

Legal thoughts on how to merge trade facilitation and safety & security

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Abstract

Trade facilitation, understood as the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment, has a lot to do with security of the global trade supply chain. Different international bodies interested in trade matters have come up with various rules, regulations, guidelines and other instruments intended to enhance trade facilitation and safety and security. This multiplicity of regulations causes some duplication and redundancies which may ultimately complicate the implementation of trade facilitation and supply chain security measures. As a solution, this paper explores the possibility of merging trade facilitation and safety and security by means of a single binding agreement under the auspices of either the World Trade Organization (WTO) or the World Customs Organization (WCO).

Cognizant of the recently concluded Agreement on Trade Facilitation (WTO 2013d, WT/MIN(13)/36, WT/L/911), we further explore how the WCO can use its expertise and tools in this field to gradually enrich the Agreement in content, implementation and administration. This is in conformity with the ‘Dublin Resolution’ of the WCO Policy Commission (WCO 2013) which re-emphasised the centrality of the WCO in the implementation and administration of the Agreement on Trade Facilitation.

The preference for a single binding agreement is based on the contention that ‘hard law’ (as opposed to ‘soft law’) is more likely to be effective particularly with regard to the implementation of trade facilitation and security-related provisions. And this is because ‘hard law’ tends to increase states’ commitment to international agreements, can be self-executing or require domestic legal enactment, and foresees dispute settlement mechanisms which aid enforcement.

By comparing the various trade facilitation and safety and security instruments under the WCO, particularly the Revised Kyoto Convention and the SAFE Framework, it is evidenced that trade facilitation and supply chain security are just different sides of the same coin. In other words, the trade facilitation principles and standards contained in the Revised Kyoto Convention are the basis of the safety and security provisions. Moreover, it is shown that some provisions of the SAFE Framework are similar in content to those of the Revised Kyoto Convention. It is therefore argued that these two instruments would need to be merged as an all-encompassing agreement under the auspices of the WCO. For better implementation, however, this should concurrently go with the institution of an effective dispute settlement system within the WCO.

The WTO Agreement on Trade Facilitation is also discussed and it is observed that it falls short on adequately addressing the safety and security issues – which issues have a strong impact on trade facilitation. Thus, as a way forward, it is suggested that the WCO needs to make good use of Article 13 (especially paragraphs 1.5. and 1.6) of the Agreement on Trade Facilitation. By using its expertise and different tools for trade facilitation, the WCO can certainly influence the implementation and administration of the Agreement on Trade Facilitation. The periodical reviews of the Agreement as per Article 13, paragraph 1.6 may, for instance, be a good medium through which the idea of a substantial merging of trade facilitation and safety and security can be introduced.

1. Introduction

The concept of trade facilitation is very old but it has only received considerable attention during the last two decades. The same attention has been given to the issue of safety and security of global trade following the infamous terrorist attack on the World Trade Centre on September 11, 2001. The term ‘trade facilitation’ is often used in the context of trying to improve the interface between government bodies and traders at national borders (Grainger 2008). It is the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment (OECD 2001). On the other hand, safety and security refer to freedom from hurt, injury, loss, danger and fear.

Since trade facilitation and security of the international trade supply chain are key elements in the rapidly growing global trade, there are a number of international/supranational organisations involved, albeit at different levels, in regulating and implementing trade facilitation and security-related provisions. These include but are not limited to the World Trade Organization (WTO), World Customs Organization (WCO), United Nations Economic Committee for Europe through its Centre for Trade Facilitation and Electronic Business (UN/CEFACT), international Standards organisations, International Chamber of Commerce, International Maritime Organization, and many others. It goes without saying that there are further regulatory frameworks on trade facilitation and trade supply chain security at regional and national levels.

The multiplicity of regulators and actors in this field often leads to duplication and redundancies and, ultimately, complicates the implementation of trade facilitation and trade supply chain security measures – and this can be the very undoing of trade facilitation. Besides, some of these organisations act at the level of public international law, others at the private international law level, and yet others at a domestic law level.

At the level of public international trade law, one cannot overlook the role played by both the WTO and the WCO. From the 1996 WTO ministerial conference in Singapore to date, trade facilitation has remained firmly on the Doha development agenda as can be confirmed by the ‘Joint Statement by the 4th Global Review of Aid for Trade of 8 July 2013’ (WTO 2013a). The WCO is also a long-time regulator and implementer in the field of trade facilitation and trade supply chain security particularly through its Revised Kyoto Convention (2006) and the *SAFE Framework of Standards to Secure and Facilitate Global Trade* (the SAFE Framework) (2005).

In an attempt to curb duplication and therefore foster easier and effective implementation of regulations in the area of trade facilitation and trade supply chain security, this article explores the possibility of merging trade facilitation and safety and security through developing a single binding agreement under

the auspices of either the WTO or the WCO. This legal exploration is premised on the juxtaposition of ‘hard law’ and ‘soft law’ in public international law and the utility of having an effective dispute settlement mechanism within any given international treaty regime.

2. Some theoretical considerations

2.1 ‘Hard law’ versus ‘soft law’ in a bid to get the suitable form of legislation

The discourse on ‘hard’ and ‘soft’ law has continued to interest public international law jurists as they seek to find the most appropriate form of legislation. Whereas traditional sources of international law as per Article 38 of the Statute of the International Court of Justice do not take into account ‘soft law’ which is described by Snyder (1995) as rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects, such law continues to be widely used because of its various advantages. Similarly, ‘hard law’ which refers to legally binding obligations that are precise (or can be made precise through adjudication or issuance of detailed regulations) and that delegate authority for interpreting and implementing the law (Abbott & Snidal 2000) is used because it also has particular advantages.

Schaffer and Pollack (2010), based on Abbott and Snidal’s definition of ‘hard law’, rightly point out that the realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation. Take, for instance, the WCO’s SAFE Framework. It is *just a framework*, not formally binding – and therefore ‘soft’ along that dimension. There may also be an agreement which is formally binding but whose content lacks precision so that the agreement leaves almost total discretion to its parties with regard to its implementation. A good example is the Revised Kyoto Convention: while it remains a blueprint for modern and efficient customs procedures and is therefore an important trade facilitation tool, its provisions (in the form of Standards, Transitional Standards and Recommended Practices) make it rather imprecise and ultimately a soft form of legislation. Thirdly, if an agreement does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement can be ‘soft’. This third dimension ultimately relates to the absence of an (effective) dispute settlement institution. And a close study of the *Convention Establishing the Customs Co-operation Council* (1950) (now also known as the World Customs Organization) and the various agreements/conventions signed under its auspices glaringly points to this lack, rendering its legislations effectively ‘soft’ in nature.

‘Soft law’ may be in the form of treaty provisions that call only for general cooperation among states or that bind states only to reach an agreement on a matter in the future; non-treaty declarations or political pacts issued by states that set forth certain aspirations; resolutions of international organisations that are recommendatory in nature; and codes of behaviour that states or non-state actors operating transnationally are invited to adopt. It should be noted that whereas laws made under the auspices of the WCO as exemplified above tend to fall under ‘soft law’, those made under the WTO tend to fall under ‘hard law’.

We agree with what Schaffer and Pollack (2010) call a pragmatic view that actors (states and non-state actors), working *ex ante*, use agreements having different characteristics to further particular aims; and that the key difference between scholars who evaluate ‘hard’ and ‘soft’ law in terms of a binary binding/non-binding distinction and those who evaluate it based on characteristics that vary along a continuum, depends on whether they address international law primarily from an *ex post* enforcement perspective or an *ex ante* negotiating one. Notwithstanding that, and taking into consideration the WTO and WCO regimes on trade facilitation and security, we maintain that an *ex post* enforcement perspective needs to be emphasised.

Both ‘hard law’ on the one hand and ‘soft law’ on the other have advantages and disadvantages depending on the context in which they are used. That is why the two are often combined to the extent of creating a hybrid of hard and soft legislation (Trubek, Cottrell & Nance 2005). ‘Hard law’ is generally portrayed as tending to have advantages including but not limited to the following:

- It tends to increase states’ commitment to international agreements as states are apparently concerned with their reputation for compliance (Guzman 2008).
- ‘Hard law’ can be self-executing or require domestic legal enactment. And all this increases its credibility.
- ‘Hard law’ also creates an authority for interpreting and implementing the law as well as enhancing enforcement mechanisms through dispute settlement bodies (Abbott & Snidal 2000).

Yet some of the often-cited disadvantages of ‘hard law’ include the following:

- It may be perceived as a kind of ‘threat’ to national sovereignty and, as a result, states may spend years or even decades in negotiation – as exemplified by some WTO negotiation rounds.
- ‘Hard law’ agreements are also hard to adapt to changing circumstances (Abbott & Snidal 2000).

On the other hand, ‘soft law’ according to Murphy (2006) is usually credited with being easy to conclude as states are often less cautious about negotiating and concluding non legally binding norms. Besides, ‘sovereignty costs’ are lower and compromises may be more easily achieved. ‘Soft law’ instruments also tend to cope better with diversity as well as affording greater flexibility for involving non-state actors. On the negative side, apart from its non-binding nature, ‘soft law’ is criticised for its lack of clarity and precision needed to provide predictability and a reliable framework for action. It is also sometimes blamed for trying to have an effect but it bypasses normal systems of accountability (Trubek, Cottrell & Nance 2005).

2.2 Can customary international law work?

Article 38, 1(b) of the Statute of the International Court of Justice lists customary international law as the second main source of international law. This means that it is possible (at least in theory) to have trade facilitation or safety and security laws of a customary nature regulating international trade. But the main question here is whether this can be carried out successfully. To answer this question we need to briefly explore the characteristics or constitutive elements of customary international law and its advantages/disadvantages.

According to Murphy (2006) and Brownlie (2008), an ‘international custom’ refers to a relatively uniform and consistent state practice regarding a particular matter coupled with a belief among states that such practice is legally binding. From this description, it is obvious that international custom is not a precise source of law as there are no clear rules on what level of consistency or uniformity must exist with regard to a given practice of states. It is also not clear how long the practice must exist to be considered a custom (Murphy 2006). Besides, on account of the complex nature of trade facilitation and global trade supply chain security, it is practically impossible to rely on customary international law for solutions.

2.3 A case for an international agreement on trade facilitation and security

From the above discussions it is clear that ‘soft law’ and customary international law will always have a role to play in public international law. Nevertheless, they do not seem to be the most suitable and primary forms of law regulating trade facilitation and safety and security issues in international trade. Therefore, an international agreement containing significant traits of ‘hard law’ seems to be the best option to harmonise and standardise the various trade facilitation and global supply chain security provisions.

This merging can theoretically be effected under the auspices of any global intergovernmental organisation. From a practical point of view, however, this can best be completed either at WTO or WCO

levels. In the following sections we examine the various trade facilitation and security provisions under these two organisations and show how trade facilitation and security are just different sides of the same coin and how best they can be merged.

3. Trade facilitation, safety and security under the WCO

The ‘roots’ of trade facilitation are traceable in the preamble to the Convention Establishing a Customs Co-operation Council of December 1950 which puts emphasis on the need *to secure the highest degree of harmony and uniformity in Customs systems*. Obviously, the harmony and uniformity considered here is not for its own sake but for the sake of facilitating trade and other roles of Customs such as protection of people through customs controls.

Since its formation and to the present day, the WCO has continuously developed and upgraded a number of conventions and instruments intended to facilitate global trade and secure the supply chain. Such conventions and instruments include but are not limited to the Revised Kyoto Convention, Istanbul Conventions, SAFE Package, WCO Data Model, Time Release Study, Globally Networked Customs Concept, WCO Customs Risk Management Compendium, Immediate Release Guidelines, and the Compendium on How to Build a Single Window Environment.

It is indisputable that each of these instruments has a particular contribution to trade facilitation and safety and security. However, a close examination of the provisions of the Revised Kyoto Convention and the SAFE Framework shows that the latter’s content is much reflected in the former. This creates overlaps which in turn may create implementation/enforcement problems. Besides, whereas the Revised Kyoto Convention to some extent has the character of ‘hard law’ with binding effect (see Article 12), the SAFE Framework is completely ‘soft law’.

3.1 The SAFE Framework and the Revised Kyoto Convention

Comparisons of some of the provisions of the SAFE Framework which are already catered for in the Revised Kyoto Convention are represented in Table 1.

Table 1: Comparison of provisions of the SAFE Framework and the Revised Kyoto Convention

Revised Kyoto Convention	SAFE Framework of Standards
<p>3.32. Transitional Standard</p> <p>For authorized persons who meet criteria specified by the Customs, including having an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records, the Customs shall provide for:</p> <ul style="list-style-type: none"> • release of the goods on the provision of the minimum information necessary to identify the goods and permit the subsequent completion of the final Goods declaration; • clearance of the goods at the declarant’s premises or another place authorized by the Customs; 	<p>1.4.1. Authorized Economic Operators</p> <p>AEOs who meet criteria specified by the Customs (see 4.2.) should reasonably expect to participate in simplified and rapid release procedures on the provision of minimum information. The criteria include having an appropriate record of compliance with Customs requirements, a demonstrated commitment to supply chain security by being a participant in a Customs-Business partnership programme, a satisfactory system for managing their commercial records and financial viability. In order to enhance supply chain security and harmonization of Customs procedures Customs administrations should seek mutual recognition of AEO status between or among programmes.</p>

<ul style="list-style-type: none"> • and, in addition, to the extent possible, other special procedures such as: • allowing a single Goods declaration for all imports or exports in a given period where goods are imported or exported frequently by the same person; • use of the authorized persons’ commercial records to self-assess their duty and tax liability and, where appropriate, to ensure compliance with other Customs requirements; 	
<p>6.3. Standard</p> <p>In the application of Customs control, the Customs shall use risk management.</p> <p>6.4. Standard</p> <p>The Customs shall use risk analysis to determine which persons and which goods, including means of transport, should be examined and the extent of the examination.</p> <p>6.5. Standard</p> <p>The Customs shall adopt a compliance measurement strategy to support risk management.</p> <p>6.6. Standard</p> <p>Customs control systems shall include audit-based controls.</p>	<p>4. Standard 4 – Risk-Management Systems</p> <p>The Customs administration should establish a risk-management system to identify potentially high-risk cargo and/or transport conveyances and automate that system. The system should include a mechanism for validating threat assessments and targeting decisions and implementing best practices.</p> <p>4.1. Automated selectivity systems</p> <p>Customs administrations should develop automated systems based on international best practice that use risk management to identify cargo and/or transport conveyances that pose a potential risk to security and safety based on advance information and strategic intelligence. For containerized maritime cargo shipments, that ability should be applied uniformly before vessel loading.</p> <p>4.2. Risk management</p> <p>Risk management is “the systematic application of management procedures and practices which provide Customs with the necessary information to address movements or consignments which present a risk”.</p>
<p>7.1. Standard</p> <p>The Customs shall apply information technology to support Customs operations, where it is cost-effective and efficient for the Customs and for the trade. The Customs shall specify the conditions for its application.</p> <p>7.2. Standard</p> <p>When introducing computer applications, the Customs shall use relevant internationally accepted standards.</p>	<p>6. Standard 6 – Advance Electronic Information</p> <p>The Customs administration should require advance electronic information in time for adequate risk assessment to take place.</p> <p>6.1. Need for computerization</p> <p>The advance electronic transmission of information to Customs requires the use of computerized Customs systems, including the use of electronic exchange of information at export and at import.</p>

<p>7.3. Standard</p> <p>The introduction of information technology shall be carried out in consultation with all relevant parties directly affected, to the greatest extent possible.</p> <p>7.4. Standard</p> <p>New or revised national legislation shall provide for:</p> <ul style="list-style-type: none"> • electronic commerce methods as an alternative to paper-based documentary requirements; • electronic as well as paper-based authentication methods; • the right of the Customs to retain information for their own use and, as appropriate, to exchange such information with other Customs administrations and all other legally approved parties by means of electronic commerce techniques. 	<p>6.2. Revised Kyoto Convention ICT Guidelines</p> <p>Standards 7.1, 6.9, 3.21 and 3.18 of the General Annex to the Revised Kyoto Convention require Customs to apply Information and Communication Technologies (ICT) for Customs operations, including the use of e-commerce technologies. For this purpose, the WCO has prepared detailed Guidelines for the application of automation for Customs. These Kyoto ICT Guidelines should be referred to for the development of new, or enhancement of existing, Customs ICT systems. In addition, Customs administrations are recommended to refer to the WCO Customs Compendium on Customs Computerization.</p>
<p>3.3. Standard</p> <p>Where Customs offices are located at a common border crossing, the Customs administrations concerned shall correlate the business hours and the competence of those offices.</p> <p>3.4. Transitional Standard</p> <p>At common border crossings, the Customs administrations concerned shall, whenever possible, operate joint controls.</p> <p>3.5. Transitional Standard</p> <p>Where the Customs intend to establish a new Customs office or to convert an existing one at a common border crossing, they shall, wherever possible, co-operate with the neighbouring Customs to establish a juxtaposed Customs office to facilitate joint controls.</p> <p>6.7. Standard</p> <p>The Customs shall seek to co-operate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs control.</p>	<p>5. Co-ordinated Border Management</p> <p>Coordinated Border Management (CBM) strengthens the ability of a multitude of border based agencies to secure and facilitate global trade. Governments should develop co-operative arrangements among their agencies (such as Customs, transport ministries, national police, immigration authorities, border guard, and other entities as appropriate on a Member-to-Member basis) that are involved in international trade and security. Governments should also work with the border agencies of foreign governments in order to maximize the harmonization of border control functions. The implementation of such co-operative arrangements could address border issues such as national and international cooperation and co-ordination and the adoption of international standards.</p>

Source: Compiled by the authors of this research for comparative purposes.

3.2 Trade facilitation and security are different sides of the same coin

The two key objectives of Customs are commonly referred to as *facilitation* and *control* (Widdowson 2005), and this is evident from the Revised Kyoto Convention and SAFE Framework provisions, some of which are reproduced in Table 1. Thus, whereas the discourse on global supply chain security gained currency after September 11, 2001 (see the introduction to this article above), the concept of customs control, which includes safety and security has always been pertinent to Customs. And the key point here concerns how best to develop a legal framework that leads to an appropriate balance between trade facilitation and security-related control.

From a risk management perspective some scholars, for example Widdowson (2005), would then propose a legislative framework which provides for flexibility and tailored solutions to enable relevant risk management and administrative strategies to be implemented. In this case, the onus for achieving regulatory compliance is placed on both government and the trading community. In our view, however, we maintain that much as a legislative base that provides for '*flexibility and tailored solutions*' may have some practical advantages; it can easily erode the long-cherished *principle of legal certainty*. And this often culminates in arbitrariness – the very undoing of the rule of law.

It is therefore pertinent that trade facilitation and safety and security issues get a formidable legal framework with a binding character across the board. One way of achieving this is to reduce the fragmentation of facilitation and security provisions found in many instruments currently in place. Hence we propose to merge the Revised Kyoto Convention with the SAFE Framework into a 'strong' trade facilitation and security treaty under the auspices of the WCO. This, however, can only make sense if the WCO is also ready to institute an effective dispute settlement mechanism and upgrade its entire enforcement legal framework.

The proposal to create an effective dispute settlement system under the WCO may not sound strange because there are already some provisions in the Convention Establishing the Customs Co-operation Council (1950) on which to base this. These are: Article XX which stipulates that '(a) The Council may recommend amendments to the present Convention to the Contracting Parties'; Section 2 of the Annex to the Convention which reads: 'the Council shall possess juridical personality. It shall have the capacity: (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings'; and Section 24 of the Annex to the Convention which states that 'the Council shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private character to which the Council is a party'.

The exposition above demonstrates how the WCO is 'naturally' engaged in trade facilitation, safety and security. It also shows that merging these into one treaty under the auspices of the WCO is not only feasible but also desirable – though it is not the only alternative. Below we explore the possibility of merging trade facilitation and trade supply chain security at the WTO level.

4. Trade facilitation, safety and security under the WTO

'The idea of creating a World Trade Organization emerged slowly from various needs and suggestions. Even at the beginning of the Uruguay Round, *negotiators and observers realized that significant new agreements would require better institutional mechanisms and a better system for resolving disputes*' [emphasis added] (Matsushita, Schoenbaum & Mavroidis 2006). Thus the WTO was formed to administer WTO trade agreements, provide a forum for trade negotiations, handle trade disputes, monitor national trade policies, offer technical assistance and training for developing countries, and cooperate with other international organisations.

The WTO's legal regime is based on the *Marrakesh Agreement* establishing it, plus all the specialised agreements such as GATT, GATS and TRIPS annexed to this Agreement – which are usually referred

to as the ‘covered agreements’. These are the fundamental sources of WTO law. Additionally, Article XVI.1 of the Marrakesh Agreement Establishing the WTO stipulates that the WTO shall be guided by the decisions, procedures and customary practices followed by GATT Contracting Parties. This ultimately leads WTO law to have a number of interpretative elements, namely GATT panel reports; WTO panel reports and Appellate Body reports; decisions and recommendations by various WTO organs; international agreements not reflected in the WTO agreement; Acts adopted by various international organisations; decisions by international courts; domestic law and practice; unilateral declarations by WTO Members; customary international law; general principles of law and doctrine (Matsushita, Schoenbaum & Mavroidis 2006).

Worth mentioning here is the peculiar nature of the WTO dispute settlement system characterised by both litigation and non-litigation methods. This peculiarity is also evidenced by the role of the Dispute Settlement Body (DSB) and use of decisions by consensus – where consensus refers the situation whereby ‘no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision’ (see footnote 1 to Article 2 of the Dispute Settlement Understanding [DSU]). Disputes may be settled through consultations (Articles 3(7) and 4 of the DSU); good offices, conciliation and mediation (Article 5 of the DSU); adjudication by panels and the Appellate Body (Articles 5 to 19 of the DSU); and arbitration (Article 25 of the DSU).

Starting from the GATT regime, trade facilitation has always had a place in the multilateral trading system. No wonder then that the newly concluded Agreement on Trade Facilitation is based on GATT Articles V, VIII and X. The Agreement on Trade Facilitation first deals with the issue of publication and availability of information (derived from GATT: X); then disciplines on fees and charges imposed on or in connection with importation and exportation (derived from GATT: VIII) and then freedom of transit (derived from GATT: V). Below is a summary of the salient issues addressed by the Agreement on Trade Facilitation.

4.1 Section I, Article 1: Publication and availability of information

Article 1.1 of the Agreement on Trade Facilitation provides that:

Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them:

- a. Importation, exportation and transit procedures (including port, airport, and other entry-point procedures) and required forms and documents;
- b. Applied rates of duties and taxes of any kind imposed on or in connection with importation, exportation;
- c. Fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;
- d. Rules for the classification or valuation of products for customs purposes;
- e. Laws, regulations and administrative rulings of general application relating to rules of origin;
- f. Import, export or transit restrictions or prohibitions;
- g. Penalty provisions against breaches of import, export or transit formalities;
- h. Appeal procedures;
- i. Agreements or parts thereof with any country or countries relating to importation, exportation or transit;
- j. Procedures relating to the administration of tariff quotas (WTO 2013d, p. 2).

It is important to note that modern methods of communication, particularly the use of the internet, are provided for. It is also interesting to learn that just as in the Revised Kyoto Convention this text contains

a number of provisions on the issuance of advance rulings and right of appeals. This reflects the general tendency to refer to the WTO and WCO as ‘sister organisations’ which complement each other. That is a good thing as long as it does not create unnecessary repetitions concerning trade facilitation- and security-related international law provisions.

4.2 Section I, Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation

The Agreement contains general, specific and penal disciplines relating to importation and exportation. The general disciplines include the following:

- 1.1. The provisions of paragraph 6.1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with importation or exportation of goods.
- 1.2. Information on fees and charges shall be published in accordance with Article 1 of this Agreement. This information shall include the fees and charges that will be applied, reason for such fees and charges, the responsible authority and when and how payment is to be made.
- 1.3. An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force except in urgent circumstances. Such fees and charges shall not be applied until information on these has been published.
- 1.4. Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable (WTO 2013d, p. 7).

The specific disciplines deal with customs processing. They stipulate that fees and charges for customs processing:

- i. shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific importation or exportation in question; and
- ii. are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods (WTO 2013d, p. 7).

It should be emphasised that the rationale of these provisions (which are in line with GATT: VIII) is to facilitate trade by reducing non-tariff fees and charges and the application of customs procedures in a protectionist manner. The same reasons also account for the penalty disciplines contained in the Agreement.

4.3 Section I, Article 11: Freedom of Transit

Some transit procedures have long been known to be a form of non-tariff barriers to trade (Kafeero 2008). Article V of GATT 1994 provides for freedom of transit, regulation of traffic in transit urging Members to avoid unnecessary delays or restrictions and to set reasonable charges and regulations on traffic in transit in a non-discriminatory manner. Article 11 of the Agreement on Trade Facilitation expands on the provisions of GATT V clearly indicating what is forbidden (paragraphs 1, 2, 3, 4, 6, 7 and 8), what must be done (paragraphs 9, 10, 11.1, 11.2, 11.3, 11.4 and 11.5); and what is recommended (paragraphs 5, 12 and 13). And all these provisions are ultimately geared towards trade facilitation.

Forbidden is, for instance, the application of ‘technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade on goods in transit’ (Article 11, 8). Among the provisions which stipulate what must be done is, for example, the rule that calls for ‘advance filing and processing of transit documentation and data prior to the arrival of goods’ (Article 11, 9). And recommendations include, for instance, Article 11, paragraph 5, which encourages Members ‘to make available ... separate infrastructure (such as lanes, berths and similar) for traffic in transit’.

4.4 Other trade facilitation/supply chain security-related provisions

The Agreement on Trade Facilitation contains further provisions some of which deal with global trade supply chain security. These provisions relate, *inter alia*, to:

- pre-arrival processing
- electronic payment
- risk management
- post-clearance audit
- establishment and publication of average release times
- trade facilitation measures for authorised operators
- expedited shipments
- customs and border agency cooperation
- establishment of single window
- the use of customs brokers.

Further, the Agreement on Trade Facilitation provides for the establishment of trade facilitation institutions at international and national levels. Article 13 of the Agreement on Trade Facilitation provides for the establishment of a Committee on Trade Facilitation at the WTO level which is responsible, among others, for:

- maintaining ‘close contact with other international organizations in the field of trade facilitation, such as the World Customs Organization, with the objective of securing the best available advice for the implementation and administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided’ (Article 13, 1.5.)
- reviewing ‘the operation and implementation of this Agreement 4 years from its entry into force, and periodically thereafter’ (Article 13, 1.6.).

Article 13, 2 of the Agreement on Trade Facilitation goes further to provide for the establishment of national committees on trade facilitation to deal with domestic coordination and implementation of the Agreement. Finally, Section II of the Agreement on Trade Facilitation contains different provisions concerning special and differential treatment for developing and least developed country Members.

From our exploration of the general WTO legal framework, the various trade facilitation/safety and security provisions under WTO auspices, the newly concluded Agreement on Trade Facilitation, we can conclude that:

- The Agreement on Trade Facilitation includes some provisions on global trade supply chain security. But these supply chain security-related provisions are just elementary and therefore call for further development especially with regard to widening their scope and making them precise. Fortunately, there is room for review of such inadequacies through the Committee on Trade Facilitation as per Article 13, 1.6.
- The WTO boasts of a dispute settlement system which is, to a considerable extent, effective and thus enhances the enforcement aspects and binding character of its provisions.
- The WTO commands political respect from international actors such as states, intergovernmental organisations, multinational corporations, non-governmental organisations, and the private sector in general.

5. Conclusions: WCO's role in merging trade facilitation and safety and security

There is certainly a strong connection between the WCO and trade facilitation and supply chain security. This is evident and summarised in the WCO's vision statement, mission statement and first strategic goal. The Vision statement reads:

Borders divide; Customs connect; **dynamically leading modernization** and connectivity in a rapidly changing world.

The Mission statement reads:

The WCO provides leadership, guidance and support to Customs administrations **to secure and facilitate legitimate trade**, realize revenues, protect society and build capacity.

And the WCO's first strategic goal is:

... to **promote the security and facilitation of international trade**, including simplification and harmonization of Customs procedures [emphasis added].

Granted that the promotion of security and facilitation of legitimate international trade is undeniably a core *raison d'être* of the WCO, one therefore has all the reasons to give security and trade facilitation a formidable legal framework. This requires taking seriously both the *ex ante* negotiating perspective and the *ex post* enforcement one. Unfortunately, there seems to be some reluctance in addressing the enforcement aspects of the provisions of the WCO instruments. Put simply, the WCO is based on 'soft law' with all its limitations. The first step to reverse this situation for the better would be to develop an effective dispute settlement mechanism with both litigation and non-litigation aspects.

Hand in hand with empowering the WCO with an effective dispute mechanism is the need to merge trade facilitation with safety and security, for they have much in common. And the best way to do this is the 'hard law' approach of having a comprehensive treaty merging trade facilitation with security. Modernising the WCO with an effective dispute settlement system and developing a treaty that merges trade facilitation and security would therefore not be a bad option.

In line with the 'Dublin Resolution' of the WCO Policy Commission (www.wcoomd.org), the alternative way forward is for the WCO to make good use of Article 13 (especially paragraphs 1.5. and 1.6) of the Agreement on Trade Facilitation. Using its expertise and different tools for trade facilitation, the WCO can still have a considerable influence on the implementation and administration of the Agreement on Trade Facilitation. The periodical reviews of the Agreement as per Article 13, 1.6 may, for instance, be a good medium through which the idea of a substantial merging of trade facilitation and safety and security can be introduced.

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