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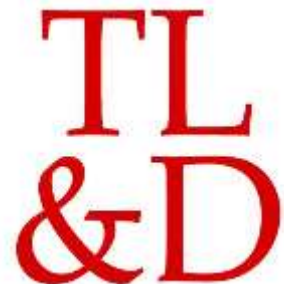
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TRADE FACILITATION—A BOUNDLESS OPPORTUNITY FOR INDIA

BIPIN MENON*

While trade facilitation has a broader context encompassing a number of areas that can facilitate trade between countries, the thrust of the World Trade Organisation's (WTO) Agreement on Trade Facilitation (TFA) focusses on key procedural issues such as transit, fees and formalities for export and import, and publication and administration of trade regulations.

Some of the arguments propounded for trade facilitation in a developing country like India are reduction in compliance costs, benefits for Micro Small and Medium Enterprises (MSMEs), obviation of procedural barriers, and improvement in infrastructure. Nevertheless, the history of the TFA negotiations suggests that many developing nations including India were not very enthusiastic since it was felt that an asymmetrical burden would be created on them for compliance. However, with the snail-paced progress on the Doha Development Agenda (DDA) and a slowdown in the multilateral negotiations, there was a push for concluding the TFA with a view of ensuring the relevance of the multilateral institution. The developing countries thus joined the bandwagon with the negotiations ensuring that their specific concerns were taken cognizance of and the texts were in line with their domestic regimes for those where commitments had to be made on entry into force. The flexibility to take longer transition periods, resulted in marginal improvements in the obligations above the domestic regimes. Finally, there was an additional flexibility of utilizing capacity building resources from other WTO Members to implement a third set of commitments.

The article explains the three parts into which the TFA has been divided into namely Section I on substantive trade facilitation disciplines, Section-II on Special & Differential Treatment provisions for developing countries and Least Developed Country Members, and Section III on Institutional Arrangements and Final Provisions. Section I which includes twelve Articles and 239 sub provisions of commitments have then been explained, specifically with reference to the commitments and their categories taken by India. These Articles include those on publication and availability of information, opportunity to comment, information before entry into force, and consultations, advance rulings, procedures for appeal or review, other measures to enhance impartiality, non-discrimination and transparency; disciplines on fees and charges imposed or in connection with importation and exportation and penalties, release and clearance of goods, border

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agency coordination, movement of goods intended for import under customs control, formalities connection with importation, exportation and transit; freedom of transit, and customs cooperation.

The focus is then on other aspects of the TFA, such as its entry into force, level of commitments by Members, India's commitments, India's implementation mechanism, and the progress made through the institutional mechanism. The work plan of the National Trade Facilitation Action Plan (NTFAP) has then been highlighted, including the role of the working groups on legislative changes, trade related infrastructure, outreach programmes, and time release study.

Finally, the article highlights the progress made by India on trade facilitation in terms of the rankings on various indices and the domestic measures being undertaken. It ends with the focus on the boundless opportunity that trade facilitation offers, which we can ill-afford to miss.

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I. INTRODUCTION

The World Trade Organization (WTO) has defined trade facilitation as the simplification, modernisation and harmonisation of export and import processes.¹ Trade facilitation, in the context of the World Customs Organization (WCO), is the avoidance of unnecessary trade restrictiveness.² The WCO highlights that one can achieve trade facilitation by applying modern techniques and technologies, while improving the quality of controls in an internationally harmonized manner. The organisation also cites its mission to enhance the efficiency and effectiveness of customs administrations by harmonizing and simplifying customs procedures. Taking the definitions used by the two organisations, we can identify the key element of trade facilitation, which is to

¹ *Trade Facilitation*, THE WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last visited Apr. 12, 2019).

² *What is Securing and Facilitating Legitimate Global Trade*, WORLD CUSTOMS ORGANIZATION, <http://www.wcoomd.org/en/topics/facilitation/overview/customs-procedures-and-facilitation.aspx> (last visted Apr. 12, 2019).

reduce barriers to trade in the entire post-production process life cycle of exports and imports, including customs procedures. The methodologies suggested to achieve this objective are threefold: one, simplification, which would reduce transaction costs for compliance; two, modernisation, such as use of information technology (IT) tools, and three, harmonisation, which can ensure that one significantly reduces the cost of adjustment to different import and export regimes across countries. The use of IT tools would facilitate online applications which can obviate any intermediary agency, ensure expeditious processing of applications, increase transparency, and thereby lead to more informed decisions by the regulatory agencies.

Trade facilitation would, thus, come under the ambit of non-tariff measures (NTMs) since they are not in the form of customs duties or tariffs on exports or imports. Nevertheless, they have a compliance cost which can severely hamper business entities, specifically the micro, small and medium enterprises (MSMEs). On a comparative basis, these barriers are more pronounced in developing countries because many of them are still in the process of developing regulatory frameworks and establishing institutional systems. The effect on MSMEs is more pronounced since these enterprises have resource constraints in terms of human capital, technology, and finance, in addition to being more vulnerable to economic downcycles. Trade facilitation assumes significance for developing countries like India, where MSMEs are estimated to contribute to around 45% of manufacturing output, 40% of exports and around 29% of the gross domestic product (GDP).³ Larger enterprises can also benefit immensely from trade facilitation measures, since their costs of compliance with export and import processes would get significantly reduced.

II. NEED FOR TRADE FACILITATION

The need for trade facilitation in a vast and diverse country like India cannot be better encapsulated than in one small example. The cost of inland freight for rice grown in the fields of Punjab to be transported to Jawaharlal Nehru Port Trust (JNPT), Mumbai via Internal Container Depot (ICD) Ludhiana, is around Rs. 40,000 for a container load. This is comparable to the ocean freight from JNPT to Rotterdam in Holland, from where the rice is to be finally exported to European markets.⁴ Notwithstanding the fact that in developed countries ocean freights are

³ *Annual Report 2017-18*, MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES, <https://msme.gov.in/sites/default/files/MSME-AR-2017-18-Eng.pdf> (last visited Apr. 12, 2019).

⁴ Based on rate of around \$ 550 per twenty feet container depending on the carrier.

normally around 1/3rd of the inland transportation costs,⁵ what is alarming is that the ocean distance in the example above, even taking into account the shortest route through the Suez Canal, is nearly seven times that of the inland distance from the paddy fields of Punjab to JNPT. While one could argue that this may boil down to infrastructural issues, the point remains that quality of infrastructure is only one dimension. The procedural barriers which may, *inter alia*, include state levies and dwelling time at state borders and ports, play a paramount role in this distortion from internationally benchmarked costs.

Another issue is that of the turnaround time (TAT) for ships at ports which is roughly the average time for a ship to unload and reload its cargo. For Indian ports, there has been a stark improvement in average TAT with a drastic reduction to 66.4 hours in 2017-18, vis-à-vis 88.3 hours in 2015-16.⁶ However, when one compares this with the average TAT in Singapore, which is twelve hours,⁷ there is still significant room for improvement. A holistic perspective on trade facilitation would thus need to take on board these infrastructure-related parameters that also add to the transaction costs of exports and imports. These parameters are much broader than what the WTO's Agreement on Trade Facilitation (TFA) envisages. One of the reasons for this is that infrastructural issues are broader than just trade and were never under the ambit of the WTO. Moreover, they also impinge upon the policy spaces of individual countries that would be reluctant to see any disciplines on it.

III. GENESIS OF THE TFA

The TFA traces its genesis to 'trade facilitation' being one of the four topics (along with investment, government procurement, and competition) taken up during the 1996 WTO Ministerial Conference in Singapore, and hence christened as the 'Singapore issues'. While negotiations on trade facilitation began in July 2004, they did not gather the requisite steam, given the scepticism of many developing countries such as India. Some of the Member countries of the WTO, chiefly those for whom trade constituted a significant part of their GDP, laid the foundation

⁵ Harry Valentine, *Comparing Maritime Versus Railway Transportation Costs*, MARITIME EXECUTIVE (Dec. 25, 2017), <https://www.maritime-executive.com/editorials/comparing-maritime-versus-railway-transportation-costs>.

⁶ *Ship Turnaround Time Reduced by 25% to 64.4 hours in 2017-18*, HINDU BUSINESS LINE (Sep. 25, 2018), <https://www.thehindubusinessline.com/news/ship-turnaround-time-reduced-by-25-to-644-hours-in-2017-18/article25041615.ece>.

⁷ Review of Maritime Transport, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, https://unctad.org/en/PublicationChapters/rmt2017ch4_en.pdf (last visited Apr. 12, 2019).

stone for what was eventually to culminate in the TFA.⁸ One of the strong arguments as to why India and other countries were hesitant to take the plunge was the fact that it was seen as asymmetrically burdensome for the developing countries and the net importers who had to shoulder the bulk of the responsibility for undertaking commitments vis-à-vis the developed Members and the net exporters who already had many of the systems in place. Another reason was that many commitments necessitated changes in domestic regimes and extensive monitoring, which really stretched the already scarce resources of these countries. Some developing countries, in their submissions, stressed upon this fact.⁹ Many of India's comments on the draft texts during the period of 2010-2013 reflected a conservative position, which includes suggesting the bracketing of the term "use of international standards as basis of single window scheme".¹⁰ Finally, it was felt that the core agenda of the WTO, namely the Doha Development Agenda (DDA), was being compromised at the altar of promoting one of the Singapore issues which had little support when it first cropped up in 1996.¹¹

Ironically, it was the last reason mentioned above that was turned turtle and used to their advantage by the TFA proponents who argued that with the WTO making little headway on its core agenda, it was important to deliver on something so as to maintain the relevance of the global trade institution that was launched with much fanfare and gusto in 1995 as the setter of multilateral trade rules. The TFA was thus seen as a succour to the snail-paced and somewhat vitriolic debates in the WTO market access negotiations under goods and services that did not make much headway. While the Doha Round negotiations intensified during the period of 2008-2010, deliberations among key Members such as Brazil, China, the European Union (EU), India, and the United States of America (US) on both agricultural and non-agricultural market access (NAMA) ended in a stalemate with no consensus on some key issues like special products, special safeguard mechanism (SSM), and sectoral initiatives. The sceptics also came to the realisation that the TFA was a watered-down step to take care of their domestic sensitivities and reduce any burdensome commitments that would stretch their resources.

⁸ Based on informal discussions with India's TF negotiators based in Geneva during that period.

⁹ *Communication From the People's Republic of China, India, Pakistan and Sri Lanka—A Proposal on the Process of Trade Facilitation*, TN/TF/W/82, WORLD TRADE ORGANIZATION (Mar. 31, 2006), http://jmcti.org/2000round/com/doha/tn/tf/tn_tf_w_082.pdf.

¹⁰ *Communication from India—General Council 28-29 July 2009*, MINISTRY OF COMMERCE AND INDUSTRY, GOVT. OF INDIA, <https://commerce.gov.in/PageContent.aspx?Id=18> (last visited Apr. 12, 2019).

¹¹ This is not specifically documented in a submission and is based on informal discussions with TF negotiators.

While some also saw it as a means to drive any domestic reforms, others felt that it could reduce the cost of business in their countries. Therefore, this change in attitude, fostered by the need to provide some traction to the multilateral system that seemed under threat, led to an intensification of the TFA negotiations in 2010.

Moreover, the economic think tanks propped up by proponents of the TFA went into overdrive, conjuring up figures based on their analysis on the benefits of the proposed TFA. The WTO, in its World Trade Report,¹² stated that trade procedures could be quantified in terms of an *ad-valorem* tariffs of 219% and 134% in developing and high-income economies respectively. The report stated that trade costs could be reduced by 9.6%-23.1% while the TAT for imports and exports could be reduced by 47% and 91% respectively. The trade impact of the TFA as manifested by the increase in exports was estimated under the computable general equilibrium and gravity modelling as varying between \$750 billion-\$1 trillion and \$1.8 trillion-\$3.6 trillion respectively. The report also dwelt at length on how the TFA could increase benefits for developing countries, reduce costs for MSMEs, enhance trade in perishable goods, and attract foreign investment. While many developing Members questioned these figures since they were based on economic assumptions, realisation dawned that the multilateral system had to deliver the TFA and the focus should be to ensure that the commitments were in tune with national policy and legislations. Special and differential treatment (S&DT) provisions were also negotiated by developing countries and least developed countries (LDCs) both in terms of a longer phasing period and for the provision of technical and financial assistance in the implementation of the TFA commitments.

S&DT has been an integral part of the WTO Agreements and recognises the unique circumstances of developing countries and LDCs in terms of their domestic sensitivities as well as the dearth of resources in fulfilling commitments. However, it is a well-known fact that while many developed countries are donors in the capacity building programmes of the WTO such as the Aid for Trade (AFT), they are reluctant to make any firm commitments on financial contributions. This is one of the reasons why S&DT provisions in other WTO Agreements do not have strong provisions on such financial contributions and are largely premised on longer time periods for implementation and less than reciprocal commitments. Even the DDA, which was premised on development, could not buck this trend. The TFA is unique in the sense that it has a three tier categorisation of commitments in terms of the difficulty of implementation. It begins with Category

¹² World Trade Report, *Speeding Up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf (last visited Apr. 12, 2019).

‘A’ commitments, which were to be implemented on the entry into force of the agreement and hence considered covered under the existing regimes of WTO Members. The Category ‘B’ commitments are those which were to be implemented over a longer phasing period and necessitated a transition period. Lastly, Category ‘C’ commitments, which had to be by self-designation by developing countries and LDCs, are the most difficult to implement and entail provisions of assistance and support for capacity building. While India as well as other developing countries and LDCs were instrumental in negotiating these provisions, the concept of Category ‘C’ commitments is unique in recognising the difficult commitments. India also decided not to categorise any commitments under ‘C’ given its economic strength and the fact that it was a key player in the negotiations.

IV. THE TFA: AN OVERVIEW AND INDIA’S POSITION

The core principle on which trade facilitation was premised was the need to improve the procedures governing both exports and imports. These procedures, that were largely under the jurisdiction of custom authorities of Members, involved other agencies such as those related to administering import and export policy and those applying technical regulations, conformity assessment procedures, and sanitary and phytosanitary (SPS) measures. They were sought to be streamlined with a view to reduce costs for both exporters and importers. The mandate for negotiations was to clarify and improve Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations) of General Agreement on Tariffs and Trade, 1994 (GATT). The structure of the TFA is such that it builds upon the provisions of these three GATT Articles and elucidates specific provisions with the level of commitments negotiated by Member countries. In a snapshot, the three GATT Articles have been split into twelve specific Articles under Section 1 of the TFA.

Finally, based on intensive negotiations, specifically during the period of 2010-13, the TFA was signed during the WTO’s Bali Ministerial Conference in December 2013. Subsequently, the Protocol of Amendment was adopted by WTO Members in November 2014 to incorporate the TFA as part of the WTO Agreements. The adoption of the TFA was contingent on ratification by 2/3rd of the membership. India ratified the TFA on April 22, 2016. The TFA was adopted on February 22, 2017 with the 110th WTO Member ratifying it. As of April 2019, 142 WTO Members (85.9% of total Members) have ratified the TFA, with Ecuador being the latest Member ratifying it on January 15, 2019. Hong Kong, China was the first

WTO Member to ratify the TFA on December 8, 2014, with Angola ratifying it on April 9, 2019.¹³

The TFA is divided into three sections: Section I (Substantive trade facilitation disciplines), Section II (Special & Differential Treatment: Provisions for Developing Countries and Least Developed Country Members), and Section III (Institutional Arrangements and Final Provisions).

Section I is the core of the TFA with WTO Members taking specific commitments on the 239 sub-provisions of this Section. India has categorised the commitments under these sub-provisions into Category 'A', which were to be implemented on entry into force of the TFA, i.e., on February 22, 2017, and Category 'B', for which there is a five year transition period with implementation from February 22, 2022. The list of the twelve Articles and the crux of their sub-provisions is as under.

- i. **Publication and Availability of Information** (Article 1): This provision seeks prompt publication of procedures and fees for importation, exportation and transit, applied customs duties, rules for classification and valuation of products, regulations on rules of origin, restrictions and prohibition on trade, penalty and review procedures, trade agreements, and procedures on tariff quotas. The Article also indicates the information to be made available through the internet and the need to establish enquiry points for answering the reasonable queries of stakeholders. India has designated most of the obligations here under category 'A'. The only ones in which a five year implementation period has been taken are on publication of applied rates of duty, establishment of enquiry points, and notification of the relevant source(s) of the information above. The publication of the applied rates of duty requires amalgamation of the duties notified through CBIC tariff notifications at a single place. The designation of enquiry points should also not pose difficulties, though the enquiry point would need to co-ordinate with other agencies. The real challenge would, however, be in having a single portal for all the information. There are existing sources of information such as the Indian Trade Portal,¹⁴ while the Logistics Division of the Department of Commerce is also planning to have a portal. The issues for which a longer implementation period has been taken are being discussed by the National Committee on Trade Facilitation (NCTF).

¹³ *Supra* note 1.

¹⁴ India, Trade Portal, Department of Commerce, MINISTRY OF COMMERCE AND INDUSTRY, GOVERNMENT OF INDIA, <http://indiantradeportal.in/> (last visited Apr. 25, 2019).

- ii. **Opportunity to comment, information before entry into force and consultation** (Article 2): This Article seeks prior consultations and publication before entry into force of new or amended laws and regulations relating to movement, release and clearance of goods, including goods in transit. However, custom duties are excluded from its purview. Prior consultations and publication before entry into force are soft obligations on account of use of the phrase “to the extent practicable and in a manner consistent with its domestic law and legal system”. India has taken a five year implementation period for this. In its domestic practice, India does not normally provide prior consultations on these laws and regulations relating to movement, release and clearance of goods. However, such prior consultations mechanisms have been institutionalised in the case of our draft sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) brought out by the relevant agencies. Therefore, only some tweaking in our regulatory framework is required to institutionalise it.
- iii. **Advance Rulings** (Article 3): Advance rulings are quasi-judicial determinations pronounced by an authority on issues including elements of trade facilitation. These rulings, which could cover a gamut of issues like classification and valuation of goods, applicability of specific notifications, rules of origin, etc., provide certainty to the enterprises thereby facilitating their business activities. The key aspects of advance rulings mentioned in Article 3 of the TFA are that they must be reasonable, must be issued in a time-bound manner, must state the basis for not issuing an advance ruling, must be valid for a reasonable period of time, must be in the form of a written notice with justification for revocation, modification or invalidation, must be of a binding nature, must be published as per the requirements mentioned, must have a time period for issuance and duration of validity, and that Members must provide for review of the ruling or any decision to revoke, modify or revoke it and should endeavour to make publicly available any information on advance rulings. The Article also defines and indicates the scope of advance rulings. India has taken a longer implementation period for some obligations such as publication of minimum requirements, review with a view to revoke, modify or invalidate the advance ruling, and transparency in any condition of legal representation or registration. India has an Authority for Advance Ruling (AAR) which comprises a Chairman who is

a retired judge of the Supreme Court and two Members of the rank of Additional Secretary to the Government of India. The scope of the ruling relates to classification of goods, applicability of notifications for customs duty, principles adopted for valuation of goods, determination of the origin of goods, and any other matters to be specified by notification.¹⁵ The procedures are incorporated in Customs (Advance Rulings) Rules, 2002 and its amendments thereof.¹⁶ As of April 2019, there are sixty two advance rulings¹⁷ and as of January 31, 2019 there are thirty seven pending applications of advance rulings on customs issues¹⁸. The time periods taken for advance rulings in India have ranged between two-three years. Some of the challenges that India would face are the provisions for providing justifications for review, revocation or modification of advance ruling, etc.

- iv. **Procedures for Appeal and Review** (Article 4): Under this Article, Members have to provide a procedure for administrative and/or judicial review and appeal. Some of the important principles of this appeal and review are the need for procedures to be carried out on a non-discriminatory basis, providing the rationale for the administrative decision with a view to facilitating appeal or review, and providing the petitioner the right for further appeal or review if decisions are not given within the given time period or are given after undue delay. India has taken a five year implementation period for certain provisions like the requirement of administrative appeal or judicial review or appeal and providing the petitioner the right for further appeal or review. India has the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) which is the forum

¹⁵ *About the Authority*, Central Board of Indirect Taxes and Customs, Department of Revenue, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, <http://www.cbic.gov.in/htdocs-cbec/aar/auth> (last visited Apr. 25, 2019).

¹⁶ *Customs Law on Advanced Rulings*, Central Board of Indirect Taxes and Customs, Department of Revenue, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, <http://www.cbic.gov.in/htdocs-cbec/aar/cs-law-idx> (last visited Apr. 25, 2019).

¹⁷ *Rulings*, Central Board of Indirect Taxes and Customs, Department of Revenue, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, <http://www.cbic.gov.in/htdocs-cbec/aar/rulings/ruling> (last visited Apr. 25, 2019).

¹⁸ Present Status of Central Excise, Customs & Service Tax Applications Received for Seeking Advance Rulings as on 31.01.2019, AUTHORITY FOR ADVANCED RULINGS, http://www.cbic.gov.in/resources//htdocs-cbec/aar/present_status_of_the_application_as_on_31.01.2019.pdf;jsessionid=2DE05BFEB5DE90875A73AFD2D28484EE (last visited Apr. 25, 2019).

for administrative appeal. Any appeal against a CESTAT decision is admissible in the Supreme Court of India.

- v. **Other measures to enhance impartiality, non-discrimination and transparency** (Article 5): The provisions under this relate to the notification of measures or guidance on control and inspections relating to trade in foods, beverages or foods relating to the objectives of protection of human, plant or animal life, and health, prompt information of detention procedures, and transparency related to test procedures. The latter includes the opportunity to grant a second test and consider the results thereof as well as publication of the name and address of the test labs. India implemented all the provisions with entry into force barring one related to uniform application of the notification or guidance to those points of entry where the SPS conditions are applied. The policy and procedures for testing of imported and exported food products are provided by Food Safety and Standard Authority of India (FSSAI) and the Export Inspection Council (EIC).

- vi. **Disciplines on Fees and Charges imposed or in connection with importation and exportation and Penalties** (Article 6): There are three specific sub-provisions of this Article. The first relates to the transparency related to the fees and charges (excluding the custom duties), namely information on these fees and charges, adequate time period between publication, and entry into force of any new or amended fee or charges and periodic review of the fee and charges. The second provision is on disciplines, namely the limitation of these to the approximate cost of services and not linking them to specific import or export operations. The third provision is on the penalties to be imposed for the breach of customs laws, regulations, and procedural requirements. The only provision for which India has taken a longer implementation period is that which relates to the country being encouraged to consider the voluntary disclosure of a breach as a potential mitigating factor while establishing any penalty. In India, the regulatory agencies have their own provisions on fees and charges in connection with importation and exportation.

- vii. **Release and clearance of goods** (Article 7): This is a comprehensive Article relating to a number of stages in the release and clearance of goods starting from pre-arrival processing, which facilitates an expeditious

clearance. There are provisions for electronic payment, separation of release from final determination of customs duties with adequate safeguards such as a guarantee, and adoption of a risk management system that includes aspects like focussing on high risk consignments and the use of an appropriate selectivity criterion. There are sub-provisions relating to post-clearance audits which are also to be a part of the risk management system, publication of average release times, and additional trade facilitation for authorised operators. Finally, there are provisions relating to expedited shipments and release of perishable goods. For most of these provisions, India has taken a five year implementation period. This has been warranted by the absence of domestic laws and relates to the advance lodging of documents, provisions for release prior to determination of duties, taxes, fees, and charges, risk management including the use of post clearance audit for it, minimisation of documentation for expedited shipments, and providing reasons for any delay in the release of perishable goods.

- viii. **Border Agency Cooperation** (Article 8): This provision has two aspects, namely, the co-operation and co-ordination of agencies within the country as well as co-operation between agencies across common borders in terms of alignment of working days/hours, procedures and formalities, sharing of common facilities, joint controls, and the establishment of one-stop border post control. India has categorised all these aspects under category 'B'.

- ix. **Movement of goods intended for importation, exportation or transit** (Article 9): The provision allows the internal movement of imported goods from one customs point to another for release and clearance. This, however, is subject to the domestic regulatory requirements being met. India has implemented this on entry into force of the TFA.

- x. **Formalities connected with importation and exportation and transit** (Article 10): While emanating from Articles V and VIII of GATT, 1994, this comprehensive provision covers the issues of formalities and documentation requirements. The first sub-paragraph has provisions related to the best practices with respect to these formalities, namely ensuring rapid release and clearance of goods; reducing time and cost of compliance for traders; looking at least trade restrictive measures if there

are alternatives; and not maintaining measures, if they are no longer required. The subsequent sub-paragraphs of this Article relate to specific provisions like acceptance of paper or electronic copies of original documents related to export, import of transit; encouragement of participation and use of international standards for these procedures; the endeavour to establish a single window for submission of applications and usage of IT tools to the extent possible; no pre-shipment inspection for tariff classification or customs valuation; no mandatory provision on customs brokers from entry into force of the TFA, with transparent and objective rules for licencing of customs brokers; use of common customs procedures and uniform document requirements with flexibility related to specific products, risk management systems, duty exemption or reduction, electronic filing and SPS measures; option to return rejected goods; and provisions for temporary admission of goods as well as inward and outward processing of goods. Some of the provisions on which India has taken a longer implementation period are acceptance of a copy if a government agency has the original document, single window, no new measures on pre-shipment inspection, and provisions of inward and outward processing.

- xi. **Freedom of Transit** (Article 11): There are comprehensive provisions related to goods in transit namely, not maintaining it if there are less trade restrictive measures or it is a disguised restriction on trade; not conditioning it on the collection of charges; not maintaining voluntary restraints; treatment as favourable as if these did not go through transit; encouragement to make physically separate infrastructure available; formalities which are not burdensome; no customs charges once goods are put in transit; non-application of TBT measures; provisions for advance filing of documents; termination of transit once the port of exit is reached; guarantees restricted to the requirement of transit; release of such guarantees once transit is terminated; provision allowing comprehensive guarantees; make publicly available information on guarantees; customs convoys or customs escort only for high risk circumstances; cooperation among authorities on transit charges, formalities and practical operation; and endeavour to appoint a national transit coordinator. India has categorised some provisions under 'B', i.e., with a 5-year implementation period. These include advance filing and processing of transit documentation, termination of transit operation, comprehensive guarantees as well as cooperation and coordination on specific issues such

as charges, formalities and legal requirement, and practical operation of the regime.

- xii. **Customs Cooperation** (Article 12): This Article also covers a number of areas like sharing of information on the best practices related to customs compliance; exchange of information on import/export declaration or its supporting documents; request for information only after due verification; detailing and rationale for the information requested; respect the confidentiality of the information provided; conditions for providing information including to the extent possible 90 days from the date of request; exceptions to providing information such as contrary to public interest, impede law enforcement, contrary to domestic law, beyond time period for retention of documents etc.; reciprocity to earlier requests made by the requested country; taking into account the administrative burden including resources and costs for the requested country; limitation clauses for the requested country such as obviating the need for modification of documents, initiation of enquiries, translation of information, verification of accuracy of information, provision of information that may prejudice commercial interest etc.; obligation of requested Member to remedy and prevent any future breach of conditions of information received; and countries being allowed to enter bilateral and regional agreements for sharing or exchange of information. All these provisions are under category 'A' for India.

Section II of the TFA relates to the special and differential treatment provisions for developing countries and LDCs. It is pertinent to note that while there is a criterion formulated by the United Nations for LDCs,¹⁹ no such criteria exist for developing and developed countries, with countries having to self-designate themselves. This could however, be subject to contention by the others. Section II consists of Articles 13-22 of the TFA. The core of this section is that it classifies the 239 sub-provisions of Section 1 into three different categories, namely 'A' for immediate implementation on date of entry into force of TFA, 'B' for a phased implementation, and 'C' for seeking technical and financial assistance and linking the implementation with the availability of this assistance. The categories 'B' and 'C' are available only for developing countries, including LDCs. There are notification obligations for these three categories. Flexibility exists for developing

¹⁹ *LDC Identification Criteria & Indicators*, UNITED NATIONS, <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html> (last visited Apr. 12, 2019).

countries and LDCs in the form of an early warning system in the eventuality of their inability to adhere to the timelines for implementation, thereby necessitating the extension of these implementation dates. The other provisions in this Section are those related to shifting between Categories 'B' and 'C' for both developing countries and LDCs. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) would be applied to these provisions with a grace period of 2 years for developing countries, while for LDCs it is 6 years for category 'A' commitments and 8 years for category 'B' and 'C' commitments. Category 'C', relating to assistance and support for capacity building, is contingent on donors coming forward. There are provisions for providing information on this assistance and support.

Finally, Section III of the TFA, that comprises Articles 23-24, relates to institutional arrangements and final provisions. The institutional mechanism for implementation of the TFA is the Committee on Trade Facilitation with its mandate covering a wide range of issues relating to the TFA, including facilitation of ad-hoc discussions and raising of questions by Members. Moreover, the respective countries are to establish their National Committees with a view of domestic coordination for implementation of this Agreement. Article 24 is the final provision and relates to the enforceability, implementation of time periods, relationship with other WTO provisions etc.

The rate of implementation of the commitments as of April 2019 is 61.9% of all commitments by WTO Members,²⁰ and includes the category 'A' commitments and category 'B' and 'C' commitments already undertaken. In terms of the overall TFA commitments, 114 countries have designated category 'A' commitments, while 77 Countries (counting EU as one) have designated category 'B' commitments, and 65 countries have designated category 'C' commitments.

V. INDIA AND THE TFA

India has notified 175 sub-provisions under Category 'A' (implemented or capable of being implemented) and the remaining sixty four have been put under Category 'B' (require transition time of five years). Therefore, India's implementation rate would stand at 73.2%. These were notified to the WTO on February 20, 2018 under Notification No. G/TFA/IND/N/1. India's category 'B' commitments would need to be undertaken by February 22, 2022.

²⁰ *Implementation Dashboard*, Trade Facilitation Agreement Database, THE WORLD TRADE ORGANIZATION, <https://www.tfadatabase.org/implementation> (last visited Apr. 12, 2019).

India has constituted a three tier system for the implementation of the TFA. At the apex is the NCTF for the implementation of the TFA, which is chaired by Cabinet Secretary bi-annually with Secretaries from various line ministries as well as industry chambers like CII, FICCI, FIEO etc. In the 2nd tier, there is a Steering Committee, which is co-chaired by the Commerce and Revenue Secretaries. It is a sub-set of the NCTF, with a core group of public and private institutions which meet quarterly, establish working groups, and finalise work programs. In the 3rd tier, there are four ad-hoc working groups created for special purposes, namely for legislative changes, time release studies, outreach, and infrastructure. This implementation mechanism is structured in such a way that while its core agenda is the implementation of the commitments taken by India on the TFA, it seeks to broaden the perspective on how to improve trade facilitation measures in the country with a view of reducing transaction costs for trade and industry. The Ad-Hoc Working Group on Time Release Study would suggest an action plan on measuring and publishing the average release time of import and export of goods, and recommend ways to reduce the overall cargo release time. The ad-hoc working group on legislative changes has the task of mapping the provisions of the TFA with the specific legislation of the relevant stakeholders, namely the Central Board of Indirect Taxes & Customs (CBIC), the Office of Directorate General of Foreign Trade (DGFT), the Food Safety and Standards Authority of India (FSSAI) etc. In its Working Group report, references have been made to notifications, circulars, orders, regulations and rules under the Customs Act as well as the provisions of the Customs Act. The Working Group on Infrastructure Augmentation is focussed on improving the core trade infrastructure like sea ports, airports, ICD, Customs Freight Station (CFS), and Land Customs Station (LCS); ensuring efficient last mile connectivity through rail and road; and improving regulatory agency infrastructure like labs etc. There have been specific recommendations made in the Working Group report involving a number of ministries such as Shipping (port related); Logistics Division; Commerce (installation of scanners, selection of transporter and container freight stations,); Civil Aviation (airport related); Railways (rail connectivity); Road Transport and Highways (road connectivity); Land Port Authority of India, Home Affairs (Land Customs Stations, Integrated Check Points, Container Freight Stations); and National Centre for Cold Chain Development, Agriculture. The Working Group on Outreach Programmes would look at dissemination of information to stakeholders; providing training to trainers; dissemination of material; holding of targeted workshops, seminars and programmes etc. Incremental progress has been made on some of these activities, with the working group reports laying the foundation stone.

A four year National Trade Facilitation Action Plan (NTFAP) from 2017 to 2020 has been chalked out by India, wherein seventy six trade facilitation measures have been identified and classified under three tiers, namely short-term (0-6 months),

mid-term (6-18 months) and long-term (18-36 months). The National Plan has enunciated 4 pillars of trade facilitation, namely transparency, technology, simplification of procedures and risk based assessments, and infrastructure augmentation. Each of these measures has been assigned to the concerned administrative ministries who have the responsibility of implementing it within the Action Plan period. The key ministries involved in implementation are the Ministries of Civil Aviation, Commerce, Finance, Home Affairs, Railways, Roadways & Highways, and Shipping. Twenty five out of the seventy six measures relate to TFA provisions while the remaining 51 measures go beyond the TFA and are hence known as 'TFA plus'. Within the 25 measures of the TFA, 16 fall under Category 'A' commitments of India and the rest 9 under Category 'B'. The objective of this Action Plan is to bring down overall cargo release time for imports to 3 days for sea cargo, 2 days for air and ICD cargo, and same day for LCS cargo. On the other hand, the cargo release time for exports is to be brought down to 2 days for sea cargo, and the same day for air/ICD and LCS cargo. While the specific action plan is still being worked out, the measures to reduce these timelines would include infrastructure development and human resource re-allocation. The Action plan also dwells upon other key aspects such as paperless regulatory environment, publication of regulations, consultations with stakeholders, use of regulatory impact assessment, and improving investment climate through better infrastructure.

Moreover, regular outreach programmes are being carried out to explain the nuances of the TFA to stakeholders, along with tackling specific trade facilitation issues. The stakeholders would include exporters; importers; trade associations; chambers of commerce; customs house agents; port authorities; and regulatory agencies like DGFT, EIC, FSSAI etc. These outreach programmes are spread across the country and also aim to act as a source of stakeholder feedback. The presentations in these programmes dwell on the initiatives of the governments such as the e-sanchit scheme for electronic filing of documents, the revamped authorised economic operators (AEOs) scheme, status holder benefits, enquiry points, etc. On the other hand, some of the issues that have been raised by stakeholders in these programmes are the cumbersome import procedures for rejected consignments, de-facto import restriction on some products like cosmetics due to lack of testing facilities in ports, high dwell time at the borders such as with Bangladesh, delays in refunds, and the need for regular training and skill.

The TFA contains provisions for expediting the movement, release and clearance of goods including goods in transit. It also sets out measures for effective co-operation between customs and other appropriate authorities on trade facilitation and customs compliance issues. These objectives are in congruence with India's "*Ease of Doing Business*?" initiative and include measures for simplification of

procedures, reduction in processing time, and use of integrated risk management system to lower the dwell time.

VI. CHALLENGES FOR INDIA

The major challenges that India would face in the implementation of the TFA would be on coverage of Advance Ruling; a single integrated portal for trade procedures, establishing one or more Enquiry Point; adoption of special facilitation measures for Perishable Goods; comprehensiveness of the Single Window; publication of Average Release Time (ART); providing an opportunity to comment on regulations; coverage of Direct Port delivery and Direct Port Entry; and infrastructure development. The challenges relating to Advance Ruling cover the aspect of its coverage as well as its revocation, modification and invalidation. Moreover, India also has the challenge of requiring a single window information portal for amalgamating all the relevant laws, regulations and procedures of the regulatory agencies; providing comprehensive information on fees and charges; listing out the offences and related penalties; electronic payment gateway and getting all stakeholders on the portal. India must also explore a more efficient risk management system (RMS) that facilitates trade by reducing the number of inspections through a focussed approach. All these issues have been brainstormed in the by the NCTF. It is expected that progress would be made through legislative changes and integration of other players into the single window.

As of April, 2019, four meetings of the NCTF have been held. While the main purpose has been to ensure compliance with the obligations under TFA, efforts have also been made for non-TFA related reforms that could facilitate trade. Some of the key issues that the NCTF has taken up are a central mechanism for monitoring all regulations related to exports and imports, greater cohesion between customs and the port agencies, deployment of manpower in ports, co-ordination between agencies for risk management so as to reduce interdiction rates for cargo, development of courier clearance module, redressal for delays in GST refunds and organisation of extensive outreach programmes.

VII. INDIA'S PERFORMANCE ON TF PARAMETERS

An important aspect of trade facilitation for business is the facilitatory environment created for it to move ahead on its agenda. The World Bank's Ease of Doing Business (EODB) index captures this aspect and encompasses a broad range of indicators reflecting the gamut of a business's life cycle, namely starting a business, dealing with construction permits, getting an electricity connection, registration of property, getting credit, protection of minority investors, payment of taxes, trading

across borders, enforcement of contracts, resolving insolvency, and the labour market regulations in the country. India has significantly improved its EODB rankings²¹ to 100th in 2017 from 130th in 2016. The creditable jump comes on the back of India's improvements in the rankings related to credit related parameters (from 44th to 29th), protection available to minority shareholders (from 13th to 4th), ease in payment of taxes (from 172nd to 119th), and measures to resolve insolvency (from 136th to 103rd).

The Logistics Performance Index (LPI) is a barometer of the state of the logistics that facilitates business in the country. This encapsulates myriad aspects like customs procedures; quality of infrastructure; ease of arranging international shipments; competence of logistics operators like transport players, customs brokers etc; ability to trace and track consignments; and the timeliness of the shipments reaching consignees. While India's overall rank in 2018 is 44 out of 160; the ranking of the various sub-parameters are 40th for customs, 52nd for infrastructure, 44th for international shipments, 42nd for logistics competence, 38th for tracking and tracing and 52nd for timeliness.

On a broader scale, there is the Global Competitiveness Index of the World Economic Forum (WEF), which looks at 12 pillars of competitiveness, namely institutions, infrastructure, macroeconomic environment, health and primary education, higher education and training, goods market efficiency, labour market efficiency, development of financial markets, technology readiness, market size, business sophistication, and innovation. On this count, India has improved its ranking from 55th to 39th in the last financial year 2017-18. The creditable parameters on this index are the 3rd rank for market size and 29th rank for innovation.

Similarly, there is another World Bank index known as “*Trading across Borders*” which covers a number of areas like documents required for export and import, time required for export and import, and costs required for trade in terms of the final cost per container load. India's ranking in this index has improved to 80th from 146th (out of 190).

VIII. CONCLUSION

Therefore, it is clear that the TFA could be used as a pivot for India to undertake reforms on trade facilitation so as to reduce the transaction cost for its exports and imports. The commitments under the TFA can scantily be regarded as onerous

²¹ *Rankings & Ease of Doing Business Score*, THE WORLD BANK, <http://www.doingbusiness.org/en/rankings> (last visited Apr. 12, 2019).

given that it emanated out of the consensus of 164 Members of the WTO keeping in perspective their existing domestic regimes. Nevertheless, as indicated above, in the challenges faced by India in TFA implementation, there are some areas which would need work to achieve compliance with multilateral obligations. It would also provide us a platform to work on other trade facilitation measures beyond the TFA that are imperative for ensuring that we can seamlessly plug into the global and regional value chains. The full implementation of our National Plan can also be a magnet for investments and ensure that the country's growth potential can be fruitfully leveraged.

Some of the noteworthy developments made by India on some of its trade facilitation measures are single window (SWIFT), e-sanchit scheme (for filing documents electronically), authorised economic operators or AEOs (for faster clearances) with around AEOs as of March 2019, pre-arrival processing; direct port delivery (DPD) for imports, direct port exit (DPE) for exports, integrated risk management system, DGFT enquiry points, and reduction in number of documents to 3 for export clearances. The TFA provides a window for India to look at many other aspects of trade facilitation and more crucially, at better coordination amongst its agencies for effective implementation of its programmes. While this could all lead to a considerable reduction in costs and transaction time to trade and industry, it would lead to greater transparency thereby facilitating decision making. India must use the TFA as a base for working towards improving its performance parameters. Thus, trade facilitation is a boundless opportunity which we can ill-afford to miss.