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What is the Best Forum For Promoting Trade Facilitation?

Zviad V. Guruli*

I. Introduction

The importance of trade facilitation has increased during the last decade. While many scholars have addressed the significance of the trade facilitation issue, few have directed their attention to the need for an appropriate forum. In the context of identifying the necessity for a new multilateral agreement on trade facilitation to be administered by the World Trade Organization (WTO), this issue has been hotly debated by national delegations.¹

Trade facilitation covers a variety of measures and activities. For a complete analysis, however, it is beneficial to examine the trade facilitation issue from the perspective of one specific field. For purposes of this examination, trade facilitation will be analyzed from the customs aspect. The choice of the customs aspect is not random. Customs issues play a predominant role in the field of trade facilitation. Additionally, the domestic legislation of many countries regarding trade facilitation is primarily limited to the customs area. Significantly, the WTO has focused its work on trade facilitation by concentrating on customs issues, and several noteworthy international agreements are currently in existence in this area. Further, the World Customs Organization (WCO) has played a vital role in promoting simplified customs procedures throughout the world. The existence of international legal instruments and the WCO’s status as a strong international inter-governmental organization, are factors that make customs a good model for the analysis

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* This paper was written while Mr. Guruli was a fellow at the Institute of International Economic Law at Georgetown University Law Center, where he was also completing his LL.M. degree in International and Comparative Law. Mr. Guruli would like to thank Mr. Richard F. Chovanec for his comments on this paper.

¹ For a comprehensive overview of the work done by various international organizations in the area of trade facilitation, see Brian R. Staples, Trade Facilitation, available at http://www1.worldbank.org/wbiep/trade/papers_2000/Bpfacil.PDF (last visited Apr. 29, 2002).
of trade facilitation.

Identification of a definition of “trade facilitation” is necessary for this analysis. It may come as a surprise that, despite the amount of controversy and debate this issue has caused in recent years, there is no uniformly agreed upon definition. Various organizations and institutions working in the area of trade facilitation have included diverse activities under this concept. Frequent use of this term has caused it to become a residual category for trade issues that are not specifically designated.

In general, trade facilitation is defined as:

the simplification and harmonization of international ‘trade procedures’ with trade procedures being the ‘activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade.’ This definition relates to a wide range of activities such as import and export procedures (e.g. customs or licensing procedures); transport formalities; payments, insurance, and other financial requirements.

The general definition appears to be a plausible one and, more importantly, it is adequate for purposes of this paper. In the customs area, trade facilitation can be defined as increasing the speed of the processing of merchandise through customs.

The purpose of this paper is to analyze the struggle among various organizations to bring international trade facilitation measures within one forum’s competence. Part II briefly addresses the status quo of trade facilitation. Part III examines the most important international instruments in the area of trade facilitation. Part IV presents a discussion on a possible forum for trade facilitation that will be best equipped to adequately confront all potential challenges. Finally, Part V suggests that countries and international organizations need to formulate a plan of action that would be acceptable to all parties involved in trade facilitation.

II. The Status Quo of Trade Facilitation

In recent years, various factors have contributed to the growing importance of trade facilitation. The most important of these factors is

2. The term “trade facilitation” can have a broad or narrow definition – the broad definition encompassing the type of work carried out by UNCTAD (related to the establishment of national Trade Points), and the narrow definition covering various areas (under the umbrella of procedural and documentary requirements) that are essential in facilitating trade. INT'L TRADE CTR. & COMMONWEALTH SECRETARIAT, BUSINESS GUIDE TO THE WORLD TRADING SYSTEM 306 (1999) (hereinafter BUSINESS GUIDE).

the sharp decrease in tariff levels after the Uruguay Round. After this tariff level decrease and the significant elimination or reduction of non-tariff barriers, trade procedures imposed by countries surfaced as the primary obstacles to trade.

In many regions of the world it is estimated that the cost associated with trade procedures is higher than the cost of existing tariffs. Recent studies also indicate that trade facilitation can reduce transaction costs up to 15 percent. According to the UNCTAD, "the average customs transaction involves 20-30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60-70% of all data at least once." Furthermore, simplified trade procedures are instrumental in attracting foreign direct investment, particularly in developing countries.

Although many international organizations were addressing trade facilitation issues prior to 1996, the Singapore Ministerial Declaration, adding trade facilitation to the WTO agenda, was an important milestone. While trade facilitation issues were always addressed by the WTO, this was the first time that trade facilitation was identified as a separate topic. Notably, the WTO has recently confirmed its commitment to trade facilitation.

4. Increased volumes of trade and innovations in the technological field have also contributed to the increased attention paid to trade facilitation issues. See WTO, A Training Package, available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto02/wto2_69.htm (last visited Apr. 29, 2002).
5. Usually these costs are associated with "delays at borders, complicated and unnecessary documentation requirements and lack of automation of government-mandated trade procedures." Id.
9. Paragraph 27 of the Doha Ministerial Declaration states: "Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves
As previously noted, work on trade facilitation has been carried out by various international inter-governmental and non-governmental organizations for many years. Although many of these organizations have been somewhat successful in their efforts to bring much needed uniformity, their progress falls short of what today's international traders desire. These organizations have primarily focused on drafting various international agreements (most of which are not legally binding). None have been successful, however, in providing a sole forum, existing or new, that would amalgamate trade facilitation issues under one institution and provide an enforcement mechanism.

Although it is undeniable that the existence of these agreements is essential to solving the trade facilitation issue, it is equally obvious that simply minting new agreements will not suffice; the lack of a strong institutional framework could devour the importance of even the most well-drafted agreement. In an era of increased world trade, identification of a proper forum for the resolution of these problems is a necessity.

III. Existing International Instruments on Trade Facilitation

As discussed above, the work of most international organizations with respect to trade facilitation has focused on drafting and implementing international agreements. The same approach has dominated the customs field. The WCO and the WTO have developed a
number of fundamental international instruments in the customs area. While not all of these instruments can be analyzed here, it is important to identify and discuss the principle instruments related to trade facilitation.

A. WTO Customs Valuation Agreement

Formally known as the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (GATT), the Customs Valuation Agreement is one of the main WTO instruments in the customs area. As the title indicates, the purpose of this agreement was to implement Article VII of GATT 1994. The Customs Valuation Agreement sets out detailed rules that must be followed by customs administrations to determine the customs value on imported goods.

Determination of the customs value on imported goods is essential for calculating appropriate duties. The Customs Valuation Agreement provides that “[t]he primary basis for customs value under this Agreement is transaction value.” Article 1 defines the transaction value as “the price actually paid or payable for the goods when sold for export to the country of importation.” The Customs Valuation Agreement also provides that the transaction value may be adjusted as a result of certain

12. The following are other WTO agreements and rules that are relevant for the trade facilitation issue: Agreement on Technical Barriers to Trade; Agreement on the Application of Sanitary and Phytosanitary Measures; GATT 1994 – Article V on Freedom of Transit, Article VIII on Fees and Formalities Connected with Importation and Exportation, Article X on Publication and Administration of Trade Regulations. These agreements and rules are not examined in this paper because, although very important for trade facilitation, they are not as closely linked to the customs area.

13. “Article VII of the General Agreement on Tariffs and Trade laid down the general principles for an international system of valuation. It stipulated that the value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values. Although Article VII also contains a definition of “actual value,” it still permitted the use of widely differing methods of valuing goods. In addition, ‘grandfather clauses’ permitted continuation of old standards which did not even meet the very general new standard.” WTO, A Training Package, available at http://www.wto.org/english/thewto_e/whatis_e/co/e/default.htm (last visited Apr. 29, 2002).

14. As a result of the Uruguay Round, this agreement replaced the GATT Valuation Code introduced by the Tokyo Round in 1979.


17. Id. art. 1.
additions or deductions.\footnote{Id.}

In addition to setting the transaction value standard, the Customs Valuation Agreement provides for five alternative methods of valuation in cases when the transaction value cannot be determined: 1) the transaction value of identical goods; 2) the transaction value of similar goods; 3) the deductive value method; 4) the computed value method; and 5) the fall-back method.\footnote{The Customs Valuation Agreement provides detailed descriptions of all these five methods.} Customs administrations are limited to these five methods when they reject the transaction value and these alternatives must be used in the above order.\footnote{The order of methods 4 and 5 can be changed, but only at the request of the importer.}

Additionally, the Customs Valuation Agreement requires WTO member states to provide certain safeguards for importers in their national legislations. These safeguards include the right of importers to use all available evidence to substantiate the transaction value declared by them. In addition, importers are allowed to demand a full written explanation from customs officials when their declared transaction value is rejected. The purpose of this provision is to provide importers with the right of appeal to higher authorities within the customs administration, or to an independent court or tribunal.

Although the Customs Valuation Agreement was developed and is enforced through the WTO, the WCO plays a key role in implementing this agreement. The Customs Valuation Agreement established a Technical Committee on customs valuation under the auspices of the WCO and granted it the authority to administer the agreement. The role of the Technical Committee is "to ensure uniformity in the interpretation and application of the Agreement at the technical level."\footnote{See WCO, supra note 15.}

The Customs Valuation Agreement is vital for trade facilitation. By providing uniform rules, the Customs Valuation Agreement reduces the risk of customs administrations reaching arbitrary decisions on valuations of imported goods, which in turn could be a significant non-tariff barrier to trade.

\section*{B. WTO Agreement on Rules of Origin}

The Agreement on Rules of Origin defines rules of origin as "laws, regulations and administrative determinations of general application applied by any WTO Member to determine the country of origin of goods."\footnote{Agreement on Rules of Origin, Apr. 15, 1994, art. 1(1), Marakesh Agreement} Rules of origin are important "to implement measures and
instruments of commercial policy such as anti-dumping duties and safeguard measures; to determine whether imported products shall receive most-favoured-nation (MFN) treatment or preferential treatment; for the purpose of trade statistics; for the application of labeling and marking requirements; and for government procurement.»

Currently, different countries are using various rules of origin, and some countries apply different rules on imported goods based on the purpose of the rules. The Rules of Origin Agreement provides for two sets of rules: 1) rules applicable in the transition period, and 2) rules applicable after the transition period. It does not provide for rules applicable to imports pursuant to preferential arrangements.

During the transition period, countries are free to employ different rules based on the purpose (i.e., administering quantitative restrictions, labeling, etc.) for which these rules are applied. The Rules of Origin Agreement, however, requires countries to follow certain principles during this transition period. Most of these principles (e.g.,

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24. It is important to note that some general principles (such as value added or tariff shift) are common to these rules.
25. During the transition period countries must ensure that:
   (a) rules of origin, including the specifications related to the substantial transformation test, are clearly defined;
   (b) rules of origin are not used as a trade policy instrument;
   (c) rules of origin do not themselves create restrictive, distorting or disruptive effects on international trade and do not require the fulfillment of conditions not related to manufacturing or processing of the product in question;
   (d) rules of origin applied to trade are not more stringent than those applied to determine whether a good is domestic, and do not discriminate between Members (the GATT MFN principle). However, with respect to rules of origin applied for government procurement, Members are not be obliged to assume additional obligations other than those already assumed under the GATT 1994 (the national treatment exception for government procurement contained in GATT Article III:8);
   (e) rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
   (f) rules of origin are based on a positive standard. Negative standards are permissible either as part of a clarification of a positive standard or in individual cases where a positive determination or origin is not necessary;
   (g) rules of origin are published promptly;
   (h) upon request, assessments of origin are issued as soon as possible but no later than 150 days after such request, they are to be made publicly available; confidential information is not to be disclosed except if required in the context of judicial proceedings. Assessments of origin remain valid for three years provided the facts and conditions remain comparable, unless a decision contrary to such assessment is made in a review referred to in (j). This advance
transparency, non-discrimination, review of administrative decisions) will continue to apply after the transition period.26

The purpose of the second set of rules is to establish harmonized non-preferential rules to be applied on MFN basis. These harmonized standards will be product-specific irrespective of the purpose for which they are used. The Rules of Origin Agreement established a Technical Committee on Rules of Origin under the auspices of the WCO and entrusted it with technical work on the harmonization of these rules. Although the Rules of Origin Agreement has been in effect since 1995, the work on “Harmonized Rules of Origin,” that will be annexed to the current agreement, is not yet complete.

Labor costs, lower tariffs, and reduced non-tariff barriers have encouraged many manufacturers to branch their productions throughout the world. Consequently, the number of goods produced in more than one country has grown substantially. This, in turn, has increased the significance of rules of origin in trade facilitation. The use of multiple rules of origin could circumvent tariff concessions and undermine their importance. Thus, the need for uniform rules of origin has also become urgent.27

C. WTO Preshipment Inspection Agreement

Preshipment inspection covers “activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be

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26. Provisions (d) through (k) will continue to apply.
27. According to the WCO, “Harmonization means that a single origin can be determined for all non-preferential commercial policy purposes. Both private and public sectors can anticipate being able to know a clear and predictable origin outcome by application of a single set of Rules of Origin. Customs officers and traders may face a significant task in implementing the Harmonized Rules of Origin once they are operational. However, in the long run, the benefits of harmonization will be widely appreciated in the same way as the Harmonized System Nomenclature.” See WCO, available at http://www.wcoomd.org/ie/en/topics_issues/Origin/origin.html#The%20Harmonized%20Rules%20of%20Origin%20and%20Trade%20Facilitation (last visited Apr. 29, 2002).
exported to the territory of the user Member.\textsuperscript{28} Governments have been using preshipment inspection (PSI) companies for the last four decades; previously, they were used primarily by private importers. The Preshipment Inspection Agreement applies to those WTO Members whose governments are utilizing services provided by PSI companies.\textsuperscript{29} These countries and PSI companies are referred to, respectively, as "user members" and "entities."\textsuperscript{30}

Article 2 of the Preshipment Inspection Agreement imposes the following main obligations on user members: 1) Non-discrimination – carrying out PSI activities in a non-discriminatory manner; 2) Governmental Requirements – respecting the national treatment principle; 3) Site of Inspection - carrying out PSI activities in the customs territory from which the goods are exported or, if not possible or both parties agree in the customs territory in which the goods are manufactured; 4) Standards – performing quantity and quality inspections in accordance with the standards defined by the seller and the buyer or, in the absence of such standards, international standards; 5) Transparency – carrying PSI activities in a transparent manner; 6) Protection of Confidential Business Information – protecting the confidentiality of documents received during PSI activities; 7) Conflicts of Interest – avoiding conflicts of interest among various entities; 8) Delays – carrying PSI activities without unreasonable delays; 9) Price Verification – using set guidelines for price verification; and, 10) Appeals – ensuring an appeals procedure within the PSI entity. In addition to an appeals procedure in Article 2, Article 4 also requires user countries to provide an independent review procedure.\textsuperscript{31}

Although the Preshipment Inspection Agreement primarily deals with user members, it also places obligations on exporting countries. Article 3 imposes three main obligations on exporting: 1) Non-discrimination – applying laws and regulations related to PSI activities in a non-discriminatory manner; 2) Transparency – publishing laws related to PSI activities; and, 3) Technical Assistance – providing technical assistance to user members.\textsuperscript{32}

While the Preshipment Inspection Agreement permits WTO Members to use the services provided by PSI companies, it encourages user countries to strengthen their customs administrations in order to be


\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id. art.4.

\textsuperscript{32} Id. art.3.
less dependent on these companies. One of the problems associated with
the use of PSI companies is the issue of liability. Since PSI companies
are used by governments, importers are unable to bring an action against
these companies. The use of PSI companies, however, also has several
advantages. Not only does it make customs clearance more effective in
those countries where customs administrations are not modernized, but it
also reduces corruption. Reducing corruption is one of the main reasons
why many developed countries are using PSI companies.\textsuperscript{33}

Although countries may limit the use of PSI companies in the
future, the importance of the Preshipment Inspection Agreement cannot
be overlooked. Today, more than thirty countries are using PSI
companies. These companies are performing many functions of customs
administrations. Thus, the Preshipment Inspection Agreement is also
critical for trade facilitation.

\textbf{D. WTO Agreement on Import Licensing Procedures}

Import licensing is defined as "administrative procedures used for
the operation of import licensing regimes requiring the submission of an
application or other documentation (other than that required for customs
purposes) to the relevant administrative body as a prior condition for
importation into the customs territory of the importing Member."\textsuperscript{34}
While the Import Licensing Agreement allows countries to maintain
import licensing procedures,\textsuperscript{35} it establishes rules that countries must
follow in order to ensure that import licensing procedures do not impede
international trade.

In general, the Import Licensing Agreement provides that "[t]he
rules for import licensing procedures shall be neutral in application and
administered in a fair and equitable manner."\textsuperscript{36} Furthermore, it requires
that application and renewal forms and procedures be as simple as
possible.\textsuperscript{37} In addition, rules on import licensing procedures are subject

\textsuperscript{33} The issue of customs-related corruption has been raised numerous times by
various organizations. Although not binding, the WCO Customs Co-operation Council
Declaration Concerning Integrity in Customs (the Arusha Declaration) is an important
instrument for trade facilitation. It provides for guidelines to be followed by countries in
order to reduce customs-related corruption.

\textsuperscript{34} Agreement on Import Licensing Procedures, Apr. 15, 1994, art. 1, Marakesh
Agreement Establishing the World Trade Organization, Annex 1, \textit{available at}
Agreement).

\textsuperscript{35} The use of these procedures is limited to certain purposes (e.g., monitoring trade
statistics, administering quantitative restrictions, etc.).

\textsuperscript{36} ILP Agreement, \textit{supra} note 34, art 1(3).

\textsuperscript{37} The Import Licensing Agreement also protects importers in cases of minor
documentation errors and minor variations in value, quantity or weight. \textit{See id.}
to a publication requirement. The Import Licensing Agreement classifies import licensing regimes as either automatic or non-automatic. In the case of automatic import licensing, approval of the application is always granted. Non-automatic import licensing, as the name indicates, is a residual category. Although the Import Licensing Agreement creates specific rules for both categories, the main objective is to avoid trade-restrictive or trade-distortive effects.

The Import Licensing Agreement promotes trade facilitation in a number of ways. First, it minimizes documentation requirements for importation. Second, it ensures the timely issuance of import licenses. Third, it makes the licensing process simple and transparent. Finally, the Import Licensing Agreement limits the number of administrative agencies handling import license applications. All of these measures substantially reduce the cost of international trade.

E. Harmonized Commodity Description and Coding System

Most international traders and scholars agree that one of the most successful international instruments in the customs area is the International Convention on the Harmonized Commodity Description and Coding System (Harmonized System), developed by the WCO. The Harmonized System entered into force internationally on January 1, 1988.

The Harmonized System is an international product nomenclature. It provides a uniform structure for tariff classification and, according to the WTO, most WTO member countries, covering ninety-five percent of world trade, use the Harmonized System. Although the Harmonized System is primarily used for classification and valuation, it is also widely "used by governments, international organizations, and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis." To better achieve uniformity in this area, the Harmonized System Convention established the Harmonized System Committee as an international dispute settlement body.

Although the Harmonized System has been extremely successful,

38. See Id.
40. Products under the HS are divided into 96 chapters, 1,241 headings and over 5,000 sub-headings.
there are several issues that need to be resolved. The main concern that has been raised in the WCO relates to the amendment process. This process requires a minimum of five years. The WCO Secretariat, in its recent information sheet, has articulated various explanations for this lengthy process; the complexities posed by both the drafting and implementation periods, have been identified as primary reasons for this protracted process. In addressing various proposed alternatives for a more expedited process, the WCO cautioned supporters of these proposals to not jeopardize the uniformity of the Harmonized System by shortening the amendment process. According to the WCO, this “is a difficult balance to strike.” Furthermore, the WCO emphasized the fact that this matter is equally important for both customs and trade issues.

As a uniform classification tool, the Harmonized System has played—and will continue to play—a central role in trade facilitation. Therefore, it is important that the Harmonized System be more receptive to a rapidly changing and growing product market. Increased flexibility of the Harmonized System will better satisfy the needs of international traders and significantly reduce the costs of international trade.

F. International Convention on the Simplification and Harmonization of Customs Procedures

The WCO has assumed the role of a leader not only in the customs area, but also in the trade facilitation field because its work is closely related to trade facilitation. Although the WCO has been influential in passing various international instruments under its auspices, the most important instrument for the purposes of trade facilitation is the 1973 International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto Convention).

The Kyoto Convention underwent a complete revision in 1999 (Revised Kyoto Convention). The purpose of the Revised Kyoto Convention is to provide countries with a model for customs procedures, and its structure, consisting of a General Annex and 10 Specific

43. See id.
44. See id.
45. Id.
Annexes,\textsuperscript{47} is significantly different from the 1973 Convention.\textsuperscript{48} Contracting Parties must accept and implement the General Annex. Unlike the 1973 Convention, the Revised Kyoto Convention prohibits reservations against the Standards and Transitional Standards of the General Annex.

In addition to the structural reformation, the Revised Kyoto Convention reflects many substantive changes and additions. These revisions were caused by the fact that the vast majority of Annexes in the 1973 Convention were outdated and needed to integrate modern approaches to customs issues. The Revised Kyoto Convention provides for many of these contemporary customs techniques, the underlying purpose of which is to promote trade facilitation.

The General Annex to the Revised Kyoto Convention recommends a number of principles: standard, simplified procedures; continuous development and improvement of customs control techniques; maximum use of information technology; and a partnership approach between Customs and Trade.\textsuperscript{49} As the WCO has indicated:

\begin{quote}
The key elements within the revised Kyoto Convention to be applied by modern Customs administrations are: the maximum use of automated systems; risk management techniques (including risk assessment and selectivity of controls); the use of pre-arrival information to drive programmes of selectivity; the use of electronic funds transfer; co-ordinated interventions with other agencies; making information on Customs requirements, laws, rules and regulations easily available to anyone; providing a system of appeals in Customs matters; formal consultative relationships with the trade.\textsuperscript{50}
\end{quote}

Again, the purpose of these modifications and additions is to facilitate international trade. Many important impediments (specifically structural and enforcement) must be overcome before the Revised Kyoto Convention can be fully implemented. These impediments will be addressed in detail in the following section.


\textsuperscript{48} 1973 Kyoto Convention consists of two parts: (1) The Main Text divided into 19 Articles, and (2) 31 Annexes (each addressing a specific customs procedure in the form of a Standard or Recommendation). However, the parties are only bound by the Main Text.

\textsuperscript{49} See Revised Kyoto Convention, supra note 46.

The analysis of existing international instruments in the customs area illustrates several points that are fundamental in dealing with trade facilitation issues. These points reveal both positive and negative aspects of work done by two leading international organizations in the trade facilitation area and stress the need for identifying a single forum that will be able to build on the past progress, and, also, to adequately deal with present and future challenges.

First, the history of the WTO Customs Valuation Agreement demonstrates that cooperation among various international organizations involved in trade facilitation is not only possible, but also productive. Entrusting the WCO with the technical aspects of the Customs Valuation Agreement is a logical allocation of roles. This type of allocation of functions secures the vitality of the agreement as well as the adequate participation of relevant international organizations.

Second, the extensive work done on the WTO Rules of Origin Agreement underscores the difficulty—despite the full participation of various international organizations—of drafting uniform rules of application that will be acceptable to all countries. Issues related to rules of origin are complex and time consuming; the goal is not to simply introduce new rules but to implement a universal system of rules of origin. Thus, the interests of efficiency and uniformity must be carefully balanced before implementing any long-term commitments.

Third, the Preshipment Inspection Agreement underscores the importance of balancing the needs of developing counties and the interests of the international trade community. Although it sanctions the use of PSI companies, it imposes necessary safeguards to ensure that traders are adequately protected.

Fourth, the current amendment process of the Harmonized System emphasizes the significance of procedural aspects in an international instrument. Although the Harmonized System has been tremendously successful, in today's market the product cycles change in months rather than years. This creates a necessity for a more expedited amendment process. A shorter amendment process, however, could weaken the significance of the Harmonized System. As a result, the need for a new amendment process also requires balancing the interests of efficiency and uniformity.

Finally, a review of international agreements indicates that these instruments do not cover the entire ambit of trade facilitation. While many issues have been, or are being addressed by international organizations, many areas are in need of uniform rules capable of adequate enforcement. This is the primary reason why many countries and international organizations have been advocating for new multilaterally binding WTO rules on trade facilitation.
IV. What Is the Most Viable Forum for Trade Facilitation?

Although there are in excess of fifteen organizations involved in the area of trade facilitation, not all have expressed a desire, or their prerogative, to be the ultimate forum for administering the trade facilitation issue in its entirety. Actually, the debate has been concentrated within one international intergovernmental organization — the WTO. The main issue has been the identification of WTO’s role in this area. Therefore, in addressing the forum issue, evaluating the role of the WTO is of primary importance.

A. Proposed Alternatives for Trade Facilitation

The trade facilitation issue has been raised in the WTO in two contexts. Primarily, this issue has been examined by inquiring into the necessity for new multilaterally binding rules in the area. A related inquiry has been the issue of designating an appropriate international organization that would be responsible for establishing these rules. Deciding that the need for new multilaterally binding rules exists automatically raises the question of an appropriate forum which would be capable of enforcing these rules. Because these issues are so intertwined, it is likely that a separate discussion of each would further confuse the matter.

Three main positions have been identified regarding the trade facilitation issue. Business Guide to the World Trading System provides a summary of three positions that different WTO members have taken during recent meetings:

One position was that predictability and security for exporters and importers were best guaranteed by establishing a set of multilaterally binding rules on trade facilitation which would strengthen already existing disciplines contained in the present WTO agreements; a number of concrete proposals for future rules in this area were tabled. According to another view, there was no need for additional multilaterally binding rules; instead, work on trade facilitation should be left to other organizations which were already carrying out such work, as well as to national initiatives which should be supported by technical assistance and capacity building. A middle position suggested that the WTO could develop general guidelines or recommendations to provide political support for trade facilitation initiatives which were undertaken elsewhere, both nationally and in other international fora.  

Individual assessment of these three approaches is required. The

51. See BUSINESS GUIDE, supra note 2
complexity of each approach makes it more logical to consider each in reverse order.

1. WTO’s Role as a Political Supporter

Although the first, so-called “middle position,” is an attempt to bring two opposing views together, it presents several problems. First, it is not clear what the legal basis would be for issuing these guidelines or recommendations. Even if the Ministers were to agree on this type of action, it would raise serious doubts as to its propriety. Although various specific provisions related to trade facilitation currently exist in WTO agreements, none of them, individually or jointly, provide a mandate for issuing these guidelines or recommendations for trade facilitation in general. It could be suggested that these guidelines or recommendations be issued separately for each individual initiative undertaken outside of the WTO. However, this individual approach would not solve the problem of identifying a proper legal basis of action, under existing WTO agreements, for every area of trade facilitation.

Second, the nature of these guidelines or recommendations indicates that there would be no adverse consequences for noncompliance. It is unclear how these instruments would assist trade facilitation initiatives taken in other international organizations given that the main problem these initiatives are facing is the issue of enforceability.

Third, this approach deviates from the purposes of the WTO, which was not designed to provide political support. Mildly put, WTO’s worldwide reputation is very delicate. Specifically, the failure of Seattle Ministerial was proof of this public relations problem. Therefore, WTO’s exercise of political power could be viewed as the extension of its dominance, even if its intentions and purposes are beneficial to all nations. Hence, the WTO should refrain from any attempt to exercise political power.

Finally, even if all of the noted obstacles were overcome, it is unclear who the beneficiaries of this political support would be. Most countries that are members of the WTO are also represented in other international organizations that conduct work in the trade facilitation area. It follows, then, that issuing these guidelines or recommendations would have no practical significance.

2. The Future of Trade Facilitation Outside the WTO

Supporters of this approach suggest that future work on trade

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52. These two positions are best illustrated by differing approaches taken by several developing countries and the European Community.
facilitation should be left to other international organizations. This approach implies two things: first, that these organizations are capable of conducting this type of work and, second, that these organizations have been successful in their efforts in the past. Although the first assumption is correct and requires no further examination, serious doubts exist as to the second one. Again, it would be helpful to analyze this approach by reviewing work done in the customs area under the guidance of the WCO. As previously stated, the goal of the Revised Kyoto Convention is to facilitate trade. Many important impediments must be overcome before the changes and additions of the Revised Kyoto Convention can be carried out effectively.

First, the most obvious and least complicated impediment is the entry into force of the Revised Kyoto Convention. As of July 2000, only five of the required forty Contracting Parties have acceded to the Protocol of Amendment, and only 19 have signed it subject to ratification. Considering the importance of this Convention, these numbers do not seem very promising. The second problem has been raised by the WCO itself. It concerns the acceptance (after its entry into force) of the Revised Kyoto Convention by all WCO members. According to the WCO:

The Member Customs administrations of the WCO invested 4 years in updating and modernizing this important instrument. By unanimously adopting the revised Convention in June 1999 all 151 WCO Members signaled their approval of these new principles and rules for simplified and harmonized Customs procedures, and with this their willingness to work towards full implementation.

These two reasons given by the WCO provide little comfort. The fact that it took four years to make these revisions does not necessarily mean that all countries are in a position to embrace the final results of the Revised Kyoto Convention. To the contrary, it can be argued that the reason it took four years to make these changes and additions is because not all WCO member countries are ready to implement them. Furthermore, the unanimous adoption of the Convention has no legal significance for its implementation. The history of international agreements provides many examples in which countries adopted or signed international legal instruments without any intention and/or capacity to implement them. Although the intentions of WCO members in adopting the Revised Kyoto Convention should not be questioned, one may have doubts as to the capacity of all members to fully implement
Third, the most important impediment is the issue of enforceability. Naturally, this issue has many dimensions. As noted, only the General Annex must be accepted by Contracting Parties. This legal structure raises an important concern that the WCO has also alluded to: "[c]an a single General Annex really cover every aspect of trade facilitation?" Unfortunately, various factors suggest that the answer to this question is no. Many important issues that relate to trade facilitation in the customs area are covered by these Specific Annexes. Therefore, the General Annex and the Specific Annexes should have equal legal significance. However, the current structure of the Revised Kyoto Convention (although an improvement over the 1973 Convention) requires Contracting Parties to accede only to certain Specific Annexes. In addition, it also allows Contracting Parties to make reservations against the Recommended Practices contained in those Specific Annexes. Undoubtedly, this structure is not very instrumental in promoting uniform customs procedures throughout the world.

There are also several enforcement issues with respect to the General Annex itself. The General Annex of the Revised Kyoto Convention does not reflect anything similar to WTO principles of most favored nation and national treatment. Absent these principles in the binding section of the Convention, there is no guarantee that Contracting Parties will not use customs procedures to protect either their domestic industries or industries of their strategic partners. It must be underscored that this possibility is not hypothetical. In today’s international trade arena, many countries use trade procedures to substitute the role that tariffs and other trade barriers used to play. In fact, this is the very reason why the importance of trade facilitation has grown in recent years.

In addition, the Revised Kyoto Convention lacks an adequate enforcement mechanism. The binding nature of the General Annex does not obviate the need for such a mechanism as no sanctions (similar to the revocation of trade concessions under the WTO) are contemplated for countries that fail to implement or violate obligatory standards of the Convention.

Finally, the Revised Kyoto Convention provides no international dispute settlement mechanism. This concern was recently raised at the Open Day For International Trade organized by the WCO for...
international traders. According to the WCO:

International trade operators, relying on the right of appeal, and finding themselves unable to obtain uniform treatment at the national level in terms of the application of regulations relating to tariff description, origin and valuation, or even uniform treatment with regard to the minimum data to be provided to Customs administrations, called for: the establishment of an international court of Customs arbitration. 58

The establishment of an International Court of Customs Arbitration would confront many problems. One such problem was identified during the Open Day and concerns "the problem of how to reconcile the taking of binding technical decisions by the WCO with the concept of respecting national sovereignty . . ." 59 The Resolution of this issue will require WCO member countries to pass national legislations which would grant a broad mandate to this International Court of Customs Arbitration. Not only would this issue be very sensitive in many countries (for example, in the United States), but it could take many years before the national legislators of WCO member countries can agree on such a mandate.

As the above analysis indicates, there are various structural and enforcement problems with the Revised Kyoto Convention. This does not diminish the substantive importance of the Convention. In drafting new multilaterally binding rules on trade facilitation, the ultimate forum must rely fully on the Revised Kyoto Convention because it provides the most effective modern principles and standards for customs procedures. Nevertheless, the substantive strength of the Convention must be buttressed with a robust institutional system. Although the WCO has the needed expertise and experience in the trade facilitation area, it is not granted an adequate mandate to fully implement the Revised Kyoto Convention.

This analysis also indicates that other international organizations, that also lack sound enforcement mechanisms, will have similar problems in dealing with their respective areas of trade facilitation. In turn, this reemphasizes the need for identification of an appropriate forum for trade facilitation.

59. See id.
3. Trade Facilitation and the WTO

Both supporters and opponents of this approach have voiced their opinions in the WTO Council for Trade in Goods. At the outset, it is helpful to address arguments submitted by opponents of this position. The main concern that these delegations have put forth is that "the problems which developing economies were facing in this area could not be solved by the introduction of binding commitments subject to the WTO dispute settlement mechanism. Instead, a vast effort in technical assistance and capacity building was needed..." These arguments are not particularly convincing for several reasons.

First, the WTO has been actively promoting capacity building and technical assistance programs for developing countries. This position was reaffirmed at the WTO Workshop on Technical Assistance and Capacity Building in Trade Facilitation, which was held in Geneva in 2001. In addition to these attempts by the WTO, various countries have also undertaken "Technical Assistance Programs" in order to assist lesser developed countries. It is unlikely that new binding WTO rules on trade facilitation will disrupt this process. In fact, new rules could potentially have the opposite effect. Developing countries could condition their support for new rules on adequate assistance from developed countries. This would not only force developed countries to address the issue, but it would also bring more awareness to developing countries' needs, and speed up the assistance and capacity building processes.

Second, developing countries' interests are recognized in almost all WTO agreements. In those agreements, developing countries are given transitional periods for capacity building purposes. No reason exists for preventing new WTO rules on trade facilitation from providing a similar approach.

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60. It must be noted that both sides are in agreement regarding the need to implement existing WTO agreements that are relevant for trade facilitation. See WTO, Factual Summary of the Informal Meetings of the Council for Trade in Goods, 99-1964 G/C/W/153 (May 12, 1999), available at http://docsonline.wto.org/gen_search.asp (last visited Apr.29, 2002)(Factual Summary).

61. See id.

62. Factual Summary, supra note 60.


64. Australia is one of many countries that provide this kind of assistance. See WTO, Council for Trade in Goods — Delivery of Technical Assistance and Capacity Building in Trade Facilitation — Australian Customs Experience, 01-2314 G/C/W/263 (July 5, 2001) available at http://docsonline.wto.org/gen_search.asp (last visited Apr.29, 2002).
Moreover, opponents of this approach have also argued that "many Members were still grappling with the implementation of certain commitments from the Uruguay Round, and that these implementation issues needed to be addressed before consideration could be given to additional rules."\(^6\) Again, this argument is not very compelling.

No specific arguments have been presented as to why the WTO should not proceed with its work on trade facilitation while these countries are trying to meet their Uruguay Round commitments. While it is possible that many developing countries would be overwhelmed by a large number of commitments, one must keep in mind that these new rules are not ready to be introduced any time soon and drafting could take a substantial amount of time. There is no need to wait for these countries to meet their Uruguay Round commitments prior to beginning work on new trade facilitation rules.

In addition, subjecting new rules to the WTO dispute settlement mechanism raises doubts with respect to the competence of the WTO Appellate Body and Panels to deal with complicated problems that trade facilitation issues present. Trade facilitation issues may be complex and detailed,\(^6\) but they are not novel for the WTO dispute settlement system.\(^6\) Although scholars may disagree on the success the WTO has had in dealing with these issues, nothing indicates that trade facilitation issues presented some kind of unusual challenge for the WTO, or that the record of compliance was low.

Proponents of this approach have also presented various arguments. They principally rely on WTO's organizational strength for their

\(^6\) Factual Summary, supra note 60.
\(^6\) For example, the Revised Kyoto Convention contains 600 Standards and Recommendations and Practices.
\(^6\) Messerlin and Zarrouk consider customs procedures and technical regulations and standards (TRS) as two important aspects of trade facilitation. According to them "Both components of trade facilitation (TRS and customs procedures) have emerged as one of the recurrent themes in WTO dispute settlement cases. Cases raised by customs procedures have involved customs classification, duty collection, GSP coverage, quota management and import measures. Cases raised by TRS are even more numerous: cases on tunas and dolphins, shrimps and turtles, beef hormones, and on asbestos focus on this topic, but provisions from the Uruguay TBT Agreement is invoked in many other complaints. All these cases involved industrial and developing countries, both as complainants and defendants. These cases have had (so far) a very different fate, depending whether customs procedures or TRS are at stake. Cases on customs procedures have been kept at their technical level, terminated without too many fights, and are (so far) followed by compliance of the losing party (or, at least, an official statement to comply). In sharp contrast, cases involving TRS have generated a lot of emotion and heat, and compliance to panel rulings seems far to be automatic (in particular since the EC decision not to implement the beef hormone WTO ruling)." Patrick A. Messerlin & Jamel Zarrouk, \textit{Trade Facilitation: Technical Regulations and Customs Procedures}, available at http://www2.cid.harvard.edu/cidtrade/Issues/messerlin.pdf (last visited Apr.29, 2002).
suggestion that “predictability and security for exporters and importers [is] best secured with a set of multilaterally binding rules on trade facilitation.”\(^{68}\) They also allude to the fact that when other international organizations have not been successful in implementing multilaterally binding rules in their respective areas, the WTO has been able to effectively intervene and provide a “regulatory framework.”\(^{69}\)

Although these proponents recognize the potential of a ‘bottom-up’ approach, they consider the ‘top-down’\(^{70}\) approach as necessary.\(^{71}\) This position is also supported by other international organizations that believe the best way to achieve progress in this area is through governments.\(^{72}\)

While the third approach is generally acceptable, it leaves two questions unanswered. The first question concerns the future of international instruments already in existence. ICC’s approach on this issue illustrates the majority opinion. It suggests that the WTO, in drafting new binding rules, should rely on the work and experience of other international organizations.\(^{73}\) It is not clear from this position, however, what should be done with these instruments once the principles and standards reflected in them are incorporated into the proposed WTO agreement.

Once again, it will be helpful to use the Revised Kyoto Convention to illustrate this point. As a reminder, the Revised Kyoto Convention has not yet entered into force and only certain parts of it are binding.

One way to approach this issue would be to incorporate the principles of the Revised Kyoto Convention into a proposed WTO agreement on trade facilitation and also promote the adoption of the Revised Kyoto Convention by countries (under the guidance of the WCO) separate from the WTO agreement.\(^{74}\) (This seems to be the approach taken by the ICC.)

There are several benefits that this approach could provide. First, the adoption of the Revised Kyoto Convention would be beneficial for those WCO member countries that do not belong to the WTO. Second, drafting the new multilateral agreement could take several years while the Revised Kyoto Convention is ready to be accepted by countries.

\(^{68}\) Factual Summary, \textit{supra} note 60. \\
\(^{69}\) See \textit{id}. \\
\(^{70}\) For a detailed discussion of ‘bottom-up’ and ‘top-down’ approaches, see Messerlin, \textit{supra} note 67. \\
\(^{71}\) Factual Summary, \textit{supra} note 60. \\
\(^{72}\) See \textit{id}. \\
\(^{73}\) See ICC, ICC Recommendations to WTO Members on Trade Facilitation, \textit{available at} http://www.iccwbo.org/home/statements_rules/statements/2001/wto_members_on_trade.asp (last visited Apr. 29, 2002). \\
\(^{74}\) The second possible option is addressed in the next subsection.
Third, the legal nature of the obligations under the Revised Kyoto Convention and the new WTO agreement would be substantially different. Finally, the adoption of the Revised Kyoto Convention could actually promote the introduction of the proposed WTO agreement on trade facilitation.

Despite several benefits, this approach has a critical drawback. The possibility of two forums individually administering similar issues would certainly not promote uniformity. Two factors could contribute to such an absence of uniformity. First, while incorporating the principles and standards of the Revised Kyoto Convention into the proposed WTO agreement, even a minor substantive change could create a possibility of two conflicting obligations being imposed on parties to both treaties. Second, conflicting obligations could also arise in cases where two forums disagree on the interpretation of a certain standard. Considering the purpose of proposed WTO rules—bringing uniformity to the trade facilitation area—this disadvantage substantially outweighs all potential benefits that this solution might provide.

The second related question involves the future role of international organizations involved in the trade facilitation area. Although supporters of the third approach, including the ICC, call for closer cooperation between the WTO and the WCO (and other relevant organizations), they do not elaborate upon the nature of this cooperation. It is imperative that once the proposed WTO agreement is finalized, the functions, prerogatives and responsibilities of each organization are specifically identified.

4. Other Alternatives for Trade Facilitation

Positions expressed in the WTO are not limited to the three main approaches discussed above. There are at least two other noteworthy positions.

First, some delegations suggest that the WTO should implement its existing agreements related to trade facilitation, and move to other areas only if problems continue to exist after the full implementation of those agreements. There are various problems with this argument.

Although current WTO agreements need to be further implemented, it is undisputed that existing WTO agreements do not

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75. This is more of an argument rather than a benefit.
76. Factual Summary, supra note 60.
77. Certain WTO agreements also need to be amended. According to international trade operators, there is "the need to amend the WTO Agreement on Customs Valuation, in order to put an end to the differing interpretations made possible by the text of the Agreement." See Open Day, supra note 58.
cover all aspects of trade facilitation. Therefore, it is not clear how the full implementation of existing agreements will solve issues in those areas of trade facilitation that are not even covered. Furthermore, the 'wait-and-see' approach could be too costly for international trade. If international traders wait for complete implementation of existing agreements, it could be too late to introduce new rules on trade facilitation.

Second, according to one WTO delegation, "the WTO should oversee the policy aspects of the Kyoto Convention, including the dispute settlement procedures, while the WCO should handle technical aspects of trade facilitation." Although this seems to be an appropriate division of functions between these two organizations, it does not obviate the need for multilaterally binding rules. It would be very hard for the WTO dispute settlement mechanism to apply the Revised Kyoto Convention in its present form. Direct incorporation of the Revised Kyoto Convention into the WTO system could create many structural problems.

B. Possible Fusion of Various Alternatives

A possible solution to the question of the most viable forum for trade facilitation lies in various alternatives discussed above. These alternatives provide a logical framework for future developments in trade facilitation.

First, it is important to commence work on proposed WTO rules on trade facilitation. As Stefano Bertasi, an ICC trade expert, has stated, "the 'need' for these rules is 'acute.'" Difficulties associated with drafting uniform rules, as illustrated by the Rules of Origin Agreement, must be taken into consideration. These new rules should be based on work done by other international organizations such as the WCO. Reliance on existing international instruments would not only shorten the drafting process, but, it would also secure the inclusion of the most modern and well-developed principles present in these agreements (such as the Revised Kyoto Convention).

Second, the existence of two similar international legal instruments under two different international organizations must be avoided in the interest of uniformity. If a decision is made to keep the existing international agreements, the possibility of any conflicting obligations must be addressed. One way this issue could be resolved is by incorporating the principles of these instruments into the new agreement as minimum standards of application to be followed by WTO Member

78. ICC News, supra note 7.
Countries, an approach is similar to the WTO Agreement on Trade Related Aspects of Intellectual Property Rights. This would insure that these instruments are not completely discarded and will also allow the introduction of additional principles and obligations under the new agreement.

Finally, the WTO and international organizations must divide their functions in administering the trade facilitation area. The WTO should oversee the policy aspects including the dispute settlement procedures, while other organizations should handle technical aspects of trade facilitation. In this respect, the structures of the Customs Valuation and the Rules of Origin Agreements could serve as models of cooperation. This type of cooperation would achieve two important goals. First, it would unite all trade facilitation issues under one forum. Second, it would safeguard the participation of all interested international organizations in this area.

V. Conclusion

There are some common “themes” in trade facilitation that are visible throughout many countries. There is a consensus among countries and international organizations with respect to trade facilitation’s increased importance during the last decade. These countries and international organizations also agree that certain changes must be made in order to meet the needs of today’s world trade. Notwithstanding this consensus, a uniformly agreed upon plan of action has not been formulated.

The United Nations Economic Commission, in cooperation with various international organizations, conducted an International Forum on Trade Facilitation in Geneva from May 29-30, 2002. One of the objectives of this forum was to “provide input to the multilateral

79. According to the Chairman of the WTO Council for Trade in Goods there are several such themes: “one theme is that trade facilitation measures are taken by administrations in response to real world problems such as challenges arising from increasing trade volumes, stagnant administrative budgets, and greater facilitation demands from the private sector. Second, the experiences highlight that simplified official requirements are an important precondition for the application of information technology. The use of information technology, in turn, is instrumental for the time saving and efficiency improvements in the customs clearance process which Members reported. A third important theme is that simplified procedures and enhanced transparency benefit in particular small and medium-sized enterprises (SMEs).” WTO, chairman’s Progress Report (2000) on Trade Facilitation, G/L/425, available at http://docsonline.wto.org/gen_search.asp (last visited Apr. 29, 2002).

While it is important to provide this type of input in every international fora, only one should be overseeing the policy and enforcement aspects of trade facilitation. It must be underscored, however, that the purpose of this concentration of power is not to undermine the involvement of other international organizations. With proper allocation of functions, all international organizations working in the trade facilitation area will be able to contribute their expertise and experience.

Although various international organizations have introduced many important instruments on trade facilitation, there is a pressing need for additional rules. Again, the purpose of these proposed rules is not to hinder the acceptance and implementation of existing international agreements (e.g., the Revised Kyoto Convention). Proposed WTO rules will not undermine the existing agreements in the trade facilitation area. With proper drafting, all potential problems of inconsistent obligations can be avoided.

The trade facilitation issue should be under the authority of a strong international organization, such as the WTO, with an effective enforcement system. This organization should be responsible for drafting new rules that would fill in existing gaps in the area of trade facilitation.

81. Id.