CHALLENGES FOR IMPLEMENTING THE TRADE FACILITATION AGREEMENT

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CHALLENGES FOR IMPLEMENTING THE TRADE FACILITATION AGREEMENT

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ABSTRACT

The adoption of the WTO Agreement on Trade Facilitation in December 2013 was a historic moment for the WTO, being the first multilateral agreement adopted since the conclusion of the Uruguay Round. Nevertheless, its ratification process by national parliaments of WTO Member States is proving challenging, despite evidence proving the link between the adoption of trade facilitation measures and the reduction of trade costs.

The main challenges faced by WTO Member States are linked to cumbersome constitutional requirements of treaty ratification, the need to make changes in domestic legislation, the challenges of providing detailed costing of TFA implementation to the government, the lack of political interest, the lack of private sector involvement in the preparation for ratification, and high costs of implementation may be deterring factors for governments willing to engage in the TFA's ratification process.

After two decades on the multilateral trade agenda and almost a decade of negotiations, the Agreement on Trade Facilitation (TFA) was finally concluded by Trade Ministers of World Trade Organisation (WTO) Member States in December 2013. In November 2014, a Protocol of Amendment was adopted to integrate the new agreement into Annex 1A of the WTO Agreement.[2]

In spite of the unequivocal evidence that the main beneficiaries of the TFA will be those countries which undertake full compliance with all of its provisions, a significant number of developing countries are still stalling in ratifying the agreement. They are struggling with the domestic challenges of the ratification process, due to inadequate policy coordination or simply because the issue is not high on the agenda of their governments. Nevertheless, and despite the lack of deadline to accept the aforementioned Protocol of Amendment, all WTO members are bound to complete their domestic ratification processes and deposit their instruments of acceptance with the Secretariat.

In this short article, we provide an overview of the WTO TFA, whilst highlighting the main implementation challenges facing developing countries.

DEFINING TRADE FACILITATION AND GLOBAL BENEFITS OF TRADE FACILITATION REFORMS

There is no universally agreed definition of the term "trade facilitation" (TF). Various definitions have been used by different international organisations and in different trade agreements.[3]

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[2] See WTO – Trade Facilitation. Available at: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm

[3] According to UNECA (2013), "A broad definition of trade facilitation encompasses policies to reduce trade transaction costs, including "behind-the-border" policy reforms and the reduction of transaction costs resulting from cumbersome administrative customs, documentary requirements and border procedures that affect cross-border movement of goods and services. The term also covers simplification of the logistics, documentation and customs procedures involved in transiting goods through ports and land borders. It refers, too, to "domestic" policies and institutional structures that create

According to Neufeld (2015), "[the] *subject is typically framed by the scope of measures covered in the respective agreement. What some treaties label as "TF" can have little to do with how the matter is approached in others*."[4] In the WTO Doha negotiations, it was agreed that for the purposes of the Agreement on Trade Facilitation, the scope of TF would be limited to issues related to three Articles of the General Agreement on Tariffs and Trade (GATT 1994): Articles V, VIII, and X, dealing, respectively with freedom of transit, fees and formalities connected with importation and exportation, and publication and administration of trade regulations.

According to the European Commission[5], "*the cost of trade procedures may represent even as much as 4-5% of the overall costs of trade transactions. This is about the same cost as the current tariff average on trade in industrial goods of industrialised countries, which is 3.8%. Halving the costs would mean saving 325 billion USD* [...] *a year – money currently being wasted – largely on the shoulders of SMEs and developing country traders.*" This also seems to indicate that the benefits from larger TF reforms would result in better market access to developed countries, than a substantive multilateral agreement on non-agricultural tariff reductions. The OECD Trade Facilitation Indicators estimate that comprehensive implementation of all measures covered by the WTO TFA would reduce total trade costs by 10% in advanced economics, and by 13–15.5% in developing countries.

With respect to commitments made by WTO Members under the TFA, the WTO Secretariat[6] has found that full implementation would reduce global trade costs by an average of 14.3%, and that African countries and least-developed countries (LDCs) could expect to see the biggest average reduction in their trade costs. The WTO also predicts, on the basis of computable general equilibrium (CGE) simulations, that export gains from full implementation of the TFA would be between USD 750 billion and well over USD 1 trillion dollars per annum, depending on the implementation time-frame and coverage, with developing countries capturing more than half of the available gains. However, on the basis of gravity model estimates, the gains would be even larger: between USD 1.1 trillion and USD 3.6 trillion.[7]

The benefits of TF reforms do not only positively impact on trade flows (both exports and imports), but also on governments' higher revenue collection (due to the increase in trade volume, and higher detection rates of fraud) and attractiveness to foreign direct investment (FDI).[8]

With respect to the ACP countries, TF was highlighted as an issue in all of the sector studies of the Sustainability Impact Assessment (SIA) of the EU-ACP EPAs, conducted by PricewaterhouseCoopers because the *"losses that businesses suffer through delays at borders, complicated and unnecessary documentation requirements, and lack of automation of government-mandated trade procedures, can exceed the costs of tariffs*."[9] Besides the classical fields of TF measures, such as improving facilities at ports, airports and other border crossings, they also involve establishing efficient and modern customs regimes, and transparent and consistent

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an enabling environment for trade. Finally, it can take in harmonisation of national and regional standards with international standards."

[4] Neufeld, Nora (2014): Trade Facilitation Provisions in Regional Trade Agreements: Traits and Trends, Journal of International Commerce, Economics and Policy Vol. 5, No. 2, p. 4.

[5] European Commission: "Trade facilitation: interest for developing countries", p. 1. Available at: http://ec.europa.eu/taxation_customs/resources/documents/trade_facilitation-interest_for_developing_countries.pdf

[6] WTO (2015): World Trade Report, Geneva

[7] The wide gaps between the high and low estimates result from the possible different implementation time-frames and also reflect the fact that the TFA contains many "soft law" provisions that developing countries may or may not implement.

[8] ECA (2013)

[9] See PricewaterhouseCoopers, "Sustainability Impact Assessment of the EU-ACP Economic Partnership Agreements - key findings, recommendations and lessons learned", Paris, PricewaterhouseCoopers, May 2007, 96 pages at page 75.

regulations among trading partners. The SIA also emphasised that "*in the ACP context, it* [TF] *also implies the fight against informal taxation on the main trade roads in Africa*," something which is definitely not dealt with under the TFA.

HOW DOES THE TFA OPERATE?

The TFA provisions aim at expediting the movement, release and clearance of goods, including goods in transit. However, the TFA does not deal with the whole spectrum of what is generally considered "trade facilitation," as infrastructural and transport issues are left outside of the agreement. Actually, the scope of the TFA is limited to clarification and extension of trade facilitation-related disciplines already provided for by one or more specific GATT articles, namely GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations). In addition, it also provides for effective cooperation between customs and other relevant authorities on trade facilitation and customs compliance issues. Section I of the TFA contains the substantive disciplines of the agreement, while Section II lays out the special and differential treatment (SDT) provisions for implementation by developing countries and LDCs. Section III of the TFA deals with institutional arrangements, including the obligation of WTO Members to establish national trade facilitation bodies.

The substantive provisions of the TFA are organised in twelve articles containing approximately 40 "technical measures," which are partly binding ("hard law") obligations and partly best-endeavour type commitments that set out good regulatory practices.[10] According to Hamanaka (2014), the majority of obligations set by the TFA are best-endeavour commitments, thus the scope of binding obligations is very limited.[11] In general the binding provisions are those which are directly linked to the already existing TF-related GATT Articles mentioned above. Contrary to the "hard law" provisions of the TFA, the "soft law" provisions are hardly enforceable.[12]

For developing countries and LDCs, the most important part of the TFA is Section II, which contains SDT provisions that condition the implementation of the agreement on their capacity to do so. In short, developing countries are allowed to decide when their obligations will be implemented, and make the implementation conditional on the provision of assistance by developed WTO Member States. To benefit from SDT they must identify each "hard law" provision of the TFA and best-endeavour commitment they wish to implement according to the three categories, and notify them to the WTO: Category A provisions are those that a developing country member designates for implementation by the time the TFA enters into force; Category B contains provisions designated for implementation after a transitional period; and Category C provisions are those for which the implementation will occur after a transitional period, and subject to the provision of assistance and support for capacity building. In addition, the TFA also provides additional flexibilities for implementation such as:[13]

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[10] In fact, the TFA abounds in such best endeavour terms as "should", "to the extent possible', "as appropriate", "as may be required", "whenever" or "wherever practicable", and "where possible".

[11] See Hamanaka, Shintaro (2014): WTO Agreement on Trade Facilitation: Assessing the Level of Ambition and Likely Impacts, Global Trade and Customs Journal, Volume 9, Issue 7 & 8.

[12] Hoekman, Bernard (2014): The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage?, EUI Working Paper RSCAS 2014/102, at pages 12-13.

[13] WTO: Trade Facilitation Agreement: Factsheet on Special and Differential Treatment for Developing Countries, found at https://www.wto.org/english/tratop_e/tradfa_e/tfa_dev_count_brochure_e.doc

- Early Warning Mechanism: Possibility to request an extension in case of difficulties in implementing a provision in Category B or C. The extension will be automatic if the additional time requested does not exceed 18 months;
- Expert Group: If a requested extension has not been granted and a member lacks the capacity to implement, the TF Committee will establish an Expert Group to examine the issue and to make a recommendation;
- Shifting between Categories: A developing country member may shift provisions between Categories B and C; and
- Grace Period: Following entry into force of the TFA, developing country members will not be subject to the Dispute Settlement Understanding for a period of 2 years for Category A provisions.

IMPLEMENTATION CHALLENGES

Many WTO Members, including 43 out of 61 ACP WTO Members, are still due to ratify this single most important multilateral agreement reached in the history of the WTO. Especially notable are the missing ratifications by those countries that are likely to benefit the most from TF reforms, namely African LDCs and LLDCs, as well as Pacific Island countries. Three quarters of African ACP countries – 30 out of 40, including South Africa, the best TF performer in the continent – and five Pacific ACP countries out of six did not manage to get assent to the TFA through their respective ratification procedures in the one and a half years since the conclusion of the negotiations at the Bali Ministerial Conference in December 2013.

Whilst the reasons for such failure might vary from country to country, they generally include cumbersome constitutional requirements of treaty ratification (e.g. the PNG Constitution requires that the TFA be on the agenda of the Parliament for at least ten sitting days, which means that the ratification process can take a year or more), the need to make changes in domestic legislation prior to ratification (e.g. in Nigeria and South Africa[14]), the challenges of providing detailed costing of TFA implementation to the government (e.g. in PNG), lack of political interest towards ratification, and last but not least the lack of, or inappropriate private sector involvement in the preparation for ratification.

High costs of implementation might be a deterring factor for governments willing to engage in the TFA's ratification process. However, the predicted high costs of TFA implementation, which had been referred to by many developing countries to justify their opposition to the agreement at earlier stages of the negotiations, proved to be exaggerated by studies conducted by international organisations such as UNCTAD, the OECD and the World Bank. According to UNCTAD, the estimated total costs observed in 26 developing countries and LDCs to reach full implementation of the TFA range widely, from USD 136,000 to USD 15.4 million. The level of development appears not to influence decisively the total cost of TF reforms, but rather it is the level of ambition of the reforms (i.e. the scope and depth of the measures) that have the greatest impact on the final bill. While governments are legitimately interested in knowing how much the TFA would cost to the budget, they should also bear in mind possible offsetting factors, such as private sector contribution in the form of mandatory user fees or PPP schemes for establishing and operating

[14] Information provided at the WTO's Preparatory Committee on Trade Facilitation meeting of 24 March 2015, https://www.wto.org/english/news_e/news15_e/fac_24mar15_e.htm

single windows, and of course the value of technical assistance for implementing Category C commitments. In PNG, for example, the National Trade Facilitation Committee recently estimated that the total cost of the activities to be undertaken over a period of five years to meet full compliance with the TFA, would amount approximately to USD 6.8 million, of which USD 1.4 million would accrue to the PNG government and the private sector, and USD 5.5 million which would be wholly, or partly financed by foreign donors. Finally, all analyses of data from actual TF projects to assess TF implementation costs, excluding infrastructure-related investment measures (which are not covered by the TFA), indicate that the benefit-cost ratio of TF is always positive and often high.[15]

CONCLUSION

Despite the different studies highlighting the potential economic benefits of the TFA, and contrary to conventional wisdom, the TFA is unlikely to bring significant direct economic gains to WTO Members. First, as briefly mentioned above, the TFA does not address investment in physical infrastructure (e.g. level of development and quality of ports, airports, roads, and rail infrastructure), from which most TF gains emanate. Second, most of the TFA provisions are non-enforceable optional measures, and although reflecting international best practices, it is left to the discretion of WTO Members to decide how far they go with such "soft" trade policy reform measures. This feature of the TFA confirms that trade facilitation reform is basically a domestic unilateral issue. As Hamanaka (2014) rightly observed, "[the] *fact that the TFA does not bring immediate economic impacts does not mean it is not economically meaningful. The TFA can be a tool of trade facilitation reform in the long-run and result in significant economic gains*."[16]

ABBREVIATIONS

ACP	Africa, Caribbean and Pacific	**PNG**	Papua New Guinea
EPA	Economic Partnership Agreement	**PPP**	Public Private Partnership
EU	European Union	**SDT**	Special and Differential Treatment
FDI	Foreign Direct Investment	**SIA**	Sustainable Impact Assessment
GATT	General Agreement on Tariffs and Trade	**SME**	Small and Medium Enterprises
CGE	Computable General Equilibrium	**TF**	Trade Facilitation
LDC	Least Developed Countries	**UNCTAD**	United Nations Conference on Trade and Development
LLDCs	Land-locked Developing Countries	**UNECA**	United Nations Economic Commission for Africa
OECD	Organisation for Economic Co-operation and Development	**USD**	United States Dollar
		WTO	World Trade Organization

[15] Hoekman (2014)
[16] See Hamanaka, Shintaro (2014): WTO Agreement on Trade Facilitation: Assessing the Level of Ambition and Likely Impacts, Global Trade and Customs Journal, Volume 9, Issue 7 & 8, at page 349.

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