries while developing countries against industrial countries filed 35 complaints. On the other hand, developing countries had raised 18 complaints against developing countries but the industrial countries raised 65 complaints against developing countries. For more information concerning this study see *Development, Trade, and the WTO - A Handbook*, Bernard Hoekman, Aaditya Mattoo, and Philip English, The World Bank, Washington D.C., 2002, p 76.

Members have not refrained from challenging the use by developing Members of the developing condition as a basis for departures from normal WTO obligations. The developing condition has been employed firstly as a relevant factual condition, and secondly as a justification for preferential implementation of obligations. The normative framework of the WTO allows the “development condition” to be a “justifiable” issue in certain circumstances regulated by rules and case law.¹⁶⁸

3.7 Alternative Legal Approaches for Implementing Trade Facilitation

3.7.1 Multilateral vs. Plurilateral Approach

In the past, there have been proposals to make the trade facilitation agreement plurilateral. As a result, the agreement will only be applicable to those WTO Members who sign the agreement. The WTO Members would then be given the choice to agree to new rules on a voluntary basis, and all countries would have a say in the negotiating process. Most developing countries, however, oppose strongly to the idea of negotiating plurilateral agreements. Some developing countries believe that accepting this kind of agreement would set an untrustworthy precedent for other issues. Moreover, a plurilateral agreement runs the risk of discriminating against non-WTO Members in violation of central WTO principles.¹⁶⁹

Another unsettling issue is that plurilateral agreements do not seem to address limited capacity and resource constraints in developing countries. Because, the participation is voluntary the regulatory provisions might seem excessively burdensome to many LDCs, which leads to developed countries as only signatories. Plurilateral agreement can result in “lock-in” regulations in a trade facilitation agreement, which will make it difficult for developing members to join later on. This given that the agreement will be written by and for advanced economies, and may not include appropriate provisions or considerations for developing economies. Since, the criticism of the European Commission’s suggestion in 2003, to address the Singapore Issues as a plurilateral agreement was vast; no WTO Member has represented this approach.¹⁷⁰

3.7.2 Bilateral Agreement vs. Multilateral Trade System

There are also those WTO Members - e.g. US and Japan - that believe that other forms of agreements outside the WTO framework, although in accordance with Article XXIV of the GATT, could be an alternative to the Doha Round. The alternatives are called bilateral agreements and they consist of Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs). Those in favor for RTAs argue, “small vulnerable economies should undertake a regional approach to the implementation of some expected WTO commitments, since they are not able to afford all the material and infrastructure necessary.”¹⁷¹ However, many WTO Members, NGOs, economists and politicians believe free trade agreements outside WTO’s framework and the Doha Round can jeopardize the entire multilateral trade system and result in extensive trade imbalances and trade disturbances.

Bilateralists argue that a regional solution would lead to the WTO Members addressing common local transaction costs jointly instead of facing the challenges of implementing trade

¹⁶⁸ Qureshi, *Interpreting World Trade Organization Agreements for the Development Objective*, p 855.

¹⁶⁹ Bagai, *Trade Facilitation; Using WTO Disciplines to promote Development*, p 8.

¹⁷⁰ Compare with <http://www.cafod.org.uk/var/storage/original/application/phpmlEnhv.pdf>. [30.10.08 at 13:47].

¹⁷¹ Citation from communication from Barbados, Fiji, Papua New Guinea and the Solomon Islands to the WTO Negotiating Group on Trade Facilitation, 7 July 2006, document TN/TF/W/129, p1.

facilitation on their own.¹⁷² This is primary crucial for LLDCs that are situated in geographically demanding areas and are dependent on their neighboring states' infrastructures. Moreover, the proponents mean that there are two main benefits of regional cooperation for the sake of trade facilitation; firstly, elimination of duplication and secondly, positive political collaboration among the states. Eliminating duplication - as a trade facilitation improvement - will enable efficiency gains for companies, but also allow smaller scale operators to access export markets, an important aspect for developing countries. Duplication arises because similar document requirements must be met repeatedly at the borders, but also because national rules differ. Therefore, the search costs and associated uncertainty increases, which creates further opportunities for rent seeking and corruption.¹⁷³ The delivery of services for trade transactions - such as insurance, logistics and communication services - can require a scale of production beyond the national borders.¹⁷⁴

Moreover, RTAs act as trust building mechanism between the governments, favoring interactions in shared information and systems. The trust dimension takes an added importance regarding security and better border control. Regional representation can also be a way to increase the bargaining power of its constituents in international negotiating forums such as the WTO.¹⁷⁵ On the other side, this form of regionalism may diminish the incentives to participate in future multilateral trade negotiations, as countries perceive they have sufficient market access and do not want to expose themselves to increased competitive pressures from others.¹⁷⁶

Trade facilitation can successfully be implemented in regional agreements such as EU, NAFTA and APEC. However, the most important argument to why RTAs are not a long-lasting solution is because of the nature of trade facilitation is of international harmonization while RTAs concentrate on benefits for the region in question. RTAs are in other words, contradictory to trade facilitation since they result in several regional areas that all have different rules for non-members and thus a stumbling block for fair regionalism. The reason for this is only the members of that specific RTA gain benefits that arise from the RTA, other duties are applied on imports or exports to other states.¹⁷⁷ Moreover, the scope of the RTAs are usually more limited and concentrated more on customs clearances and less requirements for documentation than administrative corruption, mandatory transport standards and arbitration alternatives.

Other issues concerning bilateral agreements come with their choice of partner. According to a study (World Bank 2005), with some South-South (S-S) exceptions, the majority of PTAs are of the N-S variety.¹⁷⁸ Against this background, if trade facilitation is inserted in an existing PTA or incorporated in a new agreement, there is a treacherous possibility that the weaker party is compelled to extensive administrative improvements without getting the financial support or technical assistance necessary from the wealthier counterpart. The same

¹⁷² Maur, *Regionalism and Trade Facilitation: A Primer*, p 6.

¹⁷³ Ibid pp 6-7.

¹⁷⁴ Ibid, pp 9-10.

¹⁷⁵ Ibid, p 20.

¹⁷⁶ Melo, *Regionalism and Developing Countries: A Primer*, p 353.

¹⁷⁷ Compare with following discussion paper: Estevadeordal, *Does Regionalism Affect Trade Liberalization towards Non-Member?*, Centre for Economic performance, Discussion Paper no 868, 2008.

¹⁷⁸ According to the study, the average number of RTAs per country is six, with 45 developing countries having signed bilateral trading arrangements with a Northern partner, and of the 109 North-South (N-S) PTAs, 86 of them have been created since 1990. For more information concerning this study see World Bank, *Global Economic Prospects: Trade, Regionalism and Development*, Washington D.C., 2005.

problems comes with RTAs, if not even more immense. The benefits of incorporating trade facilitation in RTAs are modest, if the agreements are signed by countries that have more or less the same technical and economical situation, e.g. some parts of Africa, Latin America and Asia. Then they have to be dependent on those countries in their region that can offer technical assistance or economical contribution to work programs, which is a huge burden for some emerging countries to bear on their own.¹⁷⁹

3.8 Conclusions

Articles V, VIII and X of the GATT, could be more accurate and precise in their scope and application but the proposals previously discussed offers the majority of the WTO Members a fair chance to submit their enhancements. Compared to other GATT Articles, e.g. the MFN or national treatment, the Articles regulating trade facilitation are not as multifaceted and politically sensitive, which serves as an advantage.

Concerning the proposals, some points are worth discussing. First, there is a superstition that computerization and Just-In-Time solutions are the resolutions to all the technological challenges that the developing countries face. In addition, the WTO should take note of the frequent and rapid changes in technology and procedures and avoid agreeing to detailed procedures that may become quickly outdated. Moreover, the proposals submitted show that several developing countries have been active in developing the modalities of trade facilitation to better suit their economical reality.

Many LDCs also have difficulties with inadequate legislation that makes it complicated to introduce changes that the submitted proposals require for adjusting to entire new ways of doing business, e.g. e-business. Outdated and corrupted customs and border authorities make it complicated to introduce changes, e.g. the Single Window system, that requires profound co-operation between all governmental authorities. Another intricacy is the lack of educated and experienced personnel to facilitate improvements. However, these are all issues that can be addressed by technical assistance programs if they are adopted after the receiving states' individual conditions.

Trade facilitation's negotiation history illustrates that SDT and technical assistance have been two of the greatest concerns of the LDCs. It is evident that although they agree that trade facilitation results in economical and political benefits, the implementation issue will continue influencing the negotiations to come. Technical assistance is at the moment not an unconditional right for the LDCs to exploit and although, the IF program for example have been less successful than expected, it is crucial to reflect the situation for many LDCs if the assistance would not be offered at first place. If the technical assistance is concentrated on a country's specific circumstances, instead of using "one size fit all" system, the outcome would probably be of better quality. Moreover, it is important that the requirements and level of assistance given to the countries will not be based on the political and economical interest of the donors but the needs of the developing countries. Otherwise there is a risk that regionalism becomes a stumbling block for those regions that need the assistance the most. The economical sponsoring that is attached to the technical assistance programs could become a setback since many donor countries are struggling with their own problems in times of financial crisis.

¹⁷⁹ Compare with following study; Dennis, *The Impact of Regional Trade Agreement and Trade Facilitation in the Middle East and North Africa Region*, WPS3837, World Bank, 2006.

Nevertheless, WTO Members e.g. Spain illustrates through an offered donation to the DDAGTF, that trade facilitation concerns are still on the international trade agenda in a long-term perspective. The most efficient effort is questionably to change the provisions regulating SDT and technical assistance from soft law instruments to hard law obligations. However, this requires both institutional and political efforts that are impossible, not to mention the judicial implications. Although, it can be argued that in some parts it is a rightful demand from the LDCs it would be jeopardizing the political will that many developed countries and other donors have shown. Until the DDA's legitimacy is not apparent, there is no point in forcing further obligations and duties on the developed countries otherwise this can result in reluctance even for trade facilitation. Lastly, the link between trade facilitation and Aid for Trade should be bared in mind; however, it is a complement and not an alternative to trade facilitation. At the same token, as long as the trade facilitation negotiations are moving forward there is no reason to lift the subject from the DDA and make it to an independent development package or development plan.

LDCs have shown unwillingness to whether the agreement should mandate the use of the DSM. The DSM is arguably being an unfair institution where the LDCs face obstacles such as financial and judicial discrepancy. To this end, it is important to keep in mind the magnitude of having the right to exploit a dispute mechanism for all parties involved regardless of their financial position. In fact, the mere existence of a compulsory multilateral settlement system is in itself a benefit for developing countries. It is true that in practice, it is more burdensome for LDCs to utilize the system, however, the DSU offers less burdensome obligations to them additional to the right to judicial assistance. However, unless Member States have an opportunity to legally examine the judicial inaccuracies that occurred in the international trading system, the risk is that the whole WTO is deteriorated as a multilateral trading organization.¹⁸⁰ Although, the provisions do not solve the existing democratic discrepancy, there are clearly more favorable arguments to maintain a "rule regulated" system than a "power regulated", which would probably be the case outside the WTO's framework.

Regarding the plurilateral approach, there is no urgent need of implementing trade facilitation as a plurilateral agreement since there are still good prospects that the Doha Round will be concluded. Given that plurilateral agreements are under the WTO's framework it would be counteractive to elevate a subject like trade facilitation under negotiations in the Doha Round, to become a separate agreement. The Doha negotiations have to be encouraged in all possible ways - a plurilateral agreement will eliminate trade facilitation from the multilateral trade agenda. The same goes for bilateral agreements.

Generally, regarding bilateral agreements, it has to be said that they can in theory provide LDCs with a voice they otherwise lack in multilateral trade negotiations. Developing countries can develop RTAs to express their collective will, campaign against global and regional measures that conflict with their own immediate interests and they can build trading blocs to empower their economies. However, the advantages with regionalism are generally conditioned to the correct trade partner/s where the power balance and the conditions of the RTA are equivalent. Unfortunately, more frequently, that has not been the case and many developing countries find themselves entrapped in disproportionate PTAs and RTAs. There are apparent disadvantages when bilateral mechanisms are adopted in an increasing pace, as a means of substituting the multilateral trade processes. The development of bilateral trade agreements arguably has discouraged some States, especially the U.S. but also free trade

¹⁸⁰ Sofia Persson, National Board of Trade, telephone interview December 2, 2008.

advocates such as Colombia and South Korea, from engaging themselves to find consensus in multilateral negotiations.

RTAs and PTAs have the type of shortcomings - e.g. their limited scope and their unbalanced trading agreements both within and towards non-members - that are incompatible to the aims of trade facilitation and opponent to the WTO system as a whole. Trade facilitation should not become the scope of RTAs or PTAs as an alternative to multilateral obligations since it could lead to a leeway for allowing other subjects on the DDA find bilateral solutions. If some of the WTO Members want to complement their RTAs with trade facilitation provisions or incorporate them in new RTAs, WTO cannot prevent them but it is crucial that the WTO keeps encouraging the WTO Members to participate in the Doha negotiations. Even committed multilateralists have to conclude that the current flood of PTA activity is probably not reversible. This puts the pressure on WTO to guarantee that the multilateral system has an effective mechanism to ensure the compatibility of PTAs with WTO law, which can be difficult to handle when they are increasing rapidly.

4. POLITICAL AND ECONOMICAL REVIEW OF TRADE FACILITATION

The WTO Members seem to agree on the benefits of trade facilitation but many of the implications are mainly concerns for the LDCs and especially the LLDC, which have limited financial or technical possibilities to implement trade facilitation in their economies. Only general topics concerning mainly the developing countries are examined since it is impracticable to study the consequences of all the proposals submitted.

4.1 The Benefits of Improved Trade Facilitation

4.1.1 Economical profits

Although, the relationships between trade facilitation, trade flows, and capacity building are complex and challenging to measure, there have been several studies made by the international and regional organizations concerning the financial economics benefits that trade facilitation accommodate. One often-quoted figure is global gains of 40 billion USD from just a 1% reduction in trade transaction costs.¹⁸¹

Another often-cited study (World Bank 2004) examined 75 countries and estimated the relationship between trade facilitation and global trade flows in manufactured goods in 2000-2001, to be able to calculate the economic revenues that had been gained. The study considered four important categories: port efficiency, customs environment, regulatory environment, and service sector infrastructure. The results suggest that both imports and exports domestically and internationally could increase with improvements in the mentioned trade facilitation areas. In total, the economic gain in trade flow from trade facilitation improvements was estimated to be 377 billion USD. The economists argue that the results suggest that improvements in trade facilitation would do more to stimulate trade than further tariff liberalization.¹⁸²

In global trade, seventy-five percent of the transactions costs are due to administrative obstacles - numerous customs procedures, tax procedures and cargo inspections - even before the products are being imported or exported.¹⁸³ The problems are magnified for LLDCs, whose exporters need to comply with different requirements at each border but also because of their time-sensitive products like agricultural goods, which stand for one of the LDCs' most vital import products. At the same time studies show that countries with longer delays are associated with relatively lower exports of time-sensitive goods.¹⁸⁴ In other words, trade facilitation will generate benefits that are more economical for the LDCs when the trade transport times become more effective. Studies estimate that each additional day that a product is delayed prior to being shipped trade is reduced by more than one percent.¹⁸⁵

¹⁸¹ Walkenhorst et al, *Quantitative Assessment of the Benefits of Trade Facilitation*, TD/TC/WP2003(31)/FINAL, p 6.

¹⁸² Wilson, et al, *Assessing the Potential Benefit of Trade Facilitation: A Global Perspective*, p 2.

¹⁸³ Djankov et al, *Trading on Time*, p 5.

¹⁸⁴ Ibid, p 13.

¹⁸⁵ Ibid, p 6.

An additional study from the World Bank (2006), which looks at the administrative requirements for exporting and importing a standardized cargo of goods with every official procedure counted along with the time necessary for completion, illustrates the situation in the world at the time being. Not surprisingly, the developed countries have the more effective procedures and less transactions costs. On the question, why the average transactions costs for the countries are lower when it comes to export costs it is argued that the volume of trade may directly affect trade costs.¹⁸⁶ Thus, the marginal value of investment in trade facilitation may be higher when the trade volume is large and since many developed countries export more than they import, their export costs are lower. However, it becomes evident that the document requirements and the high costs are, although of different magnitude, a general problem for the majority of the countries. This could be one of the reasons to why the support for trade facilitation is strong not only among the developing countries but also among the developed countries; they are realizing the benefits although they have proficient trade systems.

Various Trade Facilitation Metrics by Region or Country¹⁸⁷

Region or Economy	Doc for Export (number)	Time for export (days)	Cost to Export (US\$/container)	Doc for import (number)	Time for import (days)	Cost to import (US\$/container)
All Countries	7.0	26.1	\$1,230	7.8	29.7	\$1,412
Singapore (Best)	4.0	5.0	\$416	4.0	3.0	\$367
Kazakhstan (Worst)	12.0	89.0	\$2,730	14.0	76.0	\$2,780
East Asia & Pacific	6.9	24.5	\$885	7.5	25.8	\$1,015
Eastern Europe & Central Asia	7.0	29.3	\$1,393	8.3	30.8	\$1,551
Latin America & Caribbean	6.7	22.6	\$1,096	7.7	24.0	\$1,208
Middle East & North Africa	7.1	24.8	\$992	8.0	28.7	\$1,129
OECD	4.5	9.8	\$905	5.0	10.4	\$986
South Asia	8.6	32.5	\$1,180	9.1	32.1	\$1,418
Sub-Saharan Africa	8.1	35.6	\$1,660	9.0	43.7	\$1,986
Sweden	4.0	8.0	\$ 697	3.0	6.0	\$ 735
United States	4.0	6.0	\$960	5.0	5.0	\$1,160

Figure 2.¹⁸⁸

Trade facilitation reforms are as mentioned not only for developing countries; they are also crucial to the U.S. and other strong economic countries. At present, the U.S. but also the EU, performs not as good as the emerging countries simply because these countries are building technically advanced infrastructures instead of depredated on a drained infrastructure in need of reparations, which is the case for some developed countries like Italy and Greece. One recent study (World Bank 2006), suggests that a one-day improvement in the average time it

¹⁸⁶ Djankov et al, *Trading on Time*, pp 2 and 16.

¹⁸⁷ The data are collected from 345 freight forwarders, port and customs officials operating in 126 countries. The data is based on the average time it takes to get a 20-foot container of an identical good from a factory in the largest business city to a ship in the most accessible port.

¹⁸⁸ Unfortunately, the study has not gathered an average data for the EU as whole, which could have led to a greater understanding of the varied metrics between the geographical and political entities. The reasons for the different geographical divisions that have been made are not explained in the study. However, the specific figures for each EU Member State as an integrated part of the study can be found at the World Bank's website, *Doing Business 2008, Trading Across Borders*; <http://www.doingbusiness.org/ExploreTopics/TradingAcrossBorders/>. [13.10.08 at 9:30].

takes to move U.S. cargo from a warehouse to the port and cargo from the port to a domestic warehouse could increase U.S. trade by almost 29 billion USD per year.¹⁸⁹

The LDCs greatest concern is the short-term and administrative difficulty of implementing obligation arising out of negotiations. The WTO Members altogether, more or less, believe that the solution is TA/CB, which is an integral part of a future agreement under the WTO legal framework. There are, nonetheless, different believes on the extent of the assistance. The main argument, however, is that many expenses are short-terms and will later generate a large amount of state revenue. Chile, an often-cited example, reformed its customs systems in the beginning of 2001, with a cost of 5 million USD but it took less than one year to recoup the expenditure. The benefits included a 75% drop in the average processing time and big reduction costs for both to the government, business and ultimately the customers. UNECE have reported similar experience in Peru, the Philippines, Sri Lanka and Panama.¹⁹⁰

Lastly, although trade facilitation generate economical benefits as the impact of climate changes has become more evident voices have been raised that more focus should be on the environment problems involved. The consequences of more frequent transactions that can be a result of the logistical and administrative progress made by trade facilitation can lead to environmental implications. Not so much the actual measures of trade facilitation itself but its trade efficiency can result in air, water and noise pollution and emissions as it becomes cheaper and easier to import and export.¹⁹¹ Environmental issues are questions that both the developing and developed countries try to avoid, and no official study has been arranged by the WTO to examine the environmental impacts on some of the subjects set on the DDA. It is however recognized that is can constitute implications and become more costly than first expected.¹⁹²

4.1.2 Promotion of Democratic Institutions

Trade facilitation can in addition to spurring trade and economic development have a positive effect on government institutions. Recent developments in the customs and border agencies of some developed countries illustrate the progress. Key to the changes has been the development of a working partnership between customs administrations and traders. With increasing frequency, customs consulted closely with industry advisory groups when considering new programs and other modernizing changes. Many economists argue that the success lies in reducing government controls and instead working closer with the business community to comprehend the reforms that are needed to be made for efficient trade facilitation. It is furthermore argued that development of a functioning partnership with the trading community and other stakeholders would result in less intrusive but more effective border agency regulation and additional improvements in trade facilitation. In developing countries ruled by authoritarian regimes, this could then become an immense precedent for the development of democratic institutions.¹⁹³ Representatives from the LDCs and NGOs, however, disagree with too extensively deregulation. Although cooperation between the state authorities and the business community could be prosperous, there needs to be a control

¹⁸⁹ Creskoff, *Trade Facilitation: An Often Overlooked Engine of Trade Expansion*, p. 2.

¹⁹⁰ UNECE, *Sharing the Gains of Globalization in the New Security Environment: the Challenges to Trade Facilitation*, pp 60-62.

¹⁹¹ Thomas, *Trade and the Environment: Stuck in a Political Impasse at the WTO after the Doha and Cancun Ministerial Conferences*, pp 10-12.

¹⁹² *Ibid*, pp 20-21.

¹⁹³ Creskoff, *Trade Facilitation: An Often Overlooked Engine of Trade Expansion*, p 10.

system, which enables the governments to prevent unfair political influence, negative consequences on the local companies and monopolistic practices from powerful companies.¹⁹⁴

Governments can also gain social benefits by increased revenue and lower trade costs, because of trade facilitation. Thereby, governments can increase outflows in priority areas such as health and education.¹⁹⁵ It is also argued that the governments get an increased transparency and predictability in their trade systems with the legal harmonization that trade facilitation brings.

4.1.3 Collaboration between International Organizations

The important role of the international organizations in the field of trade facilitation have already been explained. The collaboration is crucial for the financing, studying, planning and implementing of trade facilitation. Among these organizations IMF, World Bank, WCO, UN and UNCTAD have observer status at both General Council and Council for Trade in Goods, the latter being responsible for trade facilitation.¹⁹⁶ In that way, the organizations can follow the discussions, reporting and some negotiations that are important for their work.

IMF and the World Bank are mainly responsible for financing the different trade facilitation projects. WCO and UNCTAD can offer their expertise and knowledge regarding TA/CB. The United Nations Convention on Transit Trade in Land Locked Countries from 1965 also promotes trade facilitation. The convention requires countries to attempt using simplified documentation and expeditious methods about customs clearance procedures to transit trade for the whole transit journey within their territory.¹⁹⁷

4.1.4 Collaboration with the Business Community

The fact that intergovernmental organizations and many governments have existing and long lasted collaboration with the trade community illustrates that it has already been recognized that business is a valid and valuable partner in achieving mutual aims. Collaboration between the parties can function as a resource to achieve progress in trade facilitation. The reasons for the business community's involvement and assistance to the government can be explained in five means. First, the business community has firsthand experience, which enables them to compare the relative successes of different customs' systems in the world. In that way, companies can assist in properly identifying problems, which is the first step to finding the best solutions. Second, good relations with the traders and the state authorities will result in mutually compatible processes and agreed standards that will increase compliance at costs to business and governments. Since, new requirements and standards are likely to be costly, although the costs will be regained when the systems are established, dialogue can be an incentive for the collaboration and a way to overcome resistance.¹⁹⁸ Third, the business community can share its expertise and information on technology, logistics process and data management. In so doing, governments can better keep pace with the latest developments in business practices and technology tools. In addition, the collaboration can encourage foreign

¹⁹⁴ Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, book forum, June 26, 2008 at American Enterprise Institute, Washington D.C., the U.S..

¹⁹⁵ Cosgrove-Sacks et al, United Nations Economic Commission for Europe, *Trade Facilitation – the Challenges for Growth and Development*, p 141.

¹⁹⁶ http://www.wto.org/english/thewto_e/igo_obs_e.htm. [23.10.08 at 2:34].

¹⁹⁷ *Ibid*, p 13.

¹⁹⁸ *Ibid*, p 183.

investments. Finally, business can help by providing practical assistance with technological systems or by participating in training programs in developing countries.¹⁹⁹ The benefits for the business community are lower costs and fewer delays, faster customs clearance, transparency in the system and thus a more effortless commercial framework for doing both domestic and international trade.

The main benefit for developing countries is that their Small and Medium size Enterprises (SMEs), can gain extensive business opportunity and new markets. Their SMEs can operate beyond the domestic markets, which increase the developing countries revenues. This since SMEs, in general constitute, a more significant share of the business sector in developing economies than of developed economies. Trade obstructions in turn normally constitute a larger share of SMEs' costs than of larger companies that have the capital to investment.²⁰⁰

Apart from gains of cost savings and utilizing business opportunities, trade facilitation and especially electronic business will create new business openings in a way that is impossible through the existing transport systems in developing countries.²⁰¹ Concerns are, however, raised that MNCs massive financial strength, access to technology and sophisticated IT infrastructure make it difficult if not impossible, for developing country traders (mostly SMEs and even smaller companies) to catch up with the trade facilitation improvements - or in some sectors even to compete with them in their domestic markets.²⁰²

4.2 Implications of Trade Facilitation Improvements

4.2.1 Administrative Corruption

A central obstacle to improved trade facilitation in many developing countries is administrative corruption. Unofficial payments to governmental agencies, such as the customs and the border officials, constitute a substantial transport cost in many countries with limited governmental control. Indirect payments for "facilitation services" such as fees for unofficial police escorts, documents requirements with multiple signatures and unofficial checkpoints where payments are taken from truckers, are all examples of administrative corruption that hinders the trade flow and trade efficiency.²⁰³

Another type of corruption is "facilitation services", which is payments where a trader asks customs officials to reduce tax liability or to turn a blind eye to smuggling or other illegal operations. These kinds of payments are a huge threat, not only to the trade, but also politically and socially. A study from the World Bank (2008) show that in states where trade facilitation is discouraged investments is lower than in states that offer a safer trade environment.²⁰⁴ In other words, countries with inadequate trade infrastructure, complicated regulation such as extensive document requirements and corruption, are less capable of benefiting from the opportunities of expanding global trade.

¹⁹⁹ Cosgrove-Sacks et al, United Nations Economic Commission for Europe, *Trade Facilitation – the Challenges for Growth and Development*, p 184.

²⁰⁰ Ibid, pp 183 and 185.

²⁰¹ Hellqvist, *Trade facilitation: impact and potential gains*, pp 21-22.

²⁰² Jawara et al, *Behind the Scenes at the WTO*, p 32.

²⁰³ Creskoff, *Trade Facilitation: An Often Overlooked Engine of Trade Expansion*, p 11.

²⁰⁴ The World Bank's rankings *Doing Business – Trading Across Borders 2007*. Read more about the study in Creskoff, *Trade Facilitation: An Often Overlooked Engine of Trade Expansion*, p 11.

Delays and non-transparency in determining the classification and value of merchandise, physical inspections of all cargo irrespective of risk and the operation of border posts for only a limited number of hours and frequent closings are other examples of difficulties hinders successful trade facilitation. Moreover, some governments and customs administrations are committed to a system of unofficial payments covertly and overtly oppose trade facilitation improvements because of their importance for the state's income. These problems are fundamental problems that must be addressed jointly by policy officials, business interests, international donors and others seeking to improve trade facilitation.²⁰⁵

4.2.2 Revenue Collection and Tax Farming

Revenue collection by customs and other border agencies is a critical part of the national revenue for many countries, especially LDCs. The heavy reliance of some countries on revenues collected by customs has resulted in draconian measures to prevent smuggling and corruption, while for the emerging countries there are political measures taken to try to prevent corruption. For example, in the Republic of Georgia, there is a 'Fiscal Police' that check the work of customs officers in clearing merchandise and collecting duties and taxes. If any irregularities are discovered, severe penalties are imposed and it has made a difference.²⁰⁶ If trade facilitation was stronger in countries such as Georgia the reliance on control systems, could be less and instead become a part of the custom's working environment.

Modern 'tax farming' involves governments contracting out the assessment and collection of import duties and taxes to private companies called 'tax farmers'. These are paid a percentage of the revenue collected for their services. The private inspections can result in longer processing times and increased costs for exports and imports if the taxing system used is not properly designed and administered. There are no real guarantees that the companies are using the most efficient systems available, as the transparency for the governmental authorities that rent the services, is in very limited scale.

4.2.3 The Role of the Government

The quality of governance and the related issue of corruption are also important determinants of transaction costs, time, and the level of predictability. The engagement of top leadership is essential to driving the investment necessary to make changes in the field of international trade and development. According to international studies, countries where corruption is institutionalized appear to have greater frictions in their logistics environments and will have greater problems to implement trade facilitation. Preventing corruption in the customs systems requires comprehensive, systematic and coordinated work of international and regional organizations such as the UN, the World Bank, Association of South East Asian Nations (ASEAN) and Asia-Pacific Economic Cooperation (APEC). More importantly, governments have through legal, political and economical measures facilitate the essential changes into their national systems, after their own specific conditions.²⁰⁷

Developed countries that advocate for privatization and liberalization argue that the governments are the driving force when it comes to create conducive and competitive trade environment. However, it is important to emphasize that trade liberalization should only be accepted to that extent which enables the governments to exercise control and transparency in

²⁰⁵ Creskoff, Trade Facilitation: An Often Overlooked Engine of Trade Expansion, p 12.

²⁰⁶ Ibid, p 12.

²⁰⁷ Cosgrove-Sacks et al, *Trade Facilitation – the Challenges for Growth and Development*, p 163.

their domestic markets. Otherwise, there is a risk that the international trade system endangers its legitimacy, since many developing countries are hesitant to open their markets to TNC.²⁰⁸ The majority of the LDCs are corrupt mainly because they are in national or regional conflicts. These countries especially need trade assistance, to reform institutional structures, build proficient infrastructures, create technological trade systems and educate human capital working in customs and border authorities.²⁰⁹ In order to achieve these results, considerable time, effort and resources from WTO and other international organizations are crucial.

4.2.4 Security in the Supply Chain

Trade facilitation have some elements of security initiatives, however, striving to increase security and to impose trade procedural simplifications are not mutually exclusive but can, in fact, support each other.²¹⁰ The initiatives to improve security in the supply chain on international as well as regional levels were made after the attacks on September 11, 2001. Although, WTO does not have work program for security efforts, it has emphasized the importance of proceeding with the initiatives.²¹¹ The initiatives are related to the risks of future terrorist attacks directed at the supply chain in various forms, although they have not yet taken place. To illustrate the complexity of international supply chains, the figure illustrates the various parties involved and the different activities.²¹²

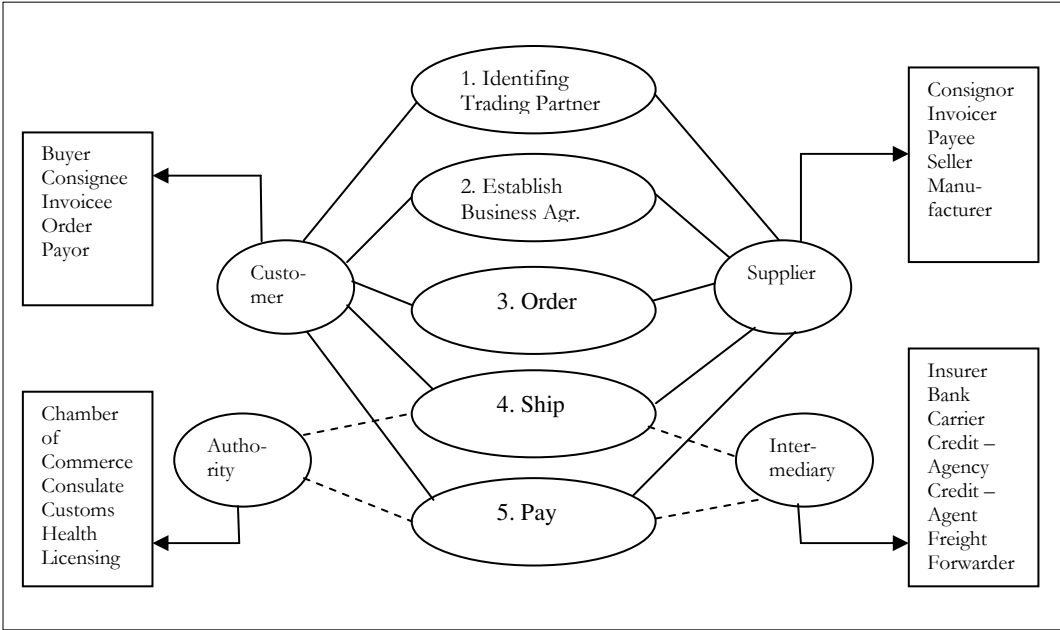


Figure 1. The activity diagram is a simplified diagram of a ship situation, showing the most basic process involve.²¹³

The reasons to why international supply chain is vulnerable lay in the different activities, which the trading parties have to handle large amounts of goods and information. Moreover, the supply chain consists of many occasions where goods must be reloaded; a product is

²⁰⁸ See Jawara et al, *Behind the Scenes at the WTO*, p 257-259 Cosgrove-Sacks et al, *Trade Facilitation – the Challenges for Growth and Development*, p 148-151.

²⁰⁹ Cosgrove-Sacks et al, *Trade Facilitation – the Challenges for Growth and Development* p 149.

²¹⁰ http://www.kommers.se/templates/Standard2_3025.aspx. [17.11.08 at 8:15].

²¹¹ WTO Press/531, 21 September 2008.

²¹² Sweden’s National Board of Trade, *Supply Chain Security Initiatives: A Trade Facilitation Perspective*, p 7.

²¹³ Hellqvist, *Trade facilitation: impact and potential gains*, p 6.

produced, sold and transported to a company, which in turn sells it onwards in the chain.²¹⁴ Threats in the supply chain can be described as aircraft that are used as weapons or containers used as a mode of transport for heavy arms and drug smuggling. Another problem is the increased hijacking, often on the roads or by sea.²¹⁵

To be able to coordinate security in the international supply chain, harmonized and compatible systems are essential. The costs that can arise with the introduction of stricter rules for security ultimately are introduction of new routines, the acquisition of new equipment, education of the personnel and the certification fee itself. In addition, after these measures have been implemented, there are still the regular costs of work on security. The main positive side is benefits arising from a reduction in the number of controls, better relations with the customs and other trade authorities, a reduction in thefts and shrinkage, and lastly the possibility of having lower insurance premiums.²¹⁶ The most important organization working with this kind of questions now is WCO but the WTO is recognizes its importance.

At the local or regional level, the threats or risks of terrorism can have the effect that companies move their operations to safer areas. Moreover, investments are affected, which affects the possibility of achieving economic growth. Even if it is difficult to assess the risks of an attack, this constitutes a strong incentive to make efforts to secure the international supply chain against possible attacks in the future. Increased security can lead to improving trade facilitation, which in turn, increases trade. However, there is a risk that intensified security requirements for customs clearance will slow down the supply chain. Longer transport times at sea or by road ultimately mean both an increase in storage costs and depreciation of the value of the product.²¹⁷

4.3 Conclusions

There are obvious advantages with trade facilitation as a trade and development promoter. The economical benefits even proceeds further tariff reductions under the Doha Round. Trade facilitation can also encourage the democratic process to reach just political and social regimes in the developing countries. The gains should, however, not be exaggerated since corruption and governmental autocracy requires years to dissolve. Nevertheless, collaboration between domestic authorities and governments, together with harmonization of the administrative procedures that trade facilitation requires, are vital benefits for LDCs. Other gains are transparency and predictability for the national government, other WTO Members and the business community.

The efforts made by the international organizations in the field of trade facilitation could be one of the most important reasons to why success can be achieved. Although, the legal framework is in some parts restricted to WTO, the UN bodies are an important incentive for developing countries to accept the enrolment in e.g. the EIF program. Many developing countries still have a strong belief in the UN, compared to the IMF or World Bank, which benefits trade facilitation in the long run. Moreover, these organizations can cooperate with local and regional organizations for the implementation or study of trade facilitation.

²¹⁴ Sweden's National Board of Trade, *Supply Chain Security Initiatives: A Trade Facilitation Perspective*, p 10.

²¹⁵ Ibid, p 13.

²¹⁶ Ibid, pp 16-17.

²¹⁷ Ibid, p 79.

If trade facilitation is implemented rightfully, it can become beneficiary to the business community on an international as well as national level. Presumably, since SMEs are more common in developing countries, and since the businesses typically have fewer resources than those in advanced countries, trade facilitation could help the developing countries' businesses to generate greater trade revenues. Although, all form of cooperation between the national governments and the business community is appreciated, a clear distinction on the judicial, political and economical command is crucial when it comes to the market access that MNCs still can get through the benefits of trade facilitation. The national government should be in charge of the judicial and political conditions that foreign companies should comply after, as long as they are consistence with WTO law, and not be affected by powerful MNCs with strong economical agendas.

To summarize there are several advantages that support trade facilitation in an international context. However, there are issues that might demand more financial support, technical assistance and political collaboration to overcome. Administrative corruption, revenue collection and tax farming are some of the phenomena that exist in the developing counties, which require more time and support than the technical assistance programs calculate. However, it is only fair to recognize that many LDCs and developing countries have regulations and policies against the illegal activities but they have difficulties to cope with the problems. This illustrates that there is a political will in some countries but that there still exists an obvious need of assistance to incorporate effective policies. Unfortunately, irregularities exist everywhere - perhaps more but in a sophisticated manner in democratic countries - so in practice these issues involve all WTO Members and should be solved collectively.

Increased transparency and efficiency of customs procedures and border procedures are thus policies that most WTO Members would find desirable to implement. Administrative corruption should be confronted by investments in human resources, adoption of more precise managements systems and management control. Regarding some WTO Members' concern that trade facilitation measures will reduce customs or fiscal revenue, is not accurate. Trade facilitation does not mean making illegal activities, e.g. tariff avoidance, easier. Rather, it means that the more efficient control systems are implemented the less complicates administrative procedures will be rendered which generates more business transactions.

It is evident that security in the international supply chain is an important initiative that must be taken serious. The number of security initiatives are steadily increasing shows that there is an interest among decision-makers, administrators, and the business community to organize security systems with efficient trade. Although it is complex to provide a clear-cut picture of the ways in which they affect trade, globally or in different regions and the economical costs involved, the WTO should encourage these types of incentives. However, the incentives should be appropriate to the longer transport times and increased storage costs that the security measures bring.

5. FINAL REMARKS

Trade facilitation has the potential to go far beyond simply growth in trade volumes. By boosting efficiency, strengthening governance, and increasing transparency in government administration, facilitation initiatives can fundamentally build a more balanced trade environment for the developing countries. An effective trade facilitation agreement is the first step towards implementing trade facilitation globally. Given the integrated and global nature of the supply chain and the required measures taken to implement trade facilitation, a multilateral agreement provide a framework for addressing crosscutting trade issues additional to garner cooperation of the international trading community, border authorities and the business community.

5.1 The Institutional Dimension

The WTO has the best position to oversee the implementation and enforcement of trade facilitation. It is clear that the WTO has a democratic deficit, especially when it comes to the unequal bargaining power that have been demonstrated at the Green Room meetings, but it does offers the same participation possibilities for all its members. Nevertheless, it is clear that the WTO is dependent on other international organizations and their completion to WTO law in order to finance, study and implement trade facilitation. This does not challenge the fact that trade facilitation should be primary implemented under the WTO framework. A WTO agreement on trade facilitation would, however, not replace other instruments that address elements of trade facilitation. While Articles V, VIII and X of the GATT highlight the formalities and procedures for movement of goods, as well as publication and administration of trade regulations, the Kyoto Convention for example, provides a practical guidelines for their implementation. The incorporation of the international soft law instruments could thus help raise and facilitate performance levels.

In the light of the criticism that the WTO has endured during the years, without questioning the authenticity of the allegations, it is also necessary to consider the counterfactual: how would/will trade policies have evolved/progress, in the absence of the WTO? Even if when its shortcomings are taken into consideration, the multilateral system is to prefer over regional or preferential alternatives.

The famous philosopher Bertrand Russell once said; “organizations are of two kinds, those which aim at getting something done, and those which aim at preventing something from being done”. Only time will tell what the future holds for the WTO but hopefully it will continue getting things done; changing the unequal trade balances and promoting economic growth and development to the world community.

5.2 The Judicial Dimension

Articles V, VIII and X of the GATT offer equal benefits as the result of trade facilitation but the duties to reach them are different. SDT and trade assistance offers less burdensome implementation obligations for the LDCs, however, the efficiency of the systems are limited since they are not of binding nature. Considering the difficulties that the Doha Round faces it is not appropriate to change the entire mandate for trade facilitation. Having the imbalanced trade positions in mind, however, reformation of the SDT and TACP programs so that they

comply with the LDCs needs are necessary and binding commitments are a way of safeguarding them. The question is when the problems are being dealt with if not under the negotiations that set the modalities for trade facilitation years to come.

Trade facilitation must be implemented under a multilateral agreement; a plurilateral agreement is doomed to fail and has small validity amongst the LDCs. PTAs and RTAs could play a complementary role to a multilateral agreement, however, they should not replace a multilateral agreement as long as the chances to achieve a successful Doha Round are realistic. Fundamentally, the resort to PTAs and RTAs should not be encouraged by the WTO since the RTAs in general are not between equal trading parties and technical assistance or other support cannot be guaranteed at all times. Although, SDT and trade assistance are not legally binding, the incentives to compliance are higher and more proficient under a multilateral system than under the majority of the bilateral systems.

However, although the MTS might prevail as the judicial institution the time to come - whether it is through hard law or soft law instruments - the current trade agenda will continue to be discussed and complex issues are remained to be solved. The reason for this is that the Member States have dissimilar ideas on the appropriate approaches on how to “cut through the red tapes”. Trade facilitation consists of many detailed and complicated procedures that need to be compromised on and settled around, but there exist no incentives for lifting trade facilitation from the DDA in order to create a separate agreement. At least not as long as there are good chances to conclude the round successfully. As long as the negotiations are moving forward, there is no need to shift to other alternatives and jeopardize the progress made in the field.

5.3 The Policy Dimension

The fact that trade facilitation result in economical benefits for all the WTO Members, even the developed countries, is an imperative incentive for all the WTO Members to work for trade facilitation. Overall, the advantages on an economical and political level exceed the disadvantages and this is widely recognized by the WTO Members, NGOs and scholars. For the WTO Members the issue at stake is the implementation difficulties of trade facilitation rather than the questioning of its positive outcome. If an equal trade balance is not obtained and if the LDCs continue not to get the same access to the world markets under their own conditions the chances are that poverty in LDCs will deepen resulting in secondary problems such as increase of armed conflicts, flows of refugees and social degradations.

Security in the supply chain and the environmental issues are two aspects that most likely will be more linked with trade facilitation in the future. Although, they are both imperative subjects for international trade and development their actual importance will continue to be restrictive until the implementation issues of trade facilitation are dealt with in future negotiations.

5.4 Future Outlook

The failure in Geneva 2008 seems not to have had any devastating consequences for international trade transactions nor has it been the starting point for the WTO's dispatch. Business as usual appears to be the case although this is a far too simple explanation of the current situation; the difficulties with concluding the Doha Round are affecting the legitimacy of the MTS. Even though, it is evident that the WTO Members will not give up WTO - the

same way as the shortcomings of the UN do not lead to its termination - it is important to understand the seriousness of the current situation. Trade between countries will obviously continue regardless of the WTO's existence. The question is rather what kind of judicial system and trade conditions the world community wishes to comply and respect.

The multilateral trading system is at a crossroads and it is of great importance that the system remains its legitimacy otherwise the chances are that bilateral agreements turn the international trade balance even more unequal as well as convoluted. The importance of the Doha Round is primarily the fact that a completed agreement will come to dictate the conditions for the world trade at least for a decade - if not longer - to come. Thus, it is vital that the Doha Round, trade facilitation specifically, ends in a *rightful* agreement rather than just *an* agreement. The question seems to be *when*, rather than *if*, the Doha Round will be concluded and trade facilitation implemented around the world. However, the question of the concrete scope and enhancement of a future agreement due to the delicate judicial, political and nonetheless the economical situation, remains to be answered the years to come.

APPENDIX

Proposals concerning Article V GATT: Freedom of Transit²¹⁸

M. MATTERS RELATED TO GOODS TRANSIT

1. Non-Discrimination and Policy Objectives

- (a) Strengthened Non-discrimination
- (b) Legitimate Policy Objective
Guarantee System

Proposal submitted by: *Cuba, Armenia, EU, Macedonia, Kyrgyzstan, Mongolia, Paraguay, Moldova, Rwanda and Switzerland.*

2. Disciplines on Fees and Charges

- (a) Publication of Fees and Charges and Prohibition of Unpublished Ones
- (b) Periodic Review of Fees and Charges
- (c) More effective Disciplines on Charges for Transit – Reduction/Simplification
- (d) Periodic Exchange between Neighbouring Authorities

Armenia, EU, Macedonia, Kyrgyzstan, Mongolia, Paraguay, Moldova, Rwanda and Switzerland.

3. Disciplines on Transit Formalities and Documentation Requirements

- (a) Publication
 - (b) Periodic Review
 - (c) Reduction/Simplification
 - (d) Harmonization/Standardization
 - (e) Promotion of Regional Transit Arrangements
 - (f) Simplified and Preferential Clearance for Certain Goods
 - (g) Limitation of Inspections and Controls
 - (h) Sealing
 - (i) Cooperation and Coordination on Document Requirements
 - (j) Monitoring
 - (k) Bonded Transport Regime and Guarantees/ International, Regional or National Custom
- Armenia, EU, Macedonia, Kyrgyzstan, Mongolia, Paraguay, Moldova, Rwanda and Switzerland.*

4. Improved Coordination and Cooperation

- (a) Amongst Authorities
 - (b) Between Authorities and the Private Sector
- Armenia, EU, Macedonia, Kyrgyzstan, Mongolia, Paraguay, Moldova, Rwanda and Switzerland.*

5. Operationalization and Clarification of Terms

Armenia, EU, Macedonia, Kyrgyzstan, Mongolia, Paraguay, Moldova, Rwanda and Switzerland.

6. Quota-free Transit Regime

Turkey and Georgia.

²¹⁸ All proposals can be found in *WTO Negotiations on Trade Facilitation Compilation of Members Textual Proposals*, TN/TF/W/43/Rev.13.

Proposals concerning Article VIII GATT: Fees and Formalities connected with Importation and Exportation

G. FEES AND CHARGES CONNECTED WITH IMPORTATION AND EXPORTATION

1. General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation

- (a) Specific Parameters for Fees/Charges
- (b) Publication/Notification of Fees/Charges
- (c) Prohibition of Collection of Unpublished Fees and Charges*
- (d) Periodic Review of Fees/Charges
- (e) Automated Payment
EU, Korea and Switzerland.

2. Reduction/Minimization of the Number and Diversity of Fees/Charges

H. FORMALITIES CONNECTED WITH IMPORTATION AND EXPORTATION

1. Disciplines on Formalities/ Procedures and Data Documentation Requirements Connected with Importation and Exportation

- (a) Non-discrimination
Hong Kong, China, Switzerland.
- (b) Periodic Review of Formalities and
Requirements
Hong Kong, China, Switzerland.
- (c) Reduction/Limitation of Formalities and
Documentation
Requirements
Hong Kong, China, Switzerland.
- (d) Use of International Standards
*Mongolia, Norway, South Africa and
Switzerland.*
- (e) Uniform Customs Code
- (f) Acceptance of Commercially Available
Information and of Copies
- (g) Automation
- (h) Single Window / One-time Submission
Korea.
- (i) Elimination of Pre-shipment Inspection
- (j) Phasing out Mandatory Use of Customs
Brokers
EU, Mongolia, Chinese Taipei and Switzerland.

* Some proposals relating to Article X.

(k) Same Border Procedures Within a Customs
Union

India.

(l) Testing Methods Based on Specific Product
Features

(m) Uniform Forms and Documentation
Requirements

Relating to Import Clearance within a Customs
Union

India.

(n) Option to Return rejected Goods to the
Exporter

India.

I. CONSULARIZATION

1. Prohibition of Consular Transaction Requirement

Uganda and the U.S.

J. BORDER AGENCY COOPERATION

1. Coordination of Activities and Requirements of all Border Agencies

Canada.

K. RELEASE AND CLEARANCE OF GOODS

1. Expedited/Simplified Release and Clearance of Goods

- (a) Pre-arrival Processing
*Hong-Kong, China, Japan, Korea, Mongolia and
Switzerland.*
- (b) Expedited Shipments
The U.S.
- (c) Risk Management / Analysis, Authorized
Traders
*EU, China and Switzerland, US, India, Korea,
Indonesia, Canada and Switzerland.*
- (d) Post-clearance Audit
China, Indonesia and Korea.
- (e) Separating Release from Clearance
Procedures*
Canada and Switzerland.
- (f) Other Measures to Simplify Customs Release
and Clearance*

L. TARIFF CLASSIFICATION

1. Objective Criteria for Tariff Classification

New Zealand.

Proposals concerning Article X GATT: Publication and Administration of Trade Regulations

A. PUBLICATION AND AVAILABILITY OF INFORMATION

1. Publication and Notification of Trade Regulations and of Penalty Provisions

Article X with some proposals also relating to
Art. VIII

Japan, Mongolia and Switzerland)

2. Internet Publication

Turkey.

(a) Internet "publication" of the elements set out
in the Article.

(b) Internet "publication" of specified
information requirements
for importing goods into a Member's territory

3. Notification of Trade Regulations*

4. Establishment of Enquiry Points / SNFP/ Information Centers

Japan, Mongolia and Switzerland.

5. Other Measures to Enhance the Availability of Information

B. TIME PERIODS BETWEEN PUBLICATION AND IMPLEMENTATION

1. Interval between Publication and Entry into Force*

*Hong Kong, China, Japan, Korea, Mongolia and
Switzerland.*

C. CONSULTATION AND COMMENTING ON NEW AND AMENDED RULES

1. Prior Consultation and Commenting on New and Amended Rules

*Hong Kong, China, Japan, Korea, Mongolia and
Switzerland*

2. Information on Policy Objectives Sought

D. ADVANCE RULINGS

1. Provision of Advance Rulings

Australia, Canada and the U.S.

E. APPEAL PROCEDURES

1. Right of Appeal

Japan and Mongolia.

2. Release of Goods in Event of Appeal*

3. Appeal Mechanism in a Customs Union

India

F. OTHER MEASURES TO ENHANCE IMPARTIALITY, NON- DISCRIMINATION AND TRANSPARENCY

1. Uniform Administration of Trade Regulations

2. Maintenance and Reinforcement of Integrity and Ethical Conduct Among Officials

(a) Establishment of a Code of Conduct

(b) Computerized System to Reduce/Eliminate
Discretion

(c) System of Penalties

(d) Technical Assistance to Create/Build up
Capacities to

Prevent and Control Customs Offences

(e) Appointment of Staff for Education and
Training)

(f) Coordination and Control Mechanisms

3. Import Alerts/Rapid Alerts

India.

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India.

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