

WORLD TRADE ORGANIZATION

TN/TF/W/181
10 July 2012

(12-3711)

Negotiating Group on Trade Facilitation

Original: English

COMMUNICATION FROM INDIA

The following communication, dated 10 July 2012, is being circulated at the request of the delegation of India for consideration by the Negotiating Group on Trade facilitation at its meeting on 9-13 July 2012.

1. Article V.7 of the GATT 1994 states that "the provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)." In a communication dated 4 July 2012 (TN/TF/W/180), a Member has suggested that this text should be reinserted into Article 11 of the Draft Consolidated Negotiating Text, even after the text on the relationship to other WTO Agreements is resolved. Concern has been expressed that non-incorporation of this language in the new Agreement on Trade Facilitation will be interpreted as a widening of the scope to encompass aircraft in transit. This interpretation, according to the Member, is supported by provisions under the Vienna Convention, and Panel and Appellate Body reports. Pending further consideration of the matter, as an interim measure, the Member has suggested that a footnote be added to Article 11 as a place holder to ensure that this issue is fully reflected in the Draft Text.

2. India endorses the view that aircrafts in transit are excluded from GATT Article V. However, India does not agree to the suggestion that a footnote be added to Article 11 as a place holder. India's comments and concerns in the matter are discussed in the following paragraphs.

3. India believes that the GATT 1994 and the new Agreement on Trade Facilitation, as and when concluded, would have to be read together harmoniously and that legal effect must be given to both. The Appellate Body has developed an approach whereby the WTO Agreement is considered to be one Agreement with many Annexes. As a result, the interpreter has to give meaning to all the provisions of the Agreement.

4. The current GATT Articles under negotiation, particularly Articles V and X, contain several provisions which have either not been discussed at all or discussed only partially, and it is unlikely that these provisions would be repeated in the new Agreement on Trade Facilitation. Some of these provisions are as follows:

- (a) Article V.2: *There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties.*
- (b) Article V.3: Compliance with applicable customs laws and regulations.
- (c) Article V.5: MFN Treatment in respect of charges, regulations and formalities in connection with transit.
- (d) Article X.1: Protection of confidential information. [*The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private*].
- (e) Article X.1: Publication of laws, regulations and administrative rulings of general application pertaining to requirements, restrictions and prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use.
- (f) Article X.3 (a): Administration of laws, regulations, judicial decisions and administrative rulings of general application in a uniform, impartial and reasonable manner.
- (g) Article X.3 (b): *Suo motu* review. [*The central administration... may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.*]

5. In Document TN/TF/W/43/Rev.15, dated 9 July 2008, there was a provision under the section on Publication which read: *"Nothing in these provisions shall be construed as requiring Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private"*. This text continued to figure in the Draft Negotiating Text until 25 February 2011, i.e. until TN/TF/W/165/Rev.7. After discussions, the text was deleted from the Draft Text in its revised version 8, issued on 15 April 2011. The general feeling was that the discipline remained but no useful purpose would be served by repeating the language of Article X: 1 of the GATT 1994 in the new Agreement.

6. In another similar case, the text: *"There shall be freedom of transit through the territory of each Member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other WTO Members"* which was there in the Draft Text dated 14 December 2009, got subsequently deleted from the Text w.e.f 25 February 2011 in Rev.7. To cite yet another example, the discipline: *"All charges and regulations imposed by a Member on traffic in transit to or from the territories of other Members shall be reasonable, having regard to the conditions of the traffic"* was there in the Draft Text dated 14 December 2009, but subsequently got deleted w.e.f 25 February 2011 in Rev.7. This was done as part of the effort to reduce duplication and eliminate unnecessary texts, as these texts are already there in GATT Article V.

7. India's concern is that if only the text excluding aircraft in transit is reinserted into Article 11 and other provisions, which were previously a part of the Draft Text, are not so reinserted, it would convey an impression that Members have had consciously decided to discard these disciplines. This is however not the case. India is of the view that all such issues, including the one raised in document TN/TF/W/180 dated 4 July 2012, should be resolved in a cross-cutting manner and not in piecemeal. India fully subscribes to the view expressed in the afore-cited document that the provisions of Article V of the GATT 1994 shall not apply to the operation of aircraft in transit, but we do not think

that the way to resolve this issue would be to insert a footnote in Article 11 for aircraft in transit, while leaving the other issues unaddressed.

Proposal

8. In the light of the above, India proposes that the text on aircraft in transit should not be reinserted as a footnote to Article 11. However, in case a decision is taken to the contrary, India proposes to re-insert the following provisions of the GATT 1994 in Article 15 as a place holder for further discussion:

- (i) Article 1: "Nothing in these provisions shall be construed as requiring Members to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private."
- (ii) Article 11: "There shall be freedom of transit through the territory of each Member, via the routes most convenient for international transit, for traffic in transit to or from the territory of other Members."
- (iii) Article 11: "All charges and regulations imposed by a Member on traffic in transit to or from the territories of other Members shall be reasonable, having regard to the conditions of the traffic."

9. India also proposes that the other issues mentioned at paragraph 4 above be listed under Article 15 as a place holder for further discussion.

10. India is making this submission in light of the decision pronounced by the NGTF Chair in the meeting held on 9 July 2012, clarifying that any text proposed by a Member which in its opinion needs to be incorporated in the Draft Text as a placeholder for further discussion, would be so done in square brackets.

11. India reserves its rights to make additional submissions in this matter as well as on other matters on a similar footing, as and when the need arises.
