

The Estey

Journal of International Law and Trade Policy

A TWAIL Perspective on WTO's Trade Facilitation Agreement

N. Bafna¹

Disclaimer: Views expressed are strictly personal and do not resonate with any institution or corporation the author may be affiliated with.

Abstract

The objective of this study is to evaluate World Trade Organization's (WTO's) Trade Facilitation Agreement (TFA). The author reviews the negotiation history and text of the TFA from a Third World Approaches to International Law (TWAIL) perspective. Special focus is provided on India's participation in the negotiation process.

Keywords: Doha Declaration, Trade Facilitation, TWAIL, WTO

I. Introduction

The theoretical foundation of the international legal system has been experiencing drastic changes² as a direct result of globalization³ and increased non-governmental advocacy.⁴ The international economic law regime has been foremost in embracing these changes, introducing new challenges and opportunities for the World Trade Organization.⁵ These challenges are best understood by treating WTO as a "regime" i.e. moving beyond formal agreements and annexes to focus on actions and implementations by its member states⁶ and are best resolved by introducing a new set of trade rules, interpretations and evolving the WTO to encompass more than just "trade".⁷

WTO has grown into a mechanism that brought almost every country in the world into a global market-driven trading mechanism.⁸ WTO is occasionally disdained for *possessing a bias towards the need of developing and under-developed member states*

(hereinafter “hypothesis”). This article tests the hypothesis by reviewing the negotiation history and text of the recently concluded WTO’s Trade Facilitation Agreement (hereinafter the “Agreement” or “TFA”).

Part II below provides brief taxonomy of trade facilitation, followed by *Part III* which provides an insight into the negotiation history of the Agreement. *Part IV* then reviews the text of the Agreement from the TWAIL perspective.⁹ Then, *Part V* provides concluding remarks and results for the hypothesis.

II Understanding Trade Facilitation

Economic theory suggests that human development is directly proportional to income growth, which in turn is directly proportional to elements of trade facilitation such as freedom of transit, trade regulations, border cooperation, and port facilities.¹⁰ Trade facilitation involves a high level of complexity, as it deals with multiple parties,¹¹ organizations,¹² and international instruments.¹³ Despite complications, an increasing number of member states acknowledge that lack of efficiency in cross-border trade could result in reduced tariff revenues, weaker regulatory controls,¹⁴ lower transparency, and reduced profits.

Pascal Lamy suggests the Agreement will result in “[r]emoving barriers to trade and cutting red tape in half, which is what a multilateral Trade Facilitation Agreement could deliver, could stimulate the US\$22 trillion world economy by more than \$1 trillion”¹⁵

These claims are backed by various studies such as that of UNCTAD¹⁶ and the World Bank.¹⁷ Other studies show that trade facilitation can save more than \$150 billion a year.¹⁸ Peru’s successful implementation of the trade facilitation program in the 1990s is often cited to indicate its benefits.¹⁹ These studies are suggestive as the benefits may vary from one member state to another, due to variations in geography, demography, and varied form of governance.²⁰

There are a few other studies that doubt the legitimacy of such claims. For instance, Jeronim Capaldo in his study asserts that these figures fail to support any reasonable expectation that the reform may benefit developing economies. He further claims that not only are the estimates of gains marred by problems but the calculations overlook the array of costs that countries may incur once the reform is implemented.²¹ It has been further asserted that trade facilitation would place a substantial financial burden on developing countries much beyond the perceived benefits²² as massive investments in trade facilitation may not be socially acceptable. Additionally, the service sector (which has been growing significantly in member states such as India and Brazil) does not find its place in the Agreement.²³ Further, it is suggested that lack of literature asserting

benefits of trade facilitation which will offset the loss of resources diverted from other sectors to adopt trade facilitation²⁴ raises concerns regarding net imports; adversely affecting their trade balance.

While the Agreement is presented as an initiative to reduce trade costs; benefits have been mainly calculated at the aggregate level.²⁵ Furthermore, the Agreement being comparatively flexible in its language, interpretational challenges may arise from this unclear relationship between the TFA and other WTO agreements.²⁶ The Agreement introduces unique concepts to the WTO such as good governance, transparency, impartiality, and neutrality.²⁷ Additional challenges could be faced by governments as the use of the same word in different contexts. For instance, “*as appropriate*”, “*appropriate*”, “*where appropriate and available*”, “*were appropriate*” and “*in appropriate circumstances*” in the Agreement could be subject to different understanding and distinct meanings on different occasions.

However, on the brighter side, the Agreement appreciates changing shifts towards regionalism by encouraging regional coordination and repeated usage of terms such as “regional” arrangements, among others.²⁸ To further appreciate and understand the Agreement, the following section examines the negotiation history of the Agreement and the role played by developing and underdeveloped member states in it.

III Negotiation History: Role of Developing Member States

Negotiations for the Agreement started back in 1996 at the Singapore Ministerial Conference²⁹ while discussing four key areas (the “Singapore Issues”) – investment, competition policy, government procurements, and trade facilitation. Paragraph twenty-one of the Singapore Ministerial Declaration directed the Council for Trade in Goods to “*undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures to assess the scope for WTO rules in this area.*”³⁰ It aimed at balancing a new multilateral trading agreement on one hand and the problem of limited resources with low-developed economies on the other.³¹ Unfortunately, the overall outcome was controversial as it saw disproportionate participation and representation from the developed member states.³²

During the initial phase, the discussions were confined to aspects such as official procedures, information requirements, transparency, and related issues.³³ Other relevant aspects to cross-border movements of goods such as payment, insurance, transport, transit to various financial requirements were added later to widen the scope of the trade facilitation.³⁴ A proper schedule for meetings and negotiations were also put in place to systematically capture the scope and nature of the trade facilitation.³⁵

The scope was, however, narrowed down to focus on provisions of General Agreement on Tariffs and Trade, 1994³⁶- Article VIII and X.

The concern was then to place them as negotiating items in the draft of the Ministerial text of the Seattle Conference of 1999. Unfortunately, the Seattle Conference did not make substantial progress³⁷ as it saw the protest of around 50,000 protestors in Seattle³⁸ who were successful in showcasing the “dark side” of globalization to the world.³⁹

The negotiation finally progressed during the preparatory work of the Doha Ministerial Conference in 2001 (the “Doha Development Agenda”).⁴⁰ Discussions revolved around customs, border clearance, and credit information.⁴¹ Unfortunately again, negotiations did not head in any significant directions and the differences were wide open.⁴² The whole process was alleged to be opaque and to be in the better interest of developed member states.⁴³

It was alleged that the views and positions of many developing member states were not adequately reflected in the draft Ministerial Declaration. India responded to the proposal similarly. The then Commerce minister Mr. *Murasoli Muran* pointed out that the “[d]eclaration was neither fair nor just to the view points of many developing member states”.⁴⁴

India played a noteworthy role in determining the outcome of the Doha Ministerial Conference. The firm approach adopted by India ran the risk of getting secluded in the international arena and the risk paid off well. Through this worthy contribution of India, an array of concerns of the developing member states were internalized into the upcoming work program of the WTO.⁴⁵

However, the next trade round created further imbalances.⁴⁶ The Cancun Ministerial text (the “Derbez text”)⁴⁷ explicitly recognized the launch of negotiation. The modalities were never discussed, clearly violating the *principle of explicit consensus*.⁴⁸ The Indian representative, the then commerce minister Mr. *Arun Jaitley* condemned the chairman for ignoring the views of most of the members that rejected the launching of the negotiation.⁴⁹ The text was condemned to be biased, undermining the legitimacy of the whole conference and resulting in no consensus.⁵⁰

After Cancun, informal consultations were conducted under the leadership of the then WTO Deputy Director-General *Rufus Yerxa*,⁵¹ resulting in the “July package”. It reflected a compromise between the demands of developed and developing member states; commencing negotiations based on modalities set out in the Annex. The Ministerial Conference of Hong-Kong in 2005⁵² made members return to the negotiating table without losing time over procedural requirements, resulting in the development of the Agreement’s basic architecture.⁵³

After Hong Kong, major progress was made during the ninth Ministerial Conference held in Bali, Indonesia in 2013.⁵⁴ It resulted in a major trade deal – the “Bali Package”.⁵⁵ After twelve years, the bargain, the first of its kind multilateral agreement on trade facilitation, was reached,⁵⁶ establishing a Preparatory Committee on Trade Facilitation and the Trade Facilitation Agreement.

The deadline for finalizing the Trade Facilitation Agreement was set to be July 31, 2014.⁵⁷ The Negotiating Group on Trade Facilitation (hereinafter “NGTF”) was formed on 12th October 2014 for implementation of the July Package. NGTF was a success as it saw a large number of proposals by both developed and developing member states. They were mainly to seek clarification on Articles V, VIII, and X of the GATT.

India and the United States filed a joint paper on the matter of the establishment of a multilateral system for exchanging and handling information among members.⁵⁸ All the proposals were combined in a document and were updated periodically reflecting recent recommendations.⁵⁹ The negotiations were concluded in a spirit of cooperation and compromise.⁶⁰ Nonetheless, the fate of the deal became unsure as India cast a veto vote against the final Agreement.

According to the WTO rules, agreements must be adopted unanimously before they can be sent to the legislature of each member state for ratification; two-thirds of the member states should ratify trade deals for them to become effective. India’s veto came as shock as, in Bali, India endorsed the agreement in its entirety.⁶¹ Nevertheless, India ratified the Agreement on 22nd April 2016⁶², being the 76th member to do so, as a result of U.S cooperation.

Why did India Choose to veto?

The Indian Food Subsidy and Food Security Program allows for the government to buy wheat and rice from local farmers at above-market prices (also known as a “Minimum Support Price”), stockpile the grains, and then sells them to the consumers at a lower price through its Public Distribution System. The National Food Security Act of 2013⁶³ ratified the National Food Security Ordinance of 2013, which was passed on the backdrop of The National Food Security Bill of 2013. It guarantees subsidized prices for food grains to roughly 70 percent of the country's 1.2 billion people.⁶⁴

This policy was widely condemned by the international trade community. The U.S and Pakistan raised concerns about its trade-distorting effects.⁶⁵ They argued that tons of grains may become putrid due to lack of storage space, resulting in the dumping of food grains, leading to potential depression of global prices and hurt farmers based out of other member states. However, India stood by its stance.

India requested a permanent solution to the food security and food subsidy issue in the WTO. India claimed that negotiations on the food subsidy had been long stagnant. India demanded to revive the negotiations by requesting the developed member states to come forward and deliberate, in exchange for signing and ratifying the Agreement by India.

India had two main requests: *first*, revision of the External Reference Price (ERP) based on which farm subsidy is calculated. At present, the year 1986 – 88 is taken as a base year. India contended that a more recent period should be considered to incorporate inflation and economic slowdown. *Second*, India should be allowed to benefit from the “Peace” clause until 2017. This implied that India may have frustrated its commitment under the Ninth Ministerial Conference.

India’s veto to TFA sent a shock wave through the entire trading community. To clear the dead-lock, members agreed to renegotiate existing rules on agricultural subsidies by the end of 2017 to address India’s concerns of regulations being restrictive; undermining its ability to stockpile grains to ensure food security.⁶⁶

Ultimately the U.S at the G20 meeting⁶⁷ agreed on India’s right to food security.⁶⁸ This cleared the deadlock and the TFA was ready (*quid pro quo*). It was decided to adopt the protocol of Amendment to be inserted in the TFA Annex 1A, putting December 2015 as the final deadline to conclude the negotiations⁶⁹ at the meeting of the General Council Preparatory Committee on Trade Facilitation on November 27, 2014.

The Agreement is now officially operational, inviting “instrument of acceptance” from the member states, making it operational upon acceptance by two-thirds of the Members.⁷⁰ India notified category ‘A’ commitments and deposited instruments of ratification on 22nd April 2016.⁷¹ Category ‘A’ provisions signify that the member will implement by the time the Agreement enters into force (or within one year after entry into force for a least-developed country member)⁷². The implementation rate currently stands at 69.7%; with 100% implementation by developed member states, 70% by developing member states, and 36 % by the least-developed countries member states.⁷³

IV Interpretation: TWAIL Perspective

The Agreement goes beyond the notions of tariffs and borders procedural requirements. It connects existing WTO rules, Free Trade Agreements, domestic law and incorporates good governance. This wide scope of the Agreement may lead to unprecedented interpretation challenges. This section addresses some of these challenges from a holistic approach – to examine if the Agreement complements the trading regimes of developing and least developed countries (LDCs).

The Agreement is structured as follows: The Preamble to the Agreement sets out its aim to clarify and improvise relevant aspects of Articles V, VIII, and X of the GATT 1994. To enable expediting movement, release, and clearance of goods, including goods in transit, providing special assistance to developing and LDCs and to further the cooperation among members for custom compliance issues. The Agreement is bifurcated into two sections: the first part sets out general provisions of trade facilitation; the other part concentrates upon Special and Differential Treatment (“S&D T”) for developing country members and LDCs.

Article I of the Agreement enumerates rules on publication and making available information, making it mandatory to publish all the laws, rules, and regulations relating to trade. Article II makes it mandatory for domestic authorities to consider public opinion before passing any law. Article III puts an obligation on authorities to provide an advance ruling in a reasonable time and manner. Article IV lays down requirements in respect of appeal and review procedures, providing the right to appeal or review as being mandatory. Article V lays down various measures to enhance impartiality, non-discrimination, and transparency, while Article VI brings out uniformity about fees imposed in connection with importation and exportation. Article VII sets out the procedure for the release and clearance of goods wherein it highlights the importance of electronic payments, risk management, expedited shipments, and special provisions for perishable goods. Article VIII enumerates cooperation among neighbors at border clearance and border control. Article IX mandates the uninterrupted movement of goods intended for importation for speedy transit of goods. Article X details the formalities about importation, exportation, and transit of goods recommends the use of the international best practice, single-window clearance, discourages the use of customs brokers, and uniformity in documentation requirements. Article XI gives effect to freedom of transition, while article XII mandates compliance with custom obligations, exchange of information, and respect for confidentiality. Lastly, Article XIII established a strong institutional framework to give effect to the provisions of this Agreement by establishing a Committee on Trade Facilitation and National Committees on Trade Facilitation.

The rest of the Agreement enumerates S&D T Provisions for developing country members and LDCs. It nullifies delayed implementation of the Agreement due to lack of capacity and resources. Special provisions are carved out for Developing and LDCs by restricting their commitments and obligations to the extent of their individual development, financial and trade needs, or their administrative and institutional capabilities. As an extensive part of the Agreement is devoted to Special & Differential

Treatment of developing member states. This section will study S&D T in the Agreement and the way it corresponds to the Doha Development Agenda.

WTO Agreements contain special provisions that give developing member states special rights and provide developed member states the possibility to treat developing member states more favorably than other WTO Members. These provisions are referred to as S&D T provisions. They majorly are: longer periods for implementing agreements and commitments, measures to increase trading opportunities for developing countries, provisions requiring all WTO members to safeguard the trade interests of developing countries, support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards, and provisions related to LDCs.⁷⁴

Implementation provisions concerning S&D T in the Agreement are divided into three categories: (1) category A puts together implementations that members designate to put in action upon entry into force of this agreement for developing member states and within one year after entry into force for LDCs. (2) category B puts together provisions which are planned to be implemented on a date after a transitional period following entry into force of this agreement and (3) category C is on the lines of category B but for those requiring the acquisition of implementation capacity through provision of assistance and support for capacity building. Paragraph three obligates developing members to implement its category A commitments upon entry into force. The LDCs may notify the Preparatory Committee⁷⁵ of the provisions it intends to implement within one year after entry into force. Paragraph four puts in place a framework for the notification and implementation of category B and C commitments. Every developing country member upon entry into force of this Agreement shall notify the committee of the provisions that it has designated in category B and category C with corresponding indicative dates for implementation.

An early warning mechanism is established under paragraph five, whereby any member that experiences difficulty in implementing provisions of Category B or C, should notify the committee not less than 180 days for developing country members and 90 days for LDCs before the expiration of the implementation date and a new date would be provided by the committee. For effective implementation of Category B and Category C commitments, the committee shall immediately establish an expert group within 60 days of notification. The expert group shall be composed of five independent persons, highly qualified in the fields of trade facilitation and assistance and support of the capacity building, as per paragraph six. Nothing specified here shall be subject to proceedings under the Dispute Settlement Understanding. Grace periods of two years for developing country and six years for LCDs after entry into force for the application

of the Understanding on Rules and Procedures Governing the Settlement of Disputes for category A commitments and eight years for LCDs for category B commitments, in pursuance to paragraph eight.

The Final Provision imports exceptions and exemptions from GATT and waivers from Agreement establishing the WTO to the Agreement. It also sets out a notwithstanding clause: “*nothing in this Agreement shall be construed as diminishing the rights and obligations of members under the Agreement unless provided and that members of a custom union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under this Agreement*”, so on and so forth.

As important as the S&D T are for the developing member states, it is equally important to ascertain if they had been successful in the past. The rhetoric around S&D T had been confined to extended deadlines and tuning for prolonged implementations, despite failure at Cancun and Seattle. The paradigm of S&D T should be shifted from that of “adjustment” and “charity” to that of “development” and “fairness”.⁷⁶ Substantial work with this respect may stem from a fair and equalitarian negotiation process at WTO. It is more important to address the needs and concerns of the LCDs during the negotiation than to offer legally binding (extended) deadlines during implementation.

This need for transformation is well documented by the report of the panel on defining the future of trade.⁷⁷ The report recommends a new perspective on managing the balance between reciprocity and flexibility. It suggests differentiations and flexibilities for LCDs should be based on individual needs and capacities, target specific challenges, be time-specific to advance progressively, and be followed by dynamic monitoring.⁷⁸

In addition to the concerns discussed above, the Agreement possesses various other challenges for developing nations, such as: *first*, an extension of GATT jurisprudence to the Agreement may lead to additional implementation and coordination cost. The Preamble to the Agreement aims at clarifying and improving relevant aspects of Article V, VIII, and X of GATT. This may mean the application of GATT jurisprudence and precedence by the TFA Council at dispute resolution. For instance, “Cost of Service Rendered” in Article VIII:1(a) requires fees and charges imposed relating to importation and exportation to not exceed the approximate cost of service rendered. In GATT, it refers to fees and formalities while the same language is used in the Agreement about enquiry points. Use of similar language in two different contexts may lead to additional obligations (GATT/WTO Plus obligations). Similar challenges may erupt for other shared common terms.

Second, the Agreement balances trade facilitation with other competing interests such as public health and data protection, causing it to be invoked either independently or in combination with existing WTO agreements in trade disputes.⁷⁹ Conflict may arise due to the juxtaposition of “hard requirements of TFA” and “domestic laws”. For instance, the publication is a hard requirement within the Agreement, which may come in conflict with local laws of member states.

Third, the cost of making necessary changes to the customs regimes, infrastructure and, capacity building of developing member states may turn out to be prohibitively expensive, which may add extra burden over other developmental concerns.⁸⁰ Implementing the Agreement could be a costly affair; requiring specialized personnel and high consultancy fees.⁸¹ Additionally, an imperfect market situation may prevent small firms, consumers, and labour from fully experiencing the expected benefits of trade-facilitation reforms.⁸²

V Concluding Remarks

The World Trade Statistical Review published by the WTO in 2016 sets out that the members introduced 132 measures aimed at facilitating trade, an average of 19 measures per month.⁸³ This certainly indicates the importance which trade facilitation measures have managed to gain in recent times. Trade Facilitation measures are important to emerging economies as the South-South trade (i.e. exports from developing economies to other developing economies) continues to grow and to constitute an increasing share of developing economies' exports.⁸⁴ Additionally, with China and India ranked first and second respectively as preferred services offshoring locations, it becomes important for them to ensure easy inflow and outflow of goods and services.⁸⁵ The Agreement appreciates the changing shift towards regionalism by encouraging regional coordination and repeated usage of terms “regional” arrangements.⁸⁶

Out of 164 WTO members, 154 members have ratified the TFA as of February 14, 2021.⁸⁷ This signifies a great success for the WTO, as TFA once in effect will be the first WTO Agreement after the Uruguay round. Once an Agreement for goods is successfully implemented, an Agreement for services should be considered by the trading community.⁸⁸

However appreciated, the efforts of the WTO to cut red-tape and relax the border movement of goods are; there may be concerns which the negotiation process and the Agreement put on the table of developing members (testing the *hypothesis*), as below:

First and foremost, the Bali Package covered four different areas: trade facilitation, agriculture, cotton, and LDCs. It is only the Trade Facilitation which now has a legally

binding agreement. For agriculture, major discussions revolved around only the Peace Clause and short-term grants to LCDs.

With regards to Cotton, major progress is yet to be made. The recent Ministerial Decision on Cotton at Nairobi Conference was declaratory; urging members to continue their efforts and contributions to enhance the cotton market.⁸⁹ Even on the reduction of export competition in cotton, the Ministerial Decision on Export Competition at Nairobi Conference was declaratory. Though it uses “shall”, it doesn’t provide fallback penalty provisions.⁹⁰ However, the future appears to be promising with the formation of the “Cotton Four” group consisting of Benin, Burkina Faso, Chad, and Mali.⁹¹

Second, while it aims at reducing costs, relaxing customs procedures, and easing the flow of imports and exports, it is claimed by some that benefits may not reach all the stakeholders in the supply chain or may not be equally distributed.⁹²

Third, the Agreement possesses a few characteristics which are new to WTO, such as a good governance clause that diffuses transparency, impartiality, and neutrality.⁹³ Such new obligations and a shift from traditional rules may bring unprecedented interpretations. Additional challenges may also occur due to the use of the same words in different contexts such as “as appropriate”, “appropriate”, “where appropriate and available”, “were appropriate” and “in appropriate circumstances” in the Agreement.

Thus, it can be concluded that the flexibilities provided in TRA significantly changes the future of world economic governance by going a step further on tariffs and non-tariff barriers. It now remains to be seen whether the Trade Facilitation Agreement will fulfill the promises endorsed by the WTO and International Chamber of Commerce or will it churn out unsatisfactory results.

The future of TFA appears to be promising in India, considering it has received considerable support from the Ministry of Commerce and Industry (as TFA will help in achieving India’s ease of doing business), with the establishment of three-tiered National Committee on Trade Facilitation (“NCTF”).⁹⁴ It now needs to work on simplifying advance ruling, establishing enquiry points, and accelerating related infrastructural developments⁹⁵ to reap the full benefits of the Agreement.

ENDNOTES

¹ Namit Bafna graduated from class of 2016, School of Law, Christ University, Bengaluru, India. The author would like to acknowledge Dr. Sunitha Abhay Jain – Associate Professor at School of Law, Christ University, and Ms. Shambhavi Ravishankar, Felix Scholar 2015, LL.M. International Human Rights Law, working in a law firm, for their reviews of this article. *All the views remain strictly that of the author and do not express of any entity whatsoever with which the author has been, is now, or will be affiliated.*

² Such changes are inspired by the market-driven economy and capitalism.

³ Mojmir Mrak, *Globalization: Trends, Challenges and Opportunities for Countries in Transition* (United Nations Industrial Development Organization, 2000), available at: <http://www.unido.org/fileadmin/import/userfiles/puffk/mrak.pdf> (globalization lead to revision of labour laws, environmental standards, financial sector reforms, enterprise reforms to adjust with public-private partnership, human resource development to increase international competitiveness, improve physical infrastructure: to integrate national economies with the global economy).

⁴ John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* 03, 1st edn. 2009.

⁵ Daniel Griswold, *The Blessings and Challenges of Globalization* (CATO Institute, 2000), available at: <http://www.cato.org/publications/commentary/blessings-challenges-globalization> (WTO was faced with certain challenges due to its market economy orientation such as free trade v/s environmental concerns, free trade v/s GMOs and labour standards to identify some).

⁶ Mary E. Footer, *An Institutional and Normative Analysis of the World Trade Organization* 88 (1st edn 2005).

⁷ Lori Wallach & Patrick Woodall, *Whose Trade Organizations? A Comprehensive Guide to the WTO* 01 (1st edn., 2004).

⁸ *Id*; See, Saif Al - Islam Alqadhafi, *Reforming the WTO: Towards More Democratic Governance and Decision - Making* (Gaddaffi Foundation for Development, 2007), available at: http://lsr.nellco.org/cgi/viewcontent.cgi?article=1166&context=nyu_plltwp; Fabien Besson & Racem Mehdi, *Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis* (2004) (their finding suggests that developing member states are more unlikely to obtain a favorable outcome due to asymmetric legal capacity. This result corroborates the idea pointed out by many scholars that developing countries lack representation in Geneva and legal resources to adjudicate cases. The increasing number of legal reviews under the strengthened procedures of the new WTO places a “premium on sophisticated legal argumentation” that may work against developing countries); Centre for Trade and Development, Trade Talk: Interview with Prof. B.S Chimni, *Developing Countries Disadvantaged in the DSB*, 14-15 (July-Sept. 2006), available at: http://iatp.org/files/451_2_89900.pdf (developing member states are at a disadvantage when it comes to retaliating against the major trading partners as the act of retaliation lacks credibility. There is also fear of big trading partner reacting by withdrawing unilateral trade preferences or suspending foreign aid).

⁹ TWAIL perceives international law as facilitating the continuous exploitation of the developing and under-developing nations through subordination to the West. See, B.S Chimni, *Third World Approaches to International Law: A Manifesto*, 8 *International Community Law Review*, 3 - 27 (2006); Makau Mutua & Antony Anghie, *What is TWAIL*, 94 *Proceedings of the Annual Meeting of the American Society of International Law*, 31 - 40 (2000); B.S Chimni, *The World of TWAIL: Introduction to the Special Issue*, 3 *Trade, Law and Development*, 14 - 25 (2011). But See also, John D. Haskell, *TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law*, 27 (2), *Canadian Journal of Law & Jurisprudence* (2015).

¹⁰ Wilson et. al., *Trade Facilitation and Economic Development: A New Approach to Quantifying the Impact*, 17 *The World Bank Economic Review*, 367 (2003).

¹¹ Parties generally involved in cross border trade are importer, exporter, insurance companies, financial institutes, freight forwarders, warehousing services, transporters, terminal operators, stevedoring companies, sea and airport authorities, inspection companies, customs brokers and customs authorities.

¹² Private international organizations include International Chambers of Commerce, International Maritime Organization, International Civil Aviation Organization, International Air Transportation, International Express Carriers Conference and International Chamber of Shipping, etc. Multilateral Organizations include World Customs Organization, International Monetary Fund, World Bank, United Nations Industrial Development Organization

Organization for Economic Cooperation and Development, World Trade Organization, United Nations Conference on Trade and Development, etc.

¹³ Customs Valuation Agreement, Agreement on Pre-shipment, Agreement on Import Licensing Procedures Agreement on Rules of Origin, Agreement on Technical Barriers to Trade, Agreement on Sanitary and Phytosanitary Measures and Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention). These international instruments directly relate to trade facilitation as they deal with the principle of non-discrimination, publication of laws and regulations, transparency, rules of origin, customs valuations, advance rulings, inquiry points, licensing and use of existing international standards.

¹⁴ However, efficiency may be inversely proportional to regulations. See, Amanda Perry-Kessaris, *Socio-Legal Approaches to International Economic Law; Text, Context, Subtext*, 03 - 18 (Routledge, 2013); Peter Muchlinski, *Operationalising the UN Business and Human Rights Framework: the Corporate Responsibility to Respect Human Rights and Due Diligence*. IN Lundan, Sarianna, (ed.), *Transnational Corporations and Transnational Governance*, 325-353 (Palgrave Macmillan, 2014); Ioannis Glinavos, *Law's Empire of Austerity: De-Politicisation of Economic Decision Making in the Twilight of European Democracy*, 03 (University of Westminster School of Law Research Paper No. 16-04, 2015).

¹⁵ Pascal Lamy, *A trade facilitation deal could give a US\$ 1tn boost to world economy* (2013), available at: http://www.wto.org/english/news_e/sppl_e/sppl265_e.htm (Last visited 05 Dec. 2014).

¹⁶ United Nations Conference on Trade and Development, *Fact Sheet 5 (United Nations International Symposium on Trade Efficiency*, October, 1994).

¹⁷ John S. Wilson et al., *Trade Facilitation and Economic Development: A new approach to quantifying the impact*, 17 *The World Bank Economic Review*, 367 (2003). (authors have used gravity model of bilateral trade flow rather than a computable general equilibrium (CGE)). See also, Wilson et al., *Assessing the Potential Benefits of Trade Facilitation: A global perspective* (World Bank Policy Research Working Paper 3224, 2004) (authors have used the gravity model to analyze the relationship between trade facilitation and trade flow in manufactured goods in 2000-2001 across 75 member states. An estimate of \$ 377 billion of total gain from trade flow has been estimated, arising from enhanced efficiency in port infrastructure, customs environment, regulatory environment, and service sector). See, Walmsley et al., *Dynamic effects of the 'New Age' Free trade agreement between Japan and Singapore*, 24 *Journal of Economic Integration*, 1019 (2001) (for analysis based on the Computable General Equilibrium method).

¹⁸ *Supra note 50*.

¹⁹ Charles Draper, *Reforming Customs Administration: The unlikely case of Bangladesh?* (World Bank), available at: http://siteresources.worldbank.org/INTRANETTRADE/Resources/Draper_customs.pdf. (last visited on 28th Jan. 2015 at 8:03 PM); But See also, Andrew Grainger, *Developing the case for trade facilitation in practice*, 5 *World Customs Journal* (2011) (discusses in detail shortcomings of developing a robust case for trade facilitation).

²⁰ ²⁰ See, Andrew Grainger, *Trade Facilitation: A conceptual Review*, 45 *Journal of World Trade* 39-69 (2011), available at: <https://www.kluwerlawonline.com/abstract.php?area=Journals&id=TRAD2011002> (provides a general review of key elements and topics that are associated with trade facilitation and sets them against underlying challenges and obstacles in practice as well as for research); Saloni Khanderia Yadav, *Implications of the World Trade Organization's Agreement on Trade Facilitation for Emerging Economies*, 12 *Manchester Journal of International Economic Law*, 33 - 58 (2015) (while the TFA would indeed call for a large number of reforms in the domestic environment of emerging economies, pertaining to customs, infrastructure and technology; the advantages of the TFA seem to far outweigh the trade-offs).

²¹Jeronim Capaldo, *Trade Hallucination: Risks of Trade Facilitation and Suggestions for Implementation* (Global Development and Environment Institute Working Paper No. 14 - 02, Tufts University), available at: <http://www.ase.tufts.edu/gdae/Pubs/wp/14-02CapaldoTradeHallucination.pdf>.

²²Nitya Nanda, *Expanding Frontiers of Global Trade Rules*, 66 (Routledge, 2008).

²³*Id.* at 70; Press Trust of India, *India to Pitch for Trade Facilitation Pact in Services at WTO*, Business Today (6th Jan., 2016), available at: <http://www.businesstoday.in/current/economy-politics/india-trade-facilitation-pact-in-services-at-wto/story/227837.html>.

²⁴*Id.* at 78.

²⁵South Centre, *WTO Negotiations on Trade Facilitation: Development Perspectives*, 78 South Bulletin (2014), available at: <https://www.southcentre.int/question/wto-negotiations-on-trade-facilitation-development-perspectives/>; Kinda Mohamdieh, *A WTO Treaty on Trade Facilitation? Regulatory, Institutional, Legislative, and Cost Challenges for Developing Countries*, 75 South Bulletin (2013), available at: <https://www.southcentre.int/question/a-wto-treaty-on-trade-facilitation-regulatory-institutional-legislative-and-cost-challenges-for-developing-countries/>.

²⁶Heng Wang, *The Agreement on Trade Facilitation and Its Implications: An Interpretative Perspective*, 9 Asian Journal of WTO & International Health Law and Policy, 472 (2014).

²⁷Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 Journal of International Economic Law, 509 – 527 (2007).

²⁸*Id.* at 461.

²⁹Singapore Ministerial Declaration, WT/MIN(96)/DEC (although the concept of Trade Facilitation dates back to the time of League of Nations, for the sake of brevity, the paper is confined to recent developments).

³⁰Singapore Ministerial Declaration, WT/MIN(96)/DEC, paragraph 21.

³¹Singapore Ministerial Declaration, WT/MIN(96)/DEC, paragraph 22.

³²Martin Khor, *The "Singapore issues" in the WTO* (Third World Network, 2007).

³³Derived mainly from the proposals of Trade in Goods Council's first informal meeting on trade facilitation held from 28 to 29 September 1998. See WTO document G/C/W/132.

³⁴See WTO document G/C/W/133.

³⁵See WTO document G/C/W/153.

³⁶General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, **The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations** 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

³⁷WTO News, *Seattle conference doomed to succeed, says Moore* (1999) available at: http://www.wto.org/english/news_e/pres99_e/pr156_e.htm.

³⁸Mapes, L, *Five days that jolted Seattle*, The Seattle Times (2009), available at: http://seattletimes.com/html/localnews/2010379181_wto29m.html.

³⁹Noah Smith. *The Dark Side of Globalization: Why Seattle's 1999 Protesters Were Right*. The Atlantic (2014), available at: <http://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/>.

⁴⁰Nora Neufeld, *The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement* (Working Paper ERSD-2014-06).

⁴¹Shahshank Priya, *Trade facilitation: A brief negotiating history*, (eSS Working Paper 2007) available at: http://econpapers.repec.org/paper/esswpaper/id_3a919.htm.

⁴²The Tribune, *Nothing resolved at WTO meeting (2001)* available at: <http://www.tribuneindia.com/2001/20011114/biz.htm#2>.

⁴³Martin Khor, *Prelude to Doha: An untransparent, manipulative process; a biased and unbalanced text* (Third World Network, 2010) available at: <http://www.twinside.org.sg/title/uphill.htm>.

- ⁴⁴ WTO Document WT/Min(01)/ST/10, dated November 10, 2001.
- ⁴⁵ Meeta et. al., *India at the Doha Ministerial Meeting: An Analysis*, 1 International Journal of Regulation and Governance 197, 197-214 (2002).
- ⁴⁶ Joseph Stiglitz, *Trade Imbalances*, The Guardian (2013), available at: <http://www.theguardian.com/world/2003/aug/15/wto.comment>.
- ⁴⁷ WTO document JOB(03)/150/Rev.2, dated September 13, 2003.
- ⁴⁸ Mary E. Footer, *The Role of Consensus in GATT/WTO Decision - Making*, 17 Northwestern Journal of International Law & Business, 653-680 (1997).
- ⁴⁹ WTO Document WT/MIN(03)/ST/7, dated September 10, 2003.
- ⁵⁰ WTO, *Day 5: Conference Ends Without Consensus*, (2003), available at: http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm (Last visited 28 Nov. 2014 at 6:30 PM).
- ⁵¹ David A. Deese, *World Trade Politics: Power, Principles, and Leadership*, 15 (1st edn. 2008).
- ⁵² WTO Document WT/MIN(05)/DEC (December 22, 2005); See also, Michael Finger & John Wilson, *Implementing a WTO Agreement on Trade Facilitation: What Makes Sense?* (World Bank Publications, 2006).
- ⁵³ Nora Neufeld, *WTO Negotiations on Trade Facilitation-Lessons for the Future? New Perspectives for and from the Developing World*, IN Garry P. Sampson & W. Bradnee Chambers, ed., *Developing Member states and the WTO: Policy Approaches* 282 (1st edn 2008).
- ⁵⁴ WTO Document WT/MIN(13)/DEC (December 11, 2013).
- ⁵⁵ Suparna Karmakar, *Life after Bali: Renewing the World Trade Negotiating Agenda* (Working Paper-Bruegel Policy Contribution, 2013) available at: <http://www.econstor.eu/handle/10419/106315> (Last visited 2nd Feb 2015 at 10:53 PM).
- ⁵⁶ G. Koopmann & Stephan Wittig, *Whither WTO — the Multilateral Trading System After Bali*, 49 *Intereconomics* (2014) available at: <http://link.springer.com/article/10.1007/s10272-014-0482-2>.
- ⁵⁷ *But See*, Rob Howse, *The Fallacy of the July 31 Deadline in the WTO TFA: Inventing a Crisis and Demonizing India's Democracy* (International Economic Law and Policy Blog, 1st Aug., 2014), available at: <http://worldtradelaw.typepad.com/ielpblog/2014/08/the-fallacy-of-the-jul-31-deadline-in-the-wto-tfainventing-a-crisis-and-demonizing-indias-democracy.html>.
- ⁵⁸ WTO Document TN/TF/W/57 (July 22, 2005).
- ⁵⁹ For the latest revised document See, WTO Document TN/TF/W/165/Rev.18 (October 23rd, 2013).
- ⁶⁰ G. McLinden, *Trade Facilitation Progress and Prospects for the Doha Negotiations*. In: R. New farmer, ed., *Trade, Doha, and Development: A window into the issues*, (1st ed. Washington D.C: The World Bank, 2006).
- ⁶¹ Donald Kirk, *Kerry Hits Stone Wall In India After Delhi Vetoes Trade Pact, Endangering WTO's Future*, Forbes, 2014, <http://www.forbes.com/sites/donaldkirk/2014/08/03/kerry-hits-stone-wall-in-india-as-delhi-vetoes-trade-pact/>.
- ⁶² WTO, *India Ratifies Trade Facilitation Agreement* (22nd April, 2016), available at: https://www.wto.org/english/news_e/news16_e/fac_21apr16_e.htm (Last visited at 11:06 PM on 24th May, 2014).
- ⁶³ The Preamble of the Act reads as “An Act to provide for food and nutritional security in human life cycle approach, by ensuring access to adequate quantity of quality food at affordable prices to people to live a life with dignity and for matters connected therewith or incidental thereto”.
- ⁶⁴ Priyam Sengupta & Kakali Mukhopadhyay, *Economic and Environmental Impact of National Food Security Act of India*, 4 *Agricultural and Food Economics* (2016).
- ⁶⁵ Paige McClanahan, *India pushes to change WTO subsidy rules so it can stockpile food*, The Guardian (2013), available at: <http://www.theguardian.com/global-development/2013/oct/21/india-pushes-change-wto-rules-food> (last visited Aug 24, 2014 at 1:20 AM).

⁶⁶ The New York Times, *Global Trade Talks Suffer Another Setback* (2014), available at <http://www.nytimes.com/2014/08/04/opinion/global-trade-talks-suffer-another-setback.html>.

⁶⁷ Neha Thirani Bagri, *U.S.-India Agreement on Stockpiles of Food Revives a Trade Deal*, The New York Times (November 13, 2014), available at: <http://www.nytimes.com/2014/11/14/business/international/us-india-agreement-clears-way-for-global-trade-deal.html?ref=topics&r=0> (Last Visited on February 7th, 2015 at 1:06 AM).

⁶⁸ Puja Mehra, *India-U.S. deal paves the way for global trade pact*, The Hindu (November 24th, 2014) available at: <http://www.thehindu.com/news/national/us-resolve-impasse-over-food-security-issues-at-wto/article6594065.ece>.

⁶⁹ WTO, *Statement by DG Azevêdo* on November 27, 2014, available at: http://wto.org/english/news_e/news14_e/gc_rpt_27nov14_e.htm (Last Visited on February 7th, 2015 at 1:09 AM).

⁷⁰ World Trade Organization, *How to accept the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement*, http://wto.org/english/tratop_e/tradfa_e/tradfa_agreement_e.htm.

⁷¹ WTO, *India Ratifies Trade Facilitation Agreement* (22nd April, 2016), available at: https://www.wto.org/english/news_e/news16_e/fac_21apr16_e.htm (Last visited at 11:06 PM on 24th May, 2016); Ministry of Commerce, *Implementation of Trade Facilitation Agreement* (3rd May 2016), available at: http://commerce.nic.in/MOC/press_release.asp?id=3214 (Last visited at 1:42 PM on 25th May, 2016).

⁷² WTO, *Trade Facilitation*, available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

⁷³ WTO, *Trade Facilitation Implementation Dashboard*, available at: <https://fadatabase.org/implementation/commitments-by-grouping> (Last visited at 06:34 PM on 14th Feb., 2021).

⁷⁴ WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions: Note by the Secretariat* (Committee on Trade and Development, 2013), WTO Document No. WT/COMTD/W/196.

⁷⁵ Paragraph two of the Draft Ministerial Decision establishes a Preparatory Committee on Trade Facilitation under the General Council, will be responsible for conducting a legal review of the Agreement, receive notification of Category A commitments, and draw up a Protocol of Amendment to insert the Agreement into Annex 1A of the WTO Agreement.

⁷⁶ Frank J. Garcia, *Beyond Special and Differential Treatment*, 27 Boston College International & Comparative Law Review, 229 (2004); Andrew D. Mitchell, *A Legal Principle of Special & Differential Treatment for WTO Disputes*, 5 World Trade Review, 445 – 470 (2006); Constantine Michalopoulos, *The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organization* (World Bank Policy Research Working Paper No. 2388, 2000).

⁷⁷ Report of the Panel on Defining the Future of Trade Convened by WTO Director – General Pascal Lamy (2013), available at: https://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf.

⁷⁸ *Id.*

⁷⁹ HENG, *Supra* 26 at 452.

⁸⁰ Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 World Trade Review, 658 (2015).

⁸¹ Jeronim Capaldo, *The Uncertain Gains from Trade Facilitation* (Global Development and Environment Institute, Tufts University Policy Brief 13-02, 2013), available at: http://www.ase.tufts.edu/gdae/policy_research/UncertainGains.html.

⁸² See, William Milber & Deborah Winkler, *Financialisation and the Dynamics of Offshoring in the USA*, 34 Cambridge Journal of Economics, 275 - 293 (2013); Wang et al., *Agricultural Trade*

Liberalization and Economic Development: The Role of Downstream Market Power, 36 *Agricultural Economics*, 253 - 270 (2007).

⁸³ WTO, *World Trade Statistical Review 2016*, 66 available at: https://www.wto.org/english/res_e/statis_e/wts2016_e/wts16_toc_e.htm (2016).

⁸⁴ *Id.* at 54.

⁸⁵ *Id.* at 58 (India's exports to foreign clients included a wide range of services, such as finance and accounting, auditing, book keeping and tax consulting services, customer services, medical transcriptions, and various types of engineering services (embedded solutions, product design, industrial automation and enterprise asset management).

⁸⁶ *Id.* at 461.

⁸⁷ Trade Facilitation Agreement Facility, *Ratification List*, available at: <http://www.tfafacility.org/ratifications> (accessed on 14 Feb., 2021 at 06:57 PM).

⁸⁸ Discussion for a TFA in Services has begun. See, IANS, *WTO has asked India to prepare trade facilitation paper: Nirmala Sitharaman*, *Business Standard* (7th Sept., 2016), available at: http://www.business-standard.com/article/economy-policy/wto-has-asked-india-to-prepare-trade-facilitation-paper-nirmala-sitharaman-116090700571_1.html (accessed on 9th Sept., 2016 at 9:56 PM).

⁸⁹ WTO, *Cotton: Ministerial Decision* (Ministerial Conference Tenth Session, 19th Dec., 2015, WT/MIN(15)/46).

⁹⁰ WTO, *Export Competition: Ministerial Decision* (Ministerial Conference Tenth Session, 19th Dec., 2015, WT/MIN(15)/45).

⁹¹ Agriculture and Development: Cotton, available at: https://www.wto.org/english/tratop_e/agric_e/cotton_e.htm.

⁹² It was estimated that there were 82,000 MNCs in operation, controlling more than 810,000 subsidiaries worldwide. Upwards of two-thirds of world trade now takes place within multinational companies or their suppliers – underlining the growing importance of global supply chains. See, United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013); See, Gary Gereffi & Timothy Sturgeon, *Global Value Chain - Oriented Industrial Policy: The Role of Emerging Economies* IN *Global Value Chains in a Changing World* (Deborah K. Elms & Patrick Low ed., 2013, WTO) (large economies have greater scope for leverage than small ones, which gives the emerging economies a distinct advantage).

⁹³ Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 *Journal of International Economic Law*, 509 – 527 (2007).

⁹⁴ Trade Facilitation, Ministry of Commerce and Industry, available at: <https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/trade-facilitation/>.

⁹⁵ See, Bipin Menon, *Trade Facilitation - A Boundless Opportunity for India*, 11 *Trade Law & Development* 73 (2019).