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Trade Facilitation

Introduction

As noted in Chapter 3, the subject of trade facilitation was included in the work programme of WTO at the Singapore Ministerial meeting held in 1996 together with three other subjects – trade and investment, trade and competition policy and transparency in government procurement. However, it was included only for study and analysis and the decision on taking up this subject for negotiations on rule making could be taken only in 2004, while it was decided the other subjects would not be taken up for negotiations in this Round.

This chapter provides an overview of the assistance provided to members of the Geneva Group in deciding whether the subject should be included for rule making in the agenda for negotiations in the Doha Round, and a description of the handbook developed for negotiators after the decision was taken to include trade facilitation as a subject for negotiation. The last section describes briefly the present state of play in the negotiations in this area.

Deciding whether new rules on trade facilitation should be adopted in WTO

Background

There is no agreed definition of the term 'trade facilitation'. Broadly speaking, however, the term is used to denote work on the simplification and harmonisation of international trade procedures including 'activities, practices, formalities and processing of movement of goods in international trade'.

The clearance of imported goods through ports and customs in a large number of developing countries can take an inordinately long time. In most of the developed countries, imported goods are cleared by customs in less than two days after their arrival in the country. The situation is entirely different in the case of developing countries, the average time for Asia Pacific countries being five days, Latin America and Caribbean nine days and Africa ten days. Importers in landlocked countries suffer most in this respect as it takes 20 days or more for the goods to reach their customs ports after their arrival at the ports of transit countries.

It is estimated that import costs can increase by as much as 10 to 15 per cent as a result of these clearance delays. Where imported products are used as an input in further production, clearance delays often lead to increased costs of the final products. The rise in processing costs makes it difficult for processing firms to market their products in foreign markets.

Based on these considerations some of the developed countries were able to secure inclusion of the subject for study and analysis in the work programme of WTO at the Singapore meeting. They argued that work in WTO in the area of trade facilitation could result in a win–win situation for both developed and developing countries. Importers in developing countries would benefit from the reduced clearance time resulting from new rules. Exporting firms, both in the developed and developing countries, unable to take full advantage of the reduction in tariffs made by developing countries in trade negotiations as the advantage is offset by the cost of delays, would also benefit from the adoption of such rules.

Reluctance of developing countries

Given the benefits that were expected to occur as a result of the adoption of uniform trade facilitation procedures, the question that arises is why developing countries were reluctant to agree to the negotiations for the development of new rules in this area in WTO.

Policy-makers in these countries recognised the urgent need, both at national and international levels, to simplify and improve the procedures adopted by them for the clearance of goods, with a view to reducing the clearance time. However they considered that at international level the work should be carried out in international organisations with expertise in the development of standards in this area that could be adopted at national level, like the World Customs Organization and UN Centre for Trade Facilitation and Economic Business. Their main objection was to WTO getting involved in substantive work in developing rules in this area. Many of them expressed doubts as to whether it would be possible to develop at international level, a harmonised set of rules for application by all countries, as there were wide differences in the procedures and practices followed by the customs officials in developed countries and those followed in developing countries. However, despite the continued opposition of developing countries, this subject, together with the three other new subjects, found a place in the Declaration adopted in 2001 launching the Doha Round of negotiations; the work on study and analysis would continue and the decision on negotiations for rules making was deferred to the next Ministerial meeting two years later.

Workshop on trade facilitation

In order to facilitate further examination at national level and to enable the governments of developing countries to decide on the approach they could adopt, the Geneva

Group organised a workshop on trade facilitation in Montreux (26–28 September 2002). Ambassadors and officials from Geneva-based missions of the Commonwealth developing countries attended along with customs experts from seven countries – Barbados, Ghana, Jamaica, Kenya, Malaysia, Sri Lanka and Uganda. Representatives from WTO, WCO and UNCTAD with responsibility for work in this area also participated in the discussions. The experts attending the meeting were required to prepare case studies on the practices followed by them in the clearance of goods and the feasibility of applying the various innovative methods that were being suggested for the adoption by all countries in the discussions that were taking place in WTO.

The Adviser laid the basis for the workshop discussions in a paper on the theory and practice of regional and international harmonisation of rules in relation to trade facilitation (Rege 2002). The paper pointed out that both theory and practice of harmonisation of rules on an international level assume a degree of coherence and similarity in the basic rules followed by countries participating in the negotiations for development of common harmonised set of rules for application by the participating countries. Moreover the theory of harmonisation recognises that where the differences in the domestic regulations of countries are 'legitimate and justifiable' and reflect the fundamental differences prevailing in the various participating countries, the case of the harmonisation of rules on multilateral basis might be weak or premature.

The paper pointed to the wide differences in the practices followed by developing and developed countries in the clearance of goods. These differences were the result of wide disparities in the levels of customs duties imposed by developed and developing countries and in the share of customs duties in the total revenue of these two groups of countries.

Broadly speaking, in the case of developed countries the level of customs duties has gradually declined over the years and the average level of tariffs of all these countries as a group is around 4 per cent. The importance of customs duties as a source of revenue has also declined in most developed countries to about 3 per cent or so of total revenue.

This contrasts with the situation prevailing in most of the developing countries. The average level of tariffs applicable to imports of agricultural and industrial products is around 12.5 per cent for this group. This average conceals the differences in the tariff levels among countries; in some of the high tariff countries the average rates reach 30–40 per cent. The share of customs duties in total revenue is also high. In a number of these countries, customs duties contribute roughly 25–30 per cent of the total revenue. In some countries, particularly those that are least developed, the share is higher than this average.

These disparities, both in the level of duties applied to imported products and in the share of custom duties in total revenue, influence differently the approach of the cus-

toms administrations towards their role and functions, and the behavioural patterns of the importing industries and traders.

In the case of developed countries, as a large portion of imports entered duty free and the level of duties applicable to other products was low, there was no incentive for traders to deliberately undervalue the goods they import, in order to reduce the incidence of duties or to engage in other customs-related fraudulent practices. The procedures adopted for clearance of goods were therefore based on the assumption that, barring a few exceptions, it would be possible to rely on the statements made in the declarations submitted by the importers. As the import duties constitute only a small or negligible proportion of the total revenue, the governments were willing to allow customs administrations to adopt procedures that allow quick clearance of goods, even though this may result in a few cases where the full revenue due is not collected.

By contrast, high rates of duties in developing countries provided an incentive to traders to reduce their incidence by resorting to undervaluation of imported goods. The practice of under valuation of goods was therefore widely prevalent in these countries. The relatively high rates of duties also encouraged fraudulent practices like smuggling and importation of sub-standard goods or goods that were barred from being sold in the markets of exporting countries. In many of the countries, particularly in Africa, new consumer articles like clothing and other apparel, and even consumer durables were often imported by unscrupulous traders as second-hand articles, on which lower rates of duties than those levied on new articles were payable. Moreover, since customs duties constituted a high proportion of total revenue, the governments of developing countries tended to err in favour of ensuring that procedures adopted for the clearance of goods were followed and that the full revenue due was collected, even though this may in certain situations lead to delays in clearance of goods through customs.

In these circumstances the procedures adopted at national level for the movement and release of goods through customs must strike a careful balance between the perceived role and responsibilities of the customs as collector of revenue, and ensuring they do not create unnecessary barriers to trade, taking into account the behavioural pattern of the business enterprises directly or indirectly associated with imports and exports.

In the case of developed countries, mainly because of the gradual decline and almost insignificant share of customs revenue in the total revenue, the role of customs administration is increasingly viewed as a facilitator of trade rather than as an agency responsible for the collection of revenue. With relatively fewer traders engaged in customs malpractices due to the low rates of duties, it was possible to adopt procedures that are based on the principle that traders would not ordinarily resort to undesirable practices. Consequently the procedures are balanced more in favour of ensuring against undue delay than in ensuring 'revenue due is fully collected'.

On the other hand both the revenue element and the control functions of customs continue to be of importance in the procedures adopted by developing countries for

the release of goods. These countries do recognise the importance of facilitating trade but they are prevented from adopting some of the more innovative methods developed countries have in place to secure speedy clearance of goods for two reasons. First is the paramount need to ensure that all revenue due is collected. Second, systems of checks and cross checks are essential because of the tendency on the part of traders to indulge in customs malpractices and the prevalence of customs-related corruption.

There was broad support in the workshop for the points made in the paper and the need to adopt a cautious approach in further work in WTO in this area. In particular a large number of participants supported the following proposals:

- The case for developing new disciplines in WTO in the area of trade facilitation was weak. As a number of international organisations were working in the area of trade facilitation it may be more desirable for WTO to adopt an understanding or a decision in the round calling on member countries to a) participate actively where work on the development of standards that could be applied at the national level for facilitating trade is undertaken, and b) make their 'best efforts' to apply such standards developed by these organisations in their customs procedures.
- The alternative could be to adopt rules in WTO on selected issues that are non-binding and impose obligations on countries to 'make their best endeavours' to apply them at national level. If such non-binding rules are adopted, the WTO's dispute settlement mechanism should not apply to these rules; it would however, be desirable to establish a separate mechanism for consultations and for consideration of complaints by a country that another country was not making 'enough efforts' to comply with the obligations.
- The developing countries would need technical and financial assistance for modernisation and reform of their existing customs procedures. The assistance required for this purpose would be considerable, as the customs reform programmes are costly and involve sizeable expenditure of capital (e.g. development of information technology infrastructure for customs operations and equipment for scanning of imported goods).

Despite the opposition from a large number of developing countries, the developed countries, with support from some of the developing countries, continued to press their demand for taking up for negotiations for development of rules in WTO on trade facilitation. They argued that even though useful work was being done by international and other organisations in this area over the last few decades, it would be necessary for political reasons to complement their work by including a trade facilitation discipline in the legal framework of the WTO. The progress in making countries accept the standards developed by these organisations had been slow. One reason for this was the low political clout of these organisations. The WTO, on the other hand, had gained political importance in most countries. The vital role of its legal

framework has been recognised not only by governments but also by the business community and the general public in many countries. Thus, the development of a new discipline at the WTO would galvanise the political will of developing countries to undertake reforms, and of developed countries to provide the financial and technical assistance needed for these reforms by developing countries.

Deadlock and compromise

As a result of these pressures from developed countries, the question of whether trade facilitation and the other three new subjects should be taken up for negotiations for rule making was again taken up for consideration at the Ministerial meeting held in Cancun in 2003. However, strong opposition from a large number of developing countries resulted in the total failure of the Cancun Ministerial meeting.

Ultimately a compromise solution was found in consultations that were held in Geneva under the auspices of the General Council in July 2005. It was agreed that three of the four new issues – trade and investment, trade and completion policy and transparency in government procurement – would not be taken up for negotiation for rule making during the negotiations in the Round. The developing countries were persuaded to agree to the inclusion of trade facilitation in the agenda for negotiations by offers to provide, on a legally binding basis, the technical assistance that they may need for the implementation of the new rules. It was further agreed that developing countries would be bound only by those rules of the agreement to be adopted that they considered they had the technical capacity to implement at the time of their adoption. With respect to the rules for which they considered they did not have such technical capacity, they would be required to apply the relevant rules on binding basis, only after they had been able to develop the required technical capacity by taking advantage of the technical assistance provided by developed countries.

The compromise solution, which has come to be known as the 'July package', further provides that the aim of the negotiations would be to adopt new rules clarifying the existing provisions in GATT 1994 that are relevant for work in the area of trade facilitation. These are:

- Article VII, which lays down rules governing the fees imposed and formalities adopted by countries in connection with importation and exportation;
- Article X, which imposes an obligation to publish the regulations applicable to the clearance of goods through customs in order to ensure transparency;
- Article V dealing with transit trade.

Assistance Provided After the Decision to Include Trade Facilitation

Handbook

After the decision was taken to include the subject of trade facilitation in the agenda for negotiations on rule making, the focus of the assistance provided under the project was shifted to helping delegations decide their position on the proposals tabled by various delegations for adoption of new rules. The Adviser prepared a number of papers on these proposals, which were discussed in a number of expert-level and Ambassador-level meetings of the Group (Rege and Kataric 2005; Rege 2006). In view of the interest shown the meetings at expert level were opened to participation by delegations from all developing countries. As a result a large number of developing countries that were not members of the CDC Group participated actively in the discussions in the expert level meetings. The various papers prepared by the Adviser were consolidated in the *Trade Facilitation: A Handbook for Trade Negotiators* (Rege and Kataric 2007).

The draft of the handbook was discussed and reviewed at a briefing session in Geneva on 21 July 2006. In order to provide for wider participation of developing countries, it was arranged by the Commonwealth Secretariat in co-operation with the ACP Geneva office and AITIC. Ambassadors and officials from the missions who had taken an active interest in the work acted as panel members and commented on the issues raised in the draft of the handbook. The draft was reviewed in the light of these comments and views, and subsequently published by the Commonwealth Secretariat (Rege and Kataric 2007).

The handbook has been well received not only by those who are involved in the negotiations but also by the general public and academic institutions. It addresses the institutional framework that may have to be adopted to ensure that developing countries are not required to adopt rules for which they have no technical capacity to apply and the developed countries abide by their commitment to provide technical assistance to build up capacities for applying such rules. The handbook includes the issues that would need further consideration in relation to the specific rules that would be included in the Agreement. Following is an overview of the main points of the handbook's proposed institutional framework:

Adoption of an appropriate scheduling technique

In order to ensure that developing countries are not required to accept obligations for which they do not have the technical capacities to implement, the handbook suggested the application of the 'technique' used for the scheduling of commitments assumed by countries under the General Agreement on Trade in Services (GATS). Under this technique a country taking a binding obligation or commitment to liberalise, can

specify in its schedule the conditions to which the obligations that it is assuming is subject. The flexibility to apply such a scheduling technique should be available only to developing countries. The developed countries would be expected to abide by all of the obligations of the proposed Agreement on Trade Facilitation from the day of its coming into force.

Each of the developing countries would have a schedule of commitment listing all of the rules included in the Agreement. For each of these listed rules the countries would be expected to indicate in the schedules whether they: commit to apply the rule on a binding basis; undertake to apply the rule on a binding basis after the expiry of the transitional period; or make the application of the rule conditional on the provision of technical assistance and indicate the type and the nature of the assistance required.

It was further suggested that there should be periodic reviews of the progress made in acceptance of obligations on a binding basis, particularly of those rules where it was indicated that the acceptance of the obligation was dependent on the technical assistance being provided for building of the necessary capacities. Such reviews could be undertaken in the Committee on Trade Facilitation, which would be established under the Agreement. The procedures adopted by the Committee for undertaking such reviews should provide that the responsibility for determining whether a developing or least-developed country has acquired the necessary capacity for the implementation of a particular rule as a result of the technical assistance that it had received, should primarily rest with the country receiving such assistance.

Establishment of a separate standby fund

To ensure that developed countries abide by the binding commitments they have undertaken to provide technical assistance where necessary to build technical capacities for the application of the rules of the Agreement, it was suggested that a separate 'standby' fund might have to be established in the area of trade facilitation. This proposal was based on recommendations on 'Aid for Trade' made by Noble Peace Prize Laureate, the economist Joseph E Stiglitz and his associate Andrew Charlton (2006). They had recommended the establishment of a special facility consisting of separate dedicated funds to provide aid for trade, with the aim of ensuring transparency and facilitating assessment of how far developed countries were adhering to their commitments to provide assistance. Box 15 lists some of the considerations in establishing such a fund.

Box 15: Trade Facilitation Fund

Issues to consider in establishing the Fund:

- The initial size would have to be negotiated by taking into account the approximate assessment of needs being made by the World Bank, WCO and other organisations.
- It should be managed by an inter-agency committee. In determining the management structure of the fund, ways to avoid the problems and difficulties in management by interagency committees would need careful consideration.
- In order to ensure that the programme is recipient-driven and focuses on providing assistance that is based on need, the management structure should provide for the establishment of an Advisory Board with balanced representation of both donor and recipient countries. At least half of the members appointed to the Board should have the background and experience of working in customs administration. The agencies responsible for the management of the Fund (WTO, WCO, ITC, UNCTAD, UNECE, World Bank and the IMF) should be ex-officio members of the Advisory Board. Due consideration should also be given to how regional organisations that are actively engaged in providing assistance in this area, such as the Asia–Pacific Economic Cooperation (APEC), and other international organisations such as the Commonwealth Secretariat are associated with the work of the Advisory Board.
- Developed countries and international financial institutions may be unwilling to change fully their existing practices for providing assistance in the area of trade facilitation. The procedures should therefore provide that, while pledging resources, they should indicate clearly the amount of resources allocated to providing assistance on a bilateral basis, and as a direct contribution to the Fund.
- The procedures should provide that at least [x] per cent of the resources be earmarked for disbursement through the Fund (the exact percentage could be agreed in the negotiations). Such a requirement was considered necessary because a) donor countries often allocate their aid to those countries with which they have close historical ties while giving low priority to other countries, and b) when aid-giving countries do not have friendly political relations with a particular country, that country is often excluded by law from the list of countries to which aid can be given. However, if aid-giving countries were required to contribute some proportion of their resources to the Fund, the disbursement of aid on an equitable basis could be greatly facilitated.

The purpose of the resources

The resources from the Fund should be available to provide assistance for the preparation of diagnostic studies to identify needs and the preparation of project documents. They should also be available for the implementation of capacity-building projects, including for the application of the rules of GATT Articles V, VIII and X and the new rules that may be adopted under the proposed Agreement on Trade Facilitation, and for implementation of the commitments that may be assumed by the countries during the course of the negotiations for the adoption of the Agreement.

Experience showed that some assistance-receiving countries had not been able to maintain the reform programme after the technical assistance project was completed

because of their inability to meet the necessary recurring expenditure from their own budgets. To avoid such a situation, the provision of assistance from the Fund should be made conditional on the recipient country agreeing to contribute a certain percentage of the expenditure on a project (say 5 per cent in the case of least-developed countries and 10 per cent in the case of others), and undertaking to meet the recurring costs afterwards from its own budgets. The imposition of such conditions may also result in the creation of a feeling of 'ownership' of the reform programme by the government of the recipient country.

Mentoring and twinning

To ensure transparency in the assistance given, and to provide a greater degree of choice in deciding on the agencies or donor countries from which a country could obtain assistance, it may be necessary to establish a complementary mechanism under the umbrella of the Trade Facilitation Fund. The purpose of such a mechanism would be to facilitate the exchange of information between the country needing the assistance and the country or agency with the necessary technical competence to provide such assistance. Such a mechanism could take the form of a 'mentoring and twinning' arrangement.

Under such an arrangement the WTO could play the role of co-ordinator and catalyst. It could bring together 'mentor' countries capable of providing the advice and 'twin' them with countries needing the assistance. The actual areas of assistance, and the accompanying terms and conditions, should be left to be negotiated on a bilateral (or plural-lateral) basis between the interested mentor country and the country or countries wishing to obtain the assistance. The advantages would be as follows:

- Countries may have the opportunity to select the mentor country they consider best equipped to provide the type of assistance they need.
- Countries may have the opportunity to seek assistance from other developing countries if they feel that the assistance provided by them is likely to be more responsive to their needs because of the similarities in their trading environments.
- Because the assistance would be obtained through bilateral agreements, the probability of the mentoring-and-twinning countries developing a long term and continuing relationship of mutual co-operation becomes much higher. This would be of great help should problems arise in the period following the completion of the assistance project.

The use of a mentoring-and-twinning arrangement for providing assistance to developing countries is not new. It has been tested with some success in the last few years by international standard-setting bodies, particularly by the International Organization for Standardization and the Codex Alimentarius Commission in certain areas.

One of the main advantages of the mentoring and twinning mechanism is that it could provide opportunities for co-operation on a South–South basis in providing technical assistance. Because of the similarities in the environment and practices among developing countries, there is an increasing recognition that in certain trade-related areas, the assistance provided by experts or consulting firms from developing countries to other developing countries is likely to be more responsive to their needs than if such assistance were to be provided by developed countries. In this context, participants at the 'Meeting and Influencing Standards Workshop', organised jointly by the Commonwealth Secretariat and the International Trade Centre in 2005, were nearly unanimous in believing that, given the similarity of processes and methods used in production, and consequently of product standards used, it might be desirable for developing countries to seek technical assistance from other developing countries for participation in the work of international standards-setting bodies on the formulation of standards.

The view was also reflected in relation to customs matters. The Commonwealth Secretariat Workshop on Trade Facilitation to which reference was made earlier, recommended that the potential benefits of South–South co-operation in providing assistance should be examined further. Case studies about the measures taken for the reform of customs procedures, which were undertaken in the preparatory work for the workshop, indicated that some Commonwealth developing countries possessed the technical capacity to provide assistance to other developing countries. These included India, Malaysia and Singapore in Asia, and Barbados in the Caribbean.

Forum on 'trilateral' development co-operation

One of the problems encountered by 'mentor' developing countries is that they are sometimes unable to meet the entire costs of providing assistance to other developing and least-developed countries from the limited resources earmarked for such purposes by their governments. A forum organised jointly by the OECD Development Committee and UNDP in February 2005, recommended that one way of making this possible is for the international community to enter into 'trilateral development co-operation arrangements'. Under such arrangements an international financial institution or organisation, or a bilateral donor agency, would agree to provide the financial resources required to pay for a developing country's experts or consultancy firms to provide assistance to other developing and least-developed countries.

The effectiveness of such assistance provided by mentor developing countries was evidenced in the Workshop on the Agreement on Customs Valuation held in May 2002 in Mumbai, India. The workshop was organised by the Commonwealth Secretariat under the Geneva-based project in co-operation with the WTO for senior customs officials from the Commonwealth developing countries in Asia, Africa and the Caribbean. The Commonwealth Secretariat provided the funds for the workshop

and the Indian customs authorities were responsible for providing technical support, including 'on-the-spot training' at the customs port. According to an evaluation of the workshop the participating officials found the training very useful mainly because of similarities in the trading realities between India and the other participating countries in the practices used by traders, for instance in the area of undervaluation of goods. Participants assessed that the methods used by the Indian authorities to deal with such malpractices would be appropriate for use in their countries.

The establishment of arrangements for mentoring and twinning at the WTO under the umbrella of the Trade Facilitation Committee could help in the negotiation of such trilateral arrangements and thus enable the international community to make the best use of available expertise in the field of trade facilitation.

Issues arising in proposals for adoption of new rules

The major portion of the analysis in *Trade Facilitation: A Handbook for Trade Negotiators* explains the issues-based questions underlying the proposals for clarification of the GATT rules relating to: fees and charges; publication of rules and procedures; rules governing techniques and modalities used in the clearance of goods through customs; and transit trade. These proposals had been tabled by participants in the negotiations and which would have to be examined further at the national level. An overview of the points made in the handbook in relation to some of these issues-based questions is provided below.

Fees and charges

How should the rules of Article VIII stipulating that the fees and charges levied in connection with importation and exportation should not exceed 'the cost of services rendered in connection with importation and exportation' be clarified? Should the provisions in the Agreement on Trade Facilitation recognise that in calculating such costs, the countries may take into account not only recurring but also non-recurring or capital costs?

The question of how the rules of Article VIII should be clarified was discussed and debated during the revision of the WCO Kyoto Convention in 1999. However, no standard could be agreed due to the divergence of views among countries on how the cost of services for determining the fees should be calculated, among other issues.

Computerisation of the customs services is a pre-condition for the adoption of a customs reform programme based on methods such as risk assessment, establishment of single windows and designation of authorised importers. But procurement of computer equipment and establishing access to telecommunications infrastructure involves high capital outlay. Additional expenditure must also to be incurred to refurbish customs headquarters, each of the regional offices and border posts where automation components have to be installed.

UNCTAD's experiences in providing automated systems (ASYCUDA) through its technical assistance programme suggests that it may cost between half-a-million and several millions of dollars and take about two years, depending on the level of computerisation existing in the country. While the initial costs are covered under the technical assistance programmes, the customs administration will have to bear the costs of replacement and keeping the system up to date. Moreover, with the fast pace of technological developments the systems become obsolete in relatively short periods.

Customs administrations introducing computerisation under technical assistance programme would therefore have to ensure that the required resources are available to replace and upgrade equipment and to train staff. This might require collecting additional fees, such as a customs reform fee, from importers and exporters.

Any clarification of the rules of Article VIII that the fee charged should not exceed the cost of services rendered, would therefore have to provide that in determining the level of fees the customs administrations could take into account not only recurring costs (maintenance of equipment, rent for office premises, etc.) but also non-recurring or capital costs (equipment, material, utilities).

In this context, the proposal made by one of the delegations suggesting that both the recurring and non-recurring costs should be included in the calculation of costs, could provide a useful basis for further examination. It may also be necessary to consider whether the costs should include other elements, such as expenditure on the training and salaries of additional staff that may have to be employed as a result of the adoption of the reform programme.

To ensure that the fees or charges calculated on such a basis do not impose a heavy additional burden on importers and exporters, the recovery of direct costs must be spread over a 'reasonable' period of time with the country concerned left to determine how long this should be.

The rules should also recognise that any fee aimed at recovering the non-recurring costs of the reform programme as well as meeting the recurring expenditure on its implementation should not be considered as constituting 'direct protection of the domestic industry' or as 'taxation of imports for fiscal purposes' provided that: a) the fees levied did not exceed the actual expenditure incurred on meeting non-recurring and recurring costs; and b) in the case of non-recurring costs, the recovery of such costs was spread over a reasonable period of time.

Should the Agreement provide that fees and charges should be collected only on a specific basis and prohibit their collection on an ad valorem basis?

The EU and some other countries have suggested that fees should be collected only on a specific basis and not on an ad valorem basis. It is, however, important to note that the existing GATT rules are silent on which basis the fees should be collected.

From the readily available information, it would appear that a large number of developing countries collect such fees on an ad valorem basis.

The view that fees should not be collected on ad valorem basis is greatly influenced by the findings of the Panel in the 1987 'United States Customs User Fee' case. The Panel held that the ad valorem duty was not consistent with the provisions of Article VIII as it resulted in the collection of fees on high value import transactions that were higher than the cost of services rendered to importers (WTO 2007).

There is considerable debate on whether the Panel had erred in taking such a rigid view in envisaging prohibition of the ad valorem method in the collection of fees. Some commentators consider that even though the ad valorem method could result in higher fees being paid where the transaction value was higher than was the case when it was lower, it may be possible to correct this by providing for 'caps or maximum limits' on the amount of fees to be paid.

In determining the approach that could be taken on the proposal in the legal text submitted by the EU, it would also be necessary to take into account the fact that a large number of developing countries levy fees on an ad valorem basis. These countries would be required to change over from ad valorem to specific duties. The specific duties or fees could also in practice produce inequitable results as they impose a higher burden on importers with lower transaction value as compared to those with higher transaction value. For instance, a uniform specific fee of US$5 on a transaction of US$1,000 would have a higher cost burden than the same fee would have on a transaction of US$100,000. In this situation, it would appear desirable to leave the decision on how fees should be collected – whether on an ad valorem or specific basis – to be determined by the country concerned.

Not all additional duties and charges that developing countries impose on imported or exported goods would meet the criteria Article VIII lays down for determining fees. The strengthened rules that would become applicable after the Agreement on Trade Facilitation becomes operational may require countries to stop imposing duties and charges that do not qualify as fees. Since these duties may constitute an important source of revenue, what could be done to ensure that countries do not have to terminate them immediately after the Agreement becomes operational?

As noted earlier Article VIII permits countries to collect from importers and exporters fees to cover the cost of services rendered by the customs administration or any other government department 'in connection with importation and exportation'. The Article clarifies that these provisions would ordinarily permit customs or other government departments to justify imposition of fees on importers and exporters for the following types of services:

- Documentation used in customs clearance;
- Services rendered in undertaking physical inspections and post audits and scrutinising invoices;

- Analysis and inspection of imported or exported products;
- Quarantine, sanitation and fumigation;
- Licensing of imports and exports.

The available information on duties and charges that are levied on imported and exported products (in addition to tariffs and export duties) by some of the developing countries is summarised in an Annex to this Chapter. There could be certain doubts as to whether all of the taxes and charges listed in the Annex could be considered as 'fees'. Prima facie it would appear only those taxes and charges listed under headings 'fees related to imports and exportation' and 'import licensing' could be considered from a legal point of view to be consistent with the rules relating to 'fees' prescribed by GATT Article VIII.

Other fiscal measures listed may not meet the criteria prescribed by Article VIII for determination of whether a particular fiscal measure constitutes a fee or duty. Such measures could include, for example, those falling under the following headings:

- Customs surcharge for infrastructure developments or other purposes;
- Taxes on sensitive products;
- Tax on transport facilities;
- Community levies on imports from countries that do not belong to regional preferential arrangements; or,
- Taxes specifically aimed at raising financial resources for the development of ports or development of certain sectors of production.

So far the GATT consistency on these taxes has not been raised in WTO discussions on the industrial sector, as most of the countries applying a large proportion of tariffs were not against further increases. In the agricultural sector these countries have bound their tariffs, but the bindings given are at rates that are higher than their applied rates. From the legal point of view these countries were therefore not prevented from levying, in addition to tariffs, additional duties such as customs surcharge or community levies on products on which duties were not bound. They could also levy such duties on products on which tariffs were bound at higher levels, so long as the total amount of duties collected (applied tariffs plus other duties) did not exceed the higher bound rates.

This situation is going to change in the post-Doha Round period. The Round would result in tariffs of all developing countries (both in the industrial and the agricultural sectors) being bound against further increases. The least-developed countries are not expected to reduce their tariffs but for other developing countries reductions in tariffs would be made on the basis of the bound rates agreed in the Uruguay Round. This would significantly reduce the difference that exists between applied and bound

rates. There are therefore possibilities that the imposition of the taxes and surcharges being levied could result in the total amount of duties payable on imported products being higher than the reduced post-Doha bound rates. Any such development would constitute a breach of the obligations countries have under GATT Article II:1(b) not to collect on GATT bound items tariffs (including other duties) that are higher than the level listed in their schedules.

There are two exceptions to this rule. First, fees and charges that meet the criteria laid down in Article VIII that they should not exceed 'the cost of services rendered in connection with importation or exportation'. Second, internal taxes (such as value added tax or sales tax) that are levied at an equal rate on imported and similar domestically produced products, and third, anti-dumping and countervailing duties.

It would therefore be necessary for developing countries to examine whether all of the duties, surcharges and levies imposed only on imported products, could be justified as fees. Prima facie, it would appear that many of the duties and charges listed above cannot be treated as fees as it could be considered they are being collected for services 'rendered in connection with importation and exportation'. Neither can they be treated as internal taxes, on which levies are permitted under the provisions of Article III, as they are collected only on imported products and are not imposed on like domestic products.

Countries levying these duties, charges and taxes may wish to continue to impose them in the post-Doha Round period in order to collect revenue required to meet planned expenditures. It may be necessary therefore to consider, either in the negotiations on trade facilitation or elsewhere, whether any legal cover could be found to permit these countries to continue to collect them. It would appear that the legal system provides them with two options.

First, it is envisaged that developing countries could request transitional periods to prepare for the application of new rules relating to fees. Countries applying duties or charges on imported products that cannot be justified as fees could use the transitional period to seek alternative sources of revenue for the planned expenditures for which the levies were put in place. But this approach is limited given the extremely narrow base available for raising taxes in developing countries; in practice the scope for raising lost revenue from alternative sources, such as increasing or broadening taxes on consumption or taxes on income, may be restricted.

The second option would be to consider whether the existing rules relating to scheduling of bindings could be clarified to permit developing countries to list in their schedules, duties and charges they collect on imported goods that cannot be treated as 'fees' or 'internal taxes'. The GATT schedules contain a column for the listing of 'other duties and charges' that are levied only on imports.

The legal situation in relation to duties and charges that can be listed in this column of the schedule is complex however. GATT Article II: 1(b) prohibits countries from levying on products listed in the schedule any 'other duties and charges' that would result in importers having to pay duties that are in excess of the bound rate of tariffs. But it also exempt from the application of this rule, all taxes and other duties countries levied at the time when the GATT came into existence – although countries were not expected to increase them beyond the level applicable at that time. As the Article did not impose any obligation to notify, there has been no transparency at international level in relation to these duties and charges.

In order to provide this transparency, it was decided in the Uruguay Round that countries applying pre-GATT duties and charges on bound items must list them in their schedules of concessions by adopting an Understanding on Interpretation of GATT Article II:1(b). Following these procedures, a number of countries included such duties in their schedules.

But it would appear that some of the developing countries took advantage of these procedures and also included in their Uruguay Round schedules duties and charges introduced post-GATT. Developing countries that subsequently became GATT members appear to have included in their schedules, other duties and charges they were levying on imported products on the date of their accession. The question of compatibility of these actions with the provision of GATT Article II and the subsequent Uruguay Round Decision was raised by some of the developed countries during the discussions on verification of the commitments included in the schedules. However, the matter was not pursued.

It would therefore be necessary for countries to examine on an urgent basis whether all of the fiscal measures termed as fees and collected at the border, would meet the criteria in the Agreement for the determination of fees, and where they do not meet the criteria, whether their continued application is necessary. Based on such a study, it would be necessary for countries to raise for discussions in the Negotiating Group, the question of finding an appropriate solution that could give legal cover for continued application of fees considered necessary for raising revenue required for development.

Should the Agreement impose an obligation on countries to notify the WTO about fees and charges they are levying in connection with importation and exportation?

Whether the rules should impose an obligation on countries to notify fees to the WTO is a question that may need careful consideration. The main purpose of requiring notification is to ensure transparency. As countries start publishing information regarding customs laws and regulations on the Internet, interested traders and the governments of other countries will have easy access to such information. An obligation to notify the WTO could impose an unnecessary and avoidable additional administrative burden on the governments of member countries.

Publication obligations

Should there be an obligation on countries to review periodically and at regular intervals customs procedures and practices?

Keeping the procedures adopted for the implementation of rules (whether they apply in the area of customs or other areas) constantly under review is a management function and an important element in good governance. Thus, it should be left to each country to decide whether there is a need for review and if so, when it should be undertaken. International rules requiring countries to undertake reviews on a periodical basis could be counterproductive and add unnecessary administrative burdens and costs.

In this context it is important to note that the provisions of Article VIII (paragraph 2) provides that counties should review the procedures, if requested to do so by a country that considers the procedures being applied in certain areas are causing barriers to its trade. Against this background, it may be desirable to consider whether the new rules, while encouraging countries to keep under review their customs procedures, should also call on them to review said procedures if requested by other countries.

Should the Agreement impose an obligation to consult other countries and to take into account their comments before adopting new laws or regulations or amending the existing laws and regulations?

There is increasing recognition on the part of most governments, including those of developing countries, of the need to consult all interested stakeholders when formulating new laws and regulations, or when reviewing existing ones. However, as one of the proposals tabled earlier recognises, it would be necessary to leave it to the judgement of the concerned country about how such consultations should be arranged, and whether any views expressed by traders or other stakeholders should be accepted or not.

The proposals that are under consideration, however, envisage that a right to comment on the draft of new legislation should also be available to the governments of other countries. This idea of giving the right to comment to the governments of other countries appears to have been borrowed from the Agreement on Technical Barriers to Trade (TBT) and Agreement on Sanitary and Phytosanitary Measures (SPS). The agreements require countries to provide an opportunity to other countries to comment on the draft TBT regulations and SPS Measures in all cases where they are not based on international standards. It is important to note that the obligation to provide foreign governments with an opportunity to comment does not apply where the regulation or measure adopted is based on international standards.

Any examination of whether this concept should be applied while adopting rules relating to customs procedures will have to take into account that the basic condition

applicable to the adoption of technical regulations and SPS measures – i.e. that they should ordinarily be based on international standards – does not apply to customs-related laws and regulations. These are adopted by governments after taking into account the views and needs of their customs authorities and, where considered desirable and appropriate, the views of the industry, trade associations and other stakeholders. In other words, they are tailored to the trade situation prevailing in the country, and aim to strike a balance between the need for controls on import and export transactions (given the prevalence of malpractices such as the undervaluation of goods and related corruption) and the desire of the business community to keep such controls to a minimum in order to facilitate trade. Consequently, the approach adopted and the detailed provisions included in the laws and regulations may vary from country to country.

A number of countries appear to be apprehensive about giving the right to other member countries to comment on the drafts of their domestic laws and regulations. It is feared that such a right may lead foreign governments to press that the country wishing to adopt new legislations should follow the procedures or practices they (the foreign governments) are following. Any such rule may therefore create unnecessary tensions, particularly if a country is put under obligation to justify the non-acceptance of the comments of other governments while adopting the legislation or regulation. In the case of laws, such a requirement may be considered as unnecessary interference by a foreign government in the work of a national parliament.

It is relevant to note in this context, that taking into account concerns expressed by delegations on the initial formulation, the revised text limits the right of foreign governments to comment only on the 'policy objectives' of the proposed rules and regulations. The proposal by China, Hong Kong and some other countries states that 'members shall provide information of their policy objectives pursued and allow a reasonable period for interested parties to submit comments'.

Would it be feasible to apply the concept 'that formalities adopted are not more trade restrictive than necessary to achieve legitimate objectives' to the rules or procedures that customs adopt in connection with importation and exportation?

The procedures and practices adopted by customs and other government departments in relation to imported and exported goods, have to be tailored to the trading environment, prevalence of corruption and other constraints confronting the authorities in applying them. The methods used and rigour with which rules are applied would be greatly different in countries where the undervaluation or smuggling is widely prevalent and corruption is rampant, than countries where traders do not engage in such practices and customs have a reputation for integrity.

In considering this issue it has to be borne in mind that under the present WTO law this concept is applied to the measures permitted under the provisions providing

exceptions to the main rules which it lays down. Thus for measures taken under general exceptions provided under Article XX, panels have developed the practice of examining whether deviation from the rule was 'necessary', and if it was necessary to achieve the legitimate objectives, whether an alternative measure that was less trade restrictive could have been adopted. Similar provisions are to be found in the TBT and SPS Agreements. These provisions, however, apply in cases where the governmental authorities have found they have to adopt technical regulations or sanitary and phytosanitary measures different to the relevant international standard they are under obligation to apply.

The question of whether such a concept should apply to the procedures applied in the administration of national laws and regulations needs careful examination. In the case of procedures governing imports and exports, while the customs authorities could be required to follow the norms laid down by rules contained in an international agreement, the decision on the way and the rigour with which they should be applied has to be left to the national administration. In countries with widespread corruption, the authorities may wish to introduce procedures for 'checks and cross checks' that are more rigorous than those applied in countries where such practices do not exist.

Consequently, if a complaint is made that practices used by a country are more trade restrictive than necessary, to attain the legitimate objectives the WTO panels would have to make an assessment on the basis of the 'facts' relating to the situation prevailing in the country. The WTO dispute settlement bodies are not presently equipped to undertake such an examination of the facts and have in general preferred to give 'deference' to the judgement by the national authorities in such cases.

Apprehension that panels may not be able to make objective assessments on the basis of facts resulted in the addition of Article 17.8(c) in the Agreement on Anti-dumping Practices. The Article imposes an obligation on the panel to show deference to the judgement made by the national investigating authorities on issues such as increased imports causing injury to the domestic industry, even though it may have arrived at a different assessment on the basis of the facts before it.

This Article in particular states that 'in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. If the establishment of the facts was objective and the evaluation was unbiased, the evaluation by the national authorities should not be overturned.'

Rules governing techniques and methods used by customs

What obligation should the Agreement provide in relation to the 'techniques and methods' customs would be required to apply (such as application of risk management techniques, appointment of authorised persons), taking into account that the World Customs Organization,

UN Centre for Trade Facilitation and Economic Business and some other organisations have adopted international standards, recommendations and guidelines on all these measures?

The handbook points out that measures on which it is proposed to adopt new rules under the proposed Agreement can be broadly categorised into two groups: those that raise trade policy issues and those that do not. In the first category would fall measures such as publication of custom rules and regulations, level of fees and charges, and establishment of procedures for appeals. In the second category would fall measures relating to techniques and methods applied in the clearance of goods through customs. These include methods that customs are encouraged to use such as:

- Adoption of risk assessment and management techniques;
- Appointment of authorised persons;
- Adoption of procedures for pre-clearance processing;
- Post clearance audit; and,
- Establishment of single windows.

On all of these measures, the international standards, recommendations and guidelines adopted by the WCO, UN/CEFACT and others are being applied by almost all developed countries and by some of the developing countries.

Against this background, the handbook suggested that the most appropriate course would be to adopt the approach of the present WTO legal system that WTO should not engage in writing standards in technical areas and leave such work to the organisations with the expertise and technical capacity to develop such standards. Therefore the TBT and SPS agreements impose an obligation on countries to use in their technical regulations and sanitary and phytosanitary measures, the standards developed by the international standard-setting bodies with the necessary competence and expertise (such as ISO, IEEC and Codex Alimentarius Commission).

However under two agreements the obligation to adopt and apply the standards developed by the international standardisation bodies is open-ended; it applies to all existing standards as well as those that may be adopted in the future. In the case of the proposed Agreement on Trade Facilitation it would be more desirable and appropriate to limit the obligation to apply those standards developed by WCO, UN/CEFACT and other organisations, which have been found suitable for adoption by all countries after discussions in the WTO Negotiating Group.

There was broad support for the adoption of this approach in formulating new rules in the area of trade facilitation in the July 2006 workshop arranged under the project by the Commonwealth Secretariat in co-operation with AITIC and the Geneva ACP Office to discuss the handbook's recommendations. A number of participants considered that it would not be desirable for WTO to adopt new rules, paraphrasing the

language used in the standards developed by other international organisations for the following reasons:

- The rules adopted in WTO are 'prescriptive'. Moreover once adopted they cannot ordinarily be changed. On the other hand standards adopted by WCO and other international organisations are often modified and adapted to take into account technological developments that have taken place and experience of their application.
- The standards adopted by these organisations are complemented by guidelines for their application. They are thus user friendly.
- These standards have been developed after negotiations involving the participation of both customs experts and the trading and business community. The WTO rules do not permit participation by the business community. Moreover in the current negotiations in WTO, most of the developing countries are being represented by trade diplomats without any assistance from customs experts.

It must be admitted, however reluctantly, that even though such concerns were being expressed by delegations of some of developing countries in informal discussions, these delegations had not raised them so far in the actual negotiations that are taking place in the Negotiating Group on Trade Facilitation. This situation could be attributed to two factors.

First, the major players, particularly the EU and the US, had made it clear for political and other reasons they were reluctant to adopt the approach taken under the TBT and SPS agreements. They preferred to see that complimentary rules covering these standards were incorporated in the Agreement, even on measures where WCO and other organisations had adopted standards.

Second, even though WCO and other organisations had initially suggested that the obligations under the Agreement should require countries to use standards developed by them, they gradually started showing willingness to go along with the above approach. This was the only practical way in which they could see that the standards developed by them are applied on universal basis, taking into account the policy approach adopted by major players. They also considered that this approach could bring them benefits as with the coming into existence of the Agreement in WTO, increased resources would be made available to them for providing technical assistance to developing countries in the area of trade facilitation.

The result has been that on all the measures on which international standards already exist, the texts that are under consideration aim at imposing a binding obligation to apply the rules. A complementary provision states that in applying these rules, the countries should endeavour to put in place, where possible, standards developed by the relevant international organisations.

It would be necessary for customs administrations in developing countries to examine how far they would be able to accept binding obligations to apply the rules governing methods and techniques that could be adopted in such areas as 'risk management techniques', 'designation of authorised persons' or 'post audit'. One of the objectives of such an examination would be to ensure that the new rules do not negate the 'flexibility' they may need to make suitable adjustments in applying them given the trading realities and the environment prevailing in the country (e.g. prevalence of undervaluation of imported goods, capacity of customs to control smuggling and other such practices, and the prevalence of corruption among customs officials).

Further since from the legal point of view the word 'shall' imposes a more binding obligation than the word 'should', it may be necessary to consider whether to use the word 'should' in relation to certain provisions.

It would be also necessary to examine whether differences in language used in the standards developed by WCO and other international organisations and the legal texts under consideration in WTO, would pose problems in implementation, as the Agreement would impose obligations on countries to rely on these international standards in applying the rules.

Rules that impose a binding obligation give a right to countries to invoke WTO dispute settlement procedures in cases where they consider that a country is not complying in accordance with the terms and conditions laid down. Once these procedures are invoked a Panel, consisting of three to five legal and trade policy experts, examines the case. If one of the parties to the dispute appeals against the decision of the Panel, the case may go to the Appellate Body. The question that would need closer examination is whether the type of differences or dispute that may arise in relation to the application of rules of the Agreement are amendable to settlement under the WTO dispute settlement procedures (particularly those rules relating to issues such as application of risk management techniques, or appointment of authorised persons or to the techniques and methods customs should follow).

Should the WTO dispute settlement procedures be applicable for the settlement of differences and disputes that may arise in the application of rules of the Agreement, particularly those relating to techniques and methods which customs would be required to apply in the clearance of goods? If not, should the Agreement provide special procedures for consultations on differences among member countries?

In considering this question, it is necessary to note that WTO law leaves it to negotiators to decide on whether or not its dispute settlement procedures should apply to the disputes that may arise in the application of the rules of any new Agreement they negotiate. The Understanding on Dispute Settlement, which lays down rules and procedures governing settlement of disputes brought to WTO, allows that its provisions shall apply 'only to multilateral and plurilateral agreements listed in the

Appendix'. The countries negotiating the Agreement have therefore to decide whether or not the WTO dispute settlement procedures should apply and if they decide on applying them, get the Agreement included in the Appendix to the Understanding. Alternatively, they may decide on providing in the Agreement special procedures for the settlement of disputes that may arise under its provisions.

The need to adopt special procedures for the settlement of differences or disputes in relation to at least some of the provisions of the proposed Agreement on Trade Facilitation (particularly those that deal with practices and procedures customs or other departments have to follow at a practical level in the clearance of imported or exported goods) arises because of the nature of the problems that would be brought to WTO for the settlement of disputes. In most cases the question the dispute settlement body would have to address is not whether the rule is being applied or not according to the letter, but whether its purpose and objectives are being achieved. The issues raised for settlement would be therefore not questions of law but of fact, in most cases.

In this context it is relevant to note that the new methods for clearance of goods that customs would be required to adopt (e.g. appointment of authorised persons, adoption of procedures for pre-clearance processing and post clearance audit) are based on the concept that customs must use 'risk assessment techniques' in order to facilitate trade and subject products to rigorous checking only where there is a high risk of traders flouting customs rules. The theory and practice of the 'application of risk assessment' emphasises that it is a 'management concept' (also used in other branches of economic activity such as banking and insurance) and cannot be subjected to strict legal process as ultimately how it should be applied must be left to those doing the applying and they have to be judged on the basis of performance and results.

For example, let us assume that country A has complained that country B has unjustifiably refused to grant 'authorised importer status' to an importer who imports from country A. The WTO panel finds on examination that country B, in coming to the decision not to grant authorised importer status to the particular importer, has taken into account all the of the criteria the relevant rules lay down. Country A, however, maintains that even though the rules have been followed, the decision taken by the authorities is not justified taking into account the facts of the case. As noted earlier, the WTO panels have generally confined themselves to the examination of questions of law and on facts, particularly where different assessments or judgement are possible, have chosen to show 'deference' to the judgement made by national authorities.

Taking into account this situation, the handbook suggested that it might be desirable to provide for special procedures, based on a two-track approach, for settlement of differences and disputes that may arise among countries regarding the application of the rules of the Agreement. The main responsibility for settlement of disputes shall be with the Committee on Trade Facilitation that would be established under

the Agreement. The Committee shall authorise a complaining country to invoke the WTO dispute settlement procedures, in the case of a complaint against a developed or a developing country, if after preliminary examination it has reason to believe that the country is in breach of the obligations under GATT Articles V, VIII and X, and/or under the Articles of the Agreements that deal primarily with trade policy issues.

In all other cases the primary responsibility for the settlement of disputes shall rest with the Committee on Trade Facilitation. The Committee shall for this purpose establish a standing group of experts for examination of both questions of law and facts. The group shall consist of five members, at least two of which must have expertise and experience on customs matters. The group shall, after examining both the questions of law and fact, submit its report to the Committee on Trade Facilitation. On questions of fact the Committee shall show deference to the 'decisions taken by national customs administrations' unless it finds that the evaluations made by the national authorities was biased or not based on objective examinations.

The Committee shall on the basis of such examination make appropriate recommendations and shall try to settle the dispute through conciliation. Where the Committee finds that a developing country against which a complaint was made has failed to comply with the rule due to lack of infrastructure or of technical capacity, the Committee should examine how the assistance required for this purpose could be provided and make appropriate arrangements for providing such assistance.

Should the Agreement provide rules prohibiting the use of services provided by the pre-shipment inspection companies?

Over 30 developing, least-developed and transition economies are using the services of pre-shipment inspection (PSI) companies. These companies conduct physical checks of the goods to be imported in the countries of export, and give advice on the prices of the products to be imported and on tariff classification.

Much of the evidence on the usefulness of PSI companies is anecdotal, and there is a wide gap between the views of analysts who consider such services useful and those who do not, and some who even maintain that such services should be prohibited. However, it appears that in many countries where the undervaluation of goods is widely prevalent and where it is not possible for customs to ascertain the true value of the imported goods, the use of such services seems to have resulted in the facilitation of trade, and a fuller collection of revenues due. The above considerations would have to be taken into account while examining further the proposal on the use of PSI services that has been tabled.

The practice followed in the past was to undertake inspections in the country from which the goods were to be exported prior to their shipment (hence the term 'pre-shipment inspection'). Before the Uruguay Round, many firms considered that the practices followed by PSI companies in inspecting goods for export in exporting

countries constituted barriers to trade. Thus the PSI Agreement lays down rules that PSI companies are expected to follow while assessing whether the invoice price correctly reflects the value of the goods as well as during the physical inspections undertaken in exporting countries prior to the shipment of goods.

The technological developments that have taken place in recent years are increasingly making it possible for these companies to arrange for price verification and physical inspection services in the country of import ('destination country') instead of in the exporting country. For this purpose they utilise cargo-scanning equipment, risk management databases and IT solutions, such as trade community network systems, to facilitate the implementation of the 'single window' concept. In providing such services, these companies often work in co-operation with customs authorities.

Thus, there is a gradual shift in the way services are being provided by PSI companies; instead of carrying out inspections and price verifications in the exporting country 'prior to the shipment of goods' they are now undertaking such functions in the country of importation. From a strictly legal point of view, the provisions of the WTO Pre-shipment Agreement are not applicable when such services are provided in the country of importation after the goods have arrived, even if a company that is registered as a pre-shipment inspection company provides them. The question that needs to be examined is whether it would be appropriate to deal with the pre-shipment inspection issues in the context of the ongoing negotiations on trade facilitation or whether a more desirable course would be to modify the provisions of the Agreement on Pre-shipment Inspections to take into account the changes that are occurring in the provision of such services from a 'pre-shipment' to a 'destination' basis.

Should the Agreement impose an obligation to publish the average release time of the clearance of goods through customs?

The average time taken for the clearance of goods varies from country to country depending on the prevalence of factors such as customs malpractices (e.g. the tendency on the part of importers to undervalue imported goods) and whether the imports are made in bulk by a few large firms or by numerous smaller companies. Differences in the composition of imports can also influence variations in clearance time. In countries where a high proportion of imports are in products that must conform to national sanitary and phytosanitary measures or other standards and therefore require approvals from the ministries of industry and/or health, the average time taken for the clearance of all imports may be longer than in countries where such imports constitute only a small proportion.

Experience has also shown that where countries have been able to reduce the time taken for the clearance and release of goods following the adoption of a reform programme, experience has shown they have not been able to maintain the speed of

clearance after the termination of the assistance programme due to the inability of the government to provide the required financial resources.

A number of countries therefore consider that if average times are to be published this should be done separately for different types of goods. Moreover it may be premature to give a right to traders to demand explanations for the delay in the clearance of goods, as the delays are often due to the lack of adequate staff and other similar reasons.

Transit trade

Should the definition of transit trade be broadened to cover goods that are transported not only through 'mobile means of transport' but also through fixed infrastructure such as 'pipelines'?

Under GATT Article V, the scope of transit trade is confined to goods that are transported by 'mobile means of transport' (such as vessels or ships, lorries and airplanes). The legal-based texts that have been tabled aim at broadening the scope of the term 'transit trade' to goods and services transported underground (through pipelines for products like petroleum and natural gas or underground cables) and overland (e.g. electricity and telephone).

The political and economic implications of broadening the scope of transit trade would have to be carefully considered, particularly in the light of the provisions in the Article on 'freedom of transit'. The proposals that have been tabled paraphrase the existing provisions and reaffirm that 'there shall be freedom of transit through the territory of each Member via the routes most convenient to international trade, not only for goods transported by mobile means but also through fixed infrastructure'. The nature of the obligations these proposals would impose on transit countries, particularly whether the scope of the definitions should be widened to cover goods transported through fixed infrastructure, would need careful examination.

What provisions should be included in the Agreement to facilitate further strengthening of the activities at regional and international level for harmonisation and standardisation of the transit documents and procedures and for facilitating transit trade?

Countries have attempted in the last 40 years or so to simplify documentation requirements for transit trade and to complement GATT rules by adopting international conventions and instruments and recommendations. These include Specific Annex E of the WCO's Revised Kyoto Convention, the UN TIR Convention,[1] the ATA Convention and the International Convention on the Harmonisation of Frontier Control of Goods, and the UN Layout Key for Trade Documents.

Of these, in addition to the Special Annex E of the Revised Kyoto Convention, the UN TIR Convention provides a system that could be used by transit and landlocked countries to facilitate transit trade. One of its main features is that the 'national

associations of transport operators' are responsible for the application of the procedures by transport operators. They issue the appropriate documents and provide a guarantee for the payment of customs duties and other taxes, in cases where the transport operators may be required to pay such taxes to the customs authorities of the transit countries (e.g. leakage of goods).

From the point of view of the customs administrations, the system has two advantages. First, duties and taxes of up to US$50,000 are guaranteed on risk products during international transit movements (with a higher maximum for alcohol and tobacco). Second, only registered transport operators are permitted to use TIR carnets (or 'merchandise passports') containing transit documents, thus ensuring the reliability of the system.

The TIR Convention however has been a success mainly in Europe. Though the system is being used by transport operators in Central Asia, the Caucasus and Maghreb, and in some parts of the Middle East, results in these countries has so far been modest. In June 1982, 16 countries belonging to the Economic Community of West African States (ECOWAS) also established a system that is commonly known as TRIE (Transit Routier Inter–Etats), which is similar to the TIR Convention. However, transport operators in the membership countries are ignoring it; about 70 per cent of transit procedures in the ECOWAS region stem from bilateral accords, and national regulations and procedures.

The main reason for the lack of success in the use of the Convention in countries other than Europe is the general absence of efficient and well-functioning national associations of transport operators in most of these countries. Even in countries where effective and credible national associations exist, they are not in a position to set up the required system for guaranteeing payments of duties to customs of transit countries (in cases of the leakage of goods). This is due to the under-development of the local financial infrastructure as well as the unwillingness of international insurance companies to provide cover given their perception of political and commercial risks.

In addition to the TRIE, the one example beyond TIR of an agreement dedicated only to transit, a number of other regional agreements on transit trade have also been adopted in recent years. These include: Association of Southeast Asian Nations (ASEAN) Framework Agreement on the Facilitation of Goods in Transit; Greater Mekong Sub-region Agreement for Facilitation of Cross Border Transport of Goods and People; Economic Co-operation Organisation (ECO) Transit Transport Framework Agreement (formed by Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan); and Common Market for Eastern and Southern Africa (COMESA) Agreement on a Single Administrative Document.

These regional agreements lay down broad goals and frameworks for co-operation among member countries for facilitating transit trade. Unfortunately it would appear

there has been very little progress in implementation of the agreements at the national level.

Given this situation, the provisions in the Agreement that urge countries to draw upon international standards contained in the international conventions and to promote regional agreements on trade facilitation, are not likely to provide meaningful solutions to the problems in transit trade, unless they are supplemented by provisions on technical assistance to transit countries. Such assistance would prepare them to deal with the practical problems encountered in applying the international standards and in the implementation of the regional agreements.

For instance, the main reasons for delay in transit are often not the customs formalities and procedures, but the lack of physical and financial infrastructure that is necessary for transit trade to move smoothly and efficiently. In the situation the improvements in international rules in the proposed legal text is likely to have only marginal effect on the movement of transit trade. The main efforts would therefore have to be directed towards assisting transit and landlocked countries in building up the physical and financial infrastructure that is required for ensuring that goods in transit reach without delay and expeditiously the landlocked countries. In a number of countries, the specially constructed vehicles that are required for transit trade are not available. Most of these vehicles do not have compartments that are sealed, in order to ensure that no goods are removed or added during transit. Further, there are no transport associations that can guarantee the vehicles are properly maintained and obtain a bank warranty to assure customs that if the goods do not reach the country of destination, they would be able to recover the duties payable from the bond.

The provisions on technical assistance that could be included in the Agreement to enable developing countries to build up the physical and financial infrastructure needed for facilitating transit trade could incorporate the following actions.

Countries that are members of the organisations that have developed international standards applicable in the area of transit trade, should request the concerned organisations to undertake studies on the problems facing non-member developing countries in applying the international standards and assess the technical assistance needs of these countries to:

- Develop the physical and financial infrastructure (including the institutional framework for private/public co-operation) for the efficient application of the international standards; and
- Train customs officials for the application of such international standards.

Countries that are members of the regional economic organisations should also make requests to the concerned organisation to:

- Undertake studies on the problems member countries are encountering in applying and implementing the provisions of the regional agreements, including

those arising from bad conditions of roads and absence of an institutional framework to guarantee payment of customs duties, in case goods do not reach their (landlocked) destination;

- Examine whether any changes or modifications in the rules are needed taking into account the provision of the WTO Agreement on Trade Facilitation;
- Assess the technical assistance needs of the members for effective application of the rules of the agreements at the national level.

It could be further agreed that the Committee on Trade Facilitation shall, before the expiry of the third or fourth year from the date of the adoption of the Agreement, arrange for a conference of the customs and other experts from transit and landlocked countries and the representatives of international and regional organisations. Based on the studies, the conference would consider how the technical-assistance needs of the transit and landlocked countries are being met, and review the provisions in the Agreement relating to transit trade with a view to finding out if any changes or modifications were needed.

State of Play in the Negotiations

The handbook has been found most useful not only by the trade officials in national capitals and by the officials from Geneva-based missions, who are actively engaged in preparing and participating in the WTO negotiations for the adoption of the Agreement on Trade Facilitation, but also by the chambers of commerce and research and other organisations interested in work in this area. Its particular usefulness to those engaged in the negotiations is evident from the fact that for over a year it had the highest sales in the WTO bookstore. In the meetings of the Group, a number of delegations emphasised the value of the detailed points and suggestions made in the handbook and other papers prepared by the Adviser, in the highly technical negotiations in which some 39 legal-based texts have been tabled by various delegations.

It is difficult to provide a detailed account of the progress made in the discussions on each of the above proposals. But a few general observations can be made, in relation to the participation of developing countries in these negotiations.

There is now a general consensus that the adoption of the Agreement in WTO would be a 'win–win situation' bringing benefits for all countries, irrespective of their stage of development.

The developing countries, particularly the LDCs, SVEs and those at a lower stage of development, have participated most actively in the negotiations on the provisions in the Agreement that would extend to them special and differential treatment and on assistance to develop their technical capacities for the implementation of the provisions.

For the purpose of identifying the provisions on which they would require assistance for implementation, the handbook suggested using the scheduling technique used in the GATS, which enables countries to impose conditions while giving commitments. Instead there is now a broad degree of support for the proposal that each developing country should, before the Agreement becomes operational, notify WTO of their needs by categorising the provisions as follows: Category A would contain provisions in the Agreement that they are implementing at present and could agree to implement from the day it becomes operational; Category B would contain those provisions for which they would need a transitional period to implement; and Category C would list all provisions for which they would need technical assistance to implement. It is further agreed that in order to ensure transparency, the notification made by each country should be appropriately published by the WTO in its Trade Facilitation Protocol.

Intensive discussions are taking place on how to ensure that commitments given by developed countries to provide technical assistance are implemented. The proposal contained in the handbook that a separate fund should be established for this purpose, which would also facilitate surveillance of whether the commitments are being implemented, is not being pursued as most of the developed countries did not wish to change the practices they have adopted for providing assistance.

In the discussions that are taking place on the proposals that have been tabled for clarification of GATT Article V, VII and X, the developing countries have taken an active interest and they appear to have relied on the information contained in the handbook in deciding on their negotiating approaches. It is expected, that as the negotiations proceed, and the focus of these countries shifts from the provisions for special and differential treatment, to the negotiations for clarification of the above provisions, they would make increasing use of the handbook and other papers prepared on the subject.

Notes

1. The 1975 Customs Convention on the International Transport of Goods Under Cover of TIR Carnets.