The Development Dimension of the WTO Agreement on Trade Facilitation

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Abstract: The focus on development adopted at the WTO's Doha Ministerial Meeting in 2001 has changed the architecture of multilateral trade negotiations, with development issues assuming a central position in the WTO negotiation spaces and agreements. In this paper, we assess the extent to which the concerns of developing countries have been addressed in the TFA substantive provisions and special and differential treatment (S&DT) provisions for developing countries. We find that the TFA approach resembles a traditional approach to addressing concerns of developing countries and follows closely the already trodden path of the Uruguay S&DT discipline. An important cluster of issues that did not find its way into the TFA is that relating to regional approach in implementation of TFA. The TFA holds the promise of contributing positively to the development process in less developed countries if the promise of support is realized and developing countries set clear and objective targets to make effective use of the assistance, but in itself may not guarantee the realization of development objectives for developing and least developed countries. Provision of support and capacity building are unguranteed by nonbinding nature of the relevant provisions. This is the input that international partners could, and should, make to the realization of development objective of TFA.

JEL Classification: F13, F68, K33.

Key words: Trade faciliation agreement, development issues, special and differential treatment, developing countries, trade and development, WTO.

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1 Introduction

The focus on development adopted at the WTO's Doha Ministerial Meeting in 2001 set a new architecture for multilateral trade negotiations and agreement, with development issues assuming a central position in all negotiation spaces and agreements. Over the years, first in the framework of the General Agreement on Tariffs and Trade (GATT), and now in the World Trade Organization (WTO), as the liberalization commitments of developing countries increasingly deepen and the multilateral trade agenda expands, the need for providing special treatment to developing countries, to facilitate their integration into the global economy has grown in importance—traditionally sought through special and differential treatment (S&DT) provisions for developing countries. The November 2001 Ministerial meeting of the WTO in Quatar that launched the Doha Development Round accorded S&DT a central place in the current round of rule negotiations. It reaffirmed that "provisions for special and differential treatment are an integral part of the WTO Agreements." One area where this need is particularly acute is trade facilitation, given the high trade costs facing less developed countries particularly, the landlocked and transit developing countries.

The region with one of the worst cross-border indicators is Sub-Saharan Africa. Recent accounts of Africa's trade with the rest of the world suggest that high trade costs remain a key barrier to its normal integration into the world economy. Hence, if African countries can control for trade costs, intra-continental trade will flourish – taking advantage of geographical proximity, rising consumer middle class, and falling tariffs. Literature identifies major components of trade cost in Sub-Saharan African countries: transportation costs, port and border-related costs (logistics, policy, language and currency barriers, etc) and distribution costs. Much of the source of these trade costs results from lack of trade facilitation and inadequate physical infrastructure. Some studies have already commented on the role of infrastructure in explaining variations in logistics costs and export growth among countries (Hall and Jones 1999; Stiglitz 1989). For instance, logistics costs in Uganda (at above 10 percent of GDP) are among the highest in the world, and inadequate infrastructure is responsible for holding back GDP growth by about 2 percent.

The Trade Facilitation Agreement (TFA) holds the promise of contributing positively in this area and to the development process in less developed countries. Concluded at the WTO's 2013 Bali Ministerial Conference, the the Trade Facilitation Agreement (TFA) contains provisions for expediting the movement, release and clearance of goods, including goods in transit, and sets out measures for effective cooperation between customs and other relevant authorities on trade facilitation and customs compliance issues. The TFA contains provisions for technical assistance and capacity building in this area. To this end, a Trade Facilitation Agreement Facility (TFAF) has been created (at the request of developing and least-developed country members); and is meant to ensure that these less developed members receive the assistance needed to reap the full benefits of the TFA and to support the ultimate goal of full implementation of the new agreement by all members to the Agreement.

The TFA entered into force on 22 February 2017 amidst hope that it would reduce trade costs that are coming in the way of deeper integration of less developed economies into global economy, boost exports in developing countries and increase global trade. The WTO's World Trade Report released barely two years before the Agreement entered into force (on 26 October 2015 to be precise) projected that global merchandise exports would rise by up to $1 trillion per annum when TFA came into effect, and suggested that more than a half of the gains would go to developing countries.

The future of developing countries and their integration into the world trading system is arguably the greatest challenge facing global community in the context of multilateral rule making. Moving towards open borders may be the ultimate goal of the FTA, but how do you ensure the real benefits of FTA go to developing and least developed countries and filter down to the wider economy?

This paper aims to assess the relevance and effectiveness of the TFA (legal instruments) in addressing developing countries' concerns and priorities, with particular focus on special and differential treatment (S&DT) provisions for developing country members and least-developed country (LDC) members, including:

(i) identifying the capacity and implementation issues that might prevent developing countries from utilising /maximizing the benefits from use of S&DT provisions and implementation of TFA; and

(ii) effectiveness of S&DT provisions in enhancing the capacity of developing countries in implementing their TFA obligations.

Section 2 briefly reviews the main case underpinning the potential contribution of trade facilitation to the development process. Section 3 reflects on the winding roads of trade facilitation negotiations until its eventual conclusion in Bali in 2013, and the outcomes. Section 4 then considers the challenges to be faced if one wants to turn into reality the potential that trade facilitation holds for development, and approach developing countries might take to work to the realization of the development objective. Section 5 concludes with a suggestion on the input that international partners could, and should, make to the realization of the development return from TFA.

2 The role of trade facilitation in development process: review of evidence

Before delving into substantive issue around TFA, it is important indeed, to highlight benefits that implementation of a good trade facilitation agreement can offer. The ultimate goal of the multilateral trading system is expansion of global trade and improvement in global welfare, and increased participation of of developing countries in this statistics. The Preamble of Marrakesh Agreement Establishing the World Trade Organization recognises the link between trade and development. It states,

"The *Parties* to this Agreement,

> *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development […]"[1]

Defining 'development' has never been easy, even when development is viewed in purely economic terms. A serious review of the literature in this area is beyond the scope of this paper. Development as we know it is a multifaceted notion that encompasses many dimensions, but there are three major dimensions around which the multilateral trade rules have been constructed as unveiled by Preamble of Marrakesh Agreement. The first one is economic transfprmation—to be achieved through ensuring full employment and a large and steady long-term economic growth (through sustained productivity increases) and effective demand, and expansion of trade in goods and services. The second one is social transformation—or improved standards of living such as access by citizens to better /quality (and continuously im-

[1] Agreement Establishing the World Trade Organization

proving services), in an inclusive manner (i.e. ensuring that the disadvantaged in society are catered for—that their basic entitlements: access to basic services, housing, education, etc. are granted). The third dimension concerns the sustainability question, and seeks to protect and preserve the environment—protecting and managing the natural resource base responsible for economic and social development—and ensuring that economic gain does not compromise with the environment, and put future generation at risk.

Trade facilitation has a distinctive impact on all the three. Lowering trade-related transaction costs can result in a significant improvement in a country's ability to compete effectively in the global market, encouraging more trade and foreign investment. A study by UNCTAD (2001) suggests that a 1 percent reduction in the cost of maritime and air transport could increase Asian GDP by about $3.3 billion. If trade facilitation is considered in a broader sense to include an improvement in wholesale and retail trade services, a 1 percent improvement in the productivity of that sector could increase GDP an additional $3.6 billion.

A study by Asia-Pacific Economic Cooperation (APEC) estimated that trade facilitation programmes would generate gains to APEC of about 0.26 per cent of real GDP, almost double the expected gains from tariff reductions, and that the savings in import prices would be between 1–2 per cent of import prices for developing countries in the region.

At a micro-economic level, there are potential benefits for developing countries and LDCs in terms of increasing the competitiveness of their small and medium-size enterprises, through lowering trade-related transaction costs, thereby facilitating their integration into regional and global value chains. The impact on consumer prices can be phenomenal. This is especially important for landlocked and transit developing countries and small states that suffer significant trade costs. Consumers can gain from lower prices due to reduced trade costs and reduced delays in the receipt of goods. If you are in Kigali and you buy a kilogramme of rice imported from abroad, about 30 percent of the value of that rice will be transport costs. In the past, it would take up to seven days to get through the Malaba border between Kenya and Uganda. There would sometime be a 25 kilometre que to the customs clearing and that means additional costs to exporters/importers, reduced profits and low wages for employees.

Other micro-level benefits of trade facilitation and in achieving social transformation accrue in terms of reduced logistical costs, the sum of time and money involved in moving traded goods and consumer prices. Lower transport costs can lead to higher wages, thereby having a direct impact on poverty reduction.

The cost of keeping a truck on the road is substantial; it could be up to U$800 a day as some studies have established. This costs trickle down to high consumer prices, lower income tax revenues and erodes export competitiveness. Low revenue collection curtails government ability to provide social services—thereby delaying process of social transformation. Trade facilitation can influence the structure of incentives to invest in productivity enhancing technology and to protect the environment and thus affect the relative prices of imported/ exported goods and services. As such, trade facilitation programmes can exert their impact by altering the composition and levels of imports and exports. Fast release of goods, therefore, may encourage businesses to take more corporate responsibilities such as preserving the environment and can lead to trade expansion which, in turn, should generate economic growth.

The associated increasing and broadening of the exports of a country can reduce the vulnerability of the respective economy to exogenous shocks, increase the potential for knowledge spillovers in specific sectors and have a positive impact on Foreign Direct Investment (FDI). Under the WTO Agreement on Trade Facilitation developing countries also stand to benefit from the aspired increase in transparency and predictability of the trading environment.

Literature abounds with positive predictions of the effects of trade facilitation. Narayanan, Sharma and Razzaque (2016) provide one of the most comprehensive reviews of this literature, which covering work in APEC, Africa, Asia-Pacific regions, and the Association of Southeast Asian Nations (ASEAN+6) that we need not repeat here.[2] However, what emerge from all these studies is that trade facilitation has a positive impact on various macroeconomic indicators such as trade costs, level of exports, employment, productivity and export competitiveness.

[2] See Narayanan, B, S Sharma and M A Razzaque (2016), 'Trade Facilitation in the Commonwealth: An Economic Analysis', *International Trade Working Paper* 2016/01, Commonwealth Secretariat, London.

Wilson *et al* (2004) found a positive relationship between port efficiency, customs environment, regulatory environment, and service sector infrastructure and flows of traded manufactured goods. They predicted an increase in global trade in manufactured goods of up to US$377 billion arising from improvement in these trade facilitation indicators. Portugal-Perez and Wilson (2010) provide evidence, suggesting that trade facilitation reforms indeed improve the export performance of developing countries, dramatically. This is particularly true with investment in physical infrastructure and regulatory reform to improve the business environment.

Drawing on estimates, the authors compute illustrative exports growth for developing countries and ad-valorem equivalents of improving each indicator halfway to the level of the top performer in the region. In Africa for example, Portugal-Perez and Wilson (2010) find that export would increase by 79.3 percent in Chad by improving the quality of the country's infrastructure halfway to the level of South Africa, and by 16.8 percent in Cameroon by improving the business environment to half the level of South Africa. And improving the quality of physical infrastructure in Egypt to bring the country's indicator half-way to the level of Tunisia's would increase exports by 10.8 percent. This is equivalent to a 7.4 percent cut in tariffs faced by Egyptian exporters across importing markets.

However, the findings provide evidence that the marginal effect of infrastructure improvement on exports appears to be decreasing in per capita income. In contrast, the impact of information and communications technology on exports appears increasingly important for richer countries. Hertel, Walmsley and Itakura (2001), Hummels (2001), Freund and Weinhold (2000), and Fink, Mattoo, and Neagu (2002), among others. Hertel et al (2001) find greater standards harmonization for e-business and automating customs procedures between Japan and Singapore to be associated with increased overall trade flows between these countries as well as their trade flows with the rest of the world. show that trade facilitation reforms do improve the export performance of developing countries Concerns trade costs, Hummels (2001) equate each day saved in shipping time (due, in part to a faster customs clearance) to a 0.5 percentage point reduction of ad-valorem tariff. Freund and Weinhold (2000) find that a 10 percent increase in the relative number of web hosts in one country

would have increased trade flows by one percent in 1998 and 1999 while Fink, Mattoo, and Neagu (2002) find that a 10 percent decrease in the bilateral price of phone calls is associated with an 8 percent increase in bilateral trade.

A properly-designed and well implemented trade facilitation program can also impact positively on SME development, which have been found to be the engines of economic development in many transitional countries (see World Bank, 2002), growing faster, engendering more employment opportunities and making a substantive contribution to the objective of broad based, inclusive economic growth. Other than increased trading volume, higher profits at firm level subsequent to reduced trade costs can translate into higher wages, and more tax revenues especially for landlocked and transit countries. That may have a far more important benefit to the economy than an increase in trade flows, because most low income countries have a very low tax base, with typically no more than 20 percent of the labour force in formal employment.

3 The TFA historical journey and results

The conclusion of the WTO Agreement on Trade Facilitation at the Bali ministerial conference in December 2013 marked the end of a decade-long journey that started in Singapore in. TFA broke new ground in the decentralized, bottom-up way the negotiations were structured; in the manner the capacities and resources of developing countries were addressed; and in how the Agreement has shifted the system's focus beyond policy barriers toward process frictions. The negotiated outcome is likely to have an impact not just on Trade Facilitation, but on the WTO and the multilateral trading system as a whole.

3.1 From Singapore to Bali: what were the issues?

Trade facilitation is a Singapore issue. The 1996 WTO Ministerial meeting in Singapore provided the first mandate for the WTO to proceed in the area of Trade Facilitation. The Council for Trade in Goods was mandated to "undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area". Concerns for developing countries and LDCs were expressed in the Singapore mandate.

After several years of exploratory work, the WTO Members (under the auspices of the General Council) decided in August 2004 by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D of the July Package. Under the July 2004 Framework, Members were tasked to clarify and improve three articles of the General Agreement on Tariff and Trade (GATT) which relate to the transit of goods (Article V), fees and formalities (documentation and procedures) (Article VIII), and transparency of laws and regulations (Article X). Article VIII contains 3 provisions that address trade costs: (i) fees and charges in connection with import and export (e.g., additional customs fees beyond a tariff duty) must be commensurate with the cost of providing the service; (ii) the number and complexity of import and export formalities must be minimized; and (iii) import and export documentation requirements should be simplified and kept at a minimum.

The aim of the negotiations was to make border procedures easier and more transparent and to expedite the movement, release and clearance of goods. The negotiations were also intended to enhance technical assistance and capacity building in this area and improve effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. In addition to technical assistance and capacity building, special and differential treatment (S&DT), in view of cost implications for implementing the agreement, was an important component of the negotiations.

In November 2005 at the Ministerial Conference in Hong Kong, the WTO Members agreed to launch negotiations on trade facilitation on the basis of modalities contained in Annex D of the ''July package'' further supporting the decision of the General Council. This mandate (Annex D of July 2004 Framework) set out the scope of negotiations with the goal to reduce the transaction cost and complexity of international trade for business and improve the trading environment in a country, while at the same time optimising efficient and effective levels of government controls. It was important from the onset to define and understand the scope of trade facilitation.

Proposals range from enhanced transparency and non-discrimination initiatives over various measures regarding import/export-related fees and formalities to matters addressing goods in transit. For many developing countries especially landlocked countries, transit matters were of particular interest in that regard. The landlocked countries were especially active in pursuing some of these issues. Regional approaches to trade facilitation were proposed by a number of small economies[3] (TN/TF/W/129/Rev.1), especially with respect to implementing requirements and the provision of technical assistance and capacity building, and enquiry points for providing information (in a proposal tabled in July 2006).

The following language was proposed by small economies for inclusion in draft text:

"E*stablish enquiry points at the national level or in the case of SVEs/developing countries involved in a Customs Union/RTA/FTA, the option of the establishment of enquiry points at the regional level, to provide relevant information on trade procedures to trade."*

[3] The submission was sponsored by Antigua and Barbuda, Barbados, Dominica, Fiji, Grenada, Papua New Guinea, the Solomon Islands, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.

> "*Members and the WTO, within its competence, shall provide technical and financial assistance on mutually agreed terms to SVEs/developing countries to support the establishment, modification and maintenance of these national and/or regional enquiry points."*

In March 2007, a group of small economies: Barbados, Cuba, Fiji, Papua New Guinea and the Solomon Islands tabled another proposal, which provided three legal drafting suggestions to be included in three different areas of an eventual text: Preamble, Establishment of Enquiry Points, Technical Assistance and Capacity Building, which emphasised use of regional approaches.

At the heart of this approach was a call to recognise the capacity constraints faced by developing world especially small states and need to utilize regional architecture to minimize administrative costs. This was hoped would allow small, vulnerable economies and other developing countries involved in a customs union or similar economic integration movement to pool their scarce resources to assist in the implementation of the obligations arising from a possible WTO agreement on trade facilitation.

Text-based negotiations began in December 2009 based on submissions that went through a series of revisions from "first generation" proposals[4] to "second generation" and finally, text-base form ("third generation").[5]

Whilst many developing countries acknowledged the utility of trade facilitation guidelines, taking on binding rules which are expensive to implement and which are likely to increase imports was a major concern especially for lower-income developing countries. There were measures related to expedited shipments that would require countries to liberalise their courier services. Many developing countries were apprehensive that they might be pressured into implementing these commitments on a permanent basis when they did not have the sus-

[4] Originated from a group of developing and developed countries: Armenia, Canada, Chile, China, Colombia Costa Rica, Dominican Republic, Ecuador, EC, Georgia, Guatemala, Honduras, Japan, Kyrgyz Republic, Mexico, Moldova, Nicaragua, Pakistan, Paraguay, Sri Lanka, Switzerland and Uruguay – and emphasised a staged, needs-oriented implementation mechanism of trade facilitation commitments, including key elements for technical assistance (TN/TF/W/137).

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[5] A textual proposal was also submitted by the Core Group of developing countries, Bangladesh, Botswana, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Namibia, Nepal, Nigeria, Philippines, Rwanda, Tanzania, Trinidad & Tobago, Uganda, Venezuela, Zambia and Zimbabwe. (TN/TF/W/142), equally presenting ideas on an implementation mechanism for S&D and TA&CB support.

tained implementation capacity and when they had more pressing national priorities to deal with.

The important issue of how this agreement (if and when agreed to) would enter into force and be incorporated into Annex 1 of the Marrakesh Agreement had not been adequately discussed by the time the final text was produced. As expected it entered in accordance with Article X.3 of Marrakesh Agreement; paragraph 47 (Doha Declaration) provides that early Agreements enter into force as parts of the single undertaking.

The draft agreement presented for decision at the 9th Ministerial Conference in Bali in December 2013 (Bali text) proposed a staged, a self-selected approach for developing countries to implementing their commitments across three categories of commitment: Category A for obligations that can be implemented immediately, Category B for obligations that require longer time frames, and Category C for obligations that need both longer time frames and technical assistance. Time periods were not specified but was hoped to be determined ex post on individual case basis. Category C compliance was conditional upon technical assistance. It also contained provisions for 'early warning' mechanism and shifting between B and C. However, the text remained bracketed in a number of areas including: expedited shipments, consularisation, use of customs brokers, and Freedom of transit amongst others.

3.2 Overview of the TFA

The Bali (MC9) result is a text containing 13 articles of rules and sub-rules that go far beyond the GATT Articles V (regarding freedom of transit), VIII (customs fees and formalities) and X (the publication and administration of trade regulations) on this issue—covering *substantive provisions and* provision of *S&DT*, presented in three sections:[6]

3.2.1 Substantive rights and obligations

[6] For the full text of the agreement, see WTO, "Agreement on Trade Facilitation," Preparatory Committee on Trade Facilitation, W/L/931, July 15, 2015, available at https://www.wto.org/english/thewto_e/20y_e/wto_tradefacilitation_e.pdf .

Section I contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It deals with substantive rights and obligations, with 12 articles. Broadly, these include the advance publication of customs rules and regulations, giving signatory countries a chance to comment on rules before their entry into force; the streamlining of customs fees and formalities with respect to imports and exports; the timely release and clearance of goods, especially expedited or perishable cargo; the freedom of transit for goods across the territory of other signatories; and cooperation between signatory countries' border management agencies, among others. It clarifies and improves the relevant articles (V, III, and X) of the General Agreement on Tariffs and Trade (GATT) 1994.

Of the 12 substantive Articles, four of them deal directly with movement of goods and customs formalities—showing the significance attached to this issue: Article 7 (Release *and clearance of goods*), Article 9 (*Movement of goods intended for import under customs control*), Article 10 (*Formalities connected with importation, exportation, and transit*), and Article 11 (*Freedom of transit*). Article 7 contains important provisions geared at expediting the movement and release of goods by establishing systems for (1) preclearing imports; (2) accepting electronic payments for customs duties, fees, and taxes; (3) separating the physical from the fiscal release of goods; (4) using risk management systems for customs processing; (5) deploying post-clearance audits; (6) publishing average release times for goods; (7) implementing trade facilitation measures for authorized economic operators; (8) expediting the release of goods delivered by air transport; and (9) releasing perishable goods in a timely way to prevent deterioration or loss of product.

Four of the 12 Articles deal directly with publication and dissemination of information related to import, export and transit procedures as well as associated fees and charges, trade laws and regulations, etc (in a timely, transparent, more accessible and non discriminatory manner)—that are central to trade facilitation efforts: Article 1 (*Publication and availability of information*), Article 2 (*Opportunity for comment, information before entry into force and consultations*), Article 3 (*Advance rulings*), Article 5 (*Other measures to enhance impartiality, nondiscrimination, and transparency*), and Article 6 (*Disciplines on fees and charges imposed on or in connection with importation and exportation and penalties*).

3.2.2 Development component

Section II sets out the basis for special and differential treatment S&DT for developing countries and for the technical assistance and capacity building needed by them for the implementation of the agreement. The S&DT provisions allow developing and least-developed countries (LDCs) to determine when they will implement individual provisions of the Agreement. The provisions allow them to identify provisions that they will only be able to implement upon the receipt of technical assistance and support for capacity building. To benefit from S& D, the Agreement requires a member to categorize each provision of the Agreement, and notify other WTO members of these categorizations in accordance with specific timelines outlined in the Agreement.

3.2.3 Institutional (and cross-cutting) issues

Section III of the Agreement contains provisions that establish a permanent committee on trade facilitation at the WTO to periodically review the Agreement's operation and implementation. The Committee held its inaugural meeting on 16 May 2017 where members elected Ambassador Daniel Blockert (Sweden) as chair. It also contains provisions requiring members to have a national committee to facilitate domestic coordination and implementation of the provisions of the Agreement.

3.3 Interaction between the TFA and the GATT

It is common within the WTO legal system, to relate specific agreement to articles in the general agreement (the GATT). The Agreement on Subsidies and Countervailing Measures, for example, relates to Article XVI and VI of the GATT. The Agreement on Anti-Dumping relates to Article VI of the GATT, and the Agreement on Safeguards relates to Article XIX of the GATT. Although Negotiations in FTA aimed to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994, the footnote (1) to Annex D of the July Package (the negotiation mandate) states,

> "It is understood that this is without prejudice to the possible format of the final result of the negotiations and would allow consideration of various forms of outcomes.

It can be argued that the mandate for the TFA was more open-ended, suggesting that the scope of the TFA was expected to extend beyond Articles V, VIII and X of the GATT 1994, which is not the case in previous WTO Agreements with similar GATT-related mandates. The question is what happens in the event of a conflict between a provision of the GATT and a provision of TFA. According to the General Interpretative Note to Annex 1A of the WTO Agreement, in the event of such conflict (between a provision of the GATT and another WTO agreement) the provision of the other agreement shall prevail to the extent of the conflict. This would mean that the provisions of the TFA shall prevail over the corresponding provisions of the GATT. This is not always obvious as proven by case law. Based on several rulings from disputes put before the Appellate Body (AB), it's known that even though the specific agreement's provisions are to prevail over the general provisions (in the GATT) in a certain conflict, this does not mean that the specific agreement supersedes the GATT.[7]

[7] See Antonia Eliason, Assistant Professor of Law at the University of Mississippi School of Law.

4 The special and differential treatment (S&DT) discipline

The TFA recognizes developing countries' growing participation in global supply chains. This growth is largely driven by these countries' increased involvement in manufacturing and intermediate goods trade, ecomerce and a rise in consumer demand by their expanding middle class. These trends underscore the need to move goods seamlessly across borders and to lower the costs and time delays arising from cumbersome export, import and transit procedures.

The Agreement differentiates between developed and developing and least developed members in implementation of the TFA. It provides for a staged, a self-selected approach for developing countries to implementing their commitments across three categories of provisions: Category A for obligations that can be implemented immediately, Category B for obligations that require longer time frames, and Category C for obligations that need both longer time frames and technical assistance. The extent and the timing of implementing the provisions of the Agreement is calibrated to the implementation capacities of developing and least developed country Members.

4.1 Flexibility in implementing TFA

The mandate makes clear that developing and least-developed Members would not be obliged to undertake investments in infrastructure projects beyond their means. Far-reaching flexibility is further granted to LDCs, which will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities. Development-related aspects are also reflected in the mandate's call for the identification of trade facilitation needs and priorities as an integral part of the negotiations.

Developed countries have committed to apply the substantive portions of the TFA from the date it takes effect (CategoryA). Developing countries and least-developed countries (LDCs), meanwhile, will only apply those substantive provisions of the TFA which they have indicated they are in a position to do so from the date of the TFA's entry into force. LDCs were given additional one year to do so. These commitments are set out in the submit-

ted Category A notifications. Table 1 reports the number of WTO members that have presented nofications to date.

Table 1. Number of WTO Members that have presented notifications to date

	Notified Category A	Notified Category B	Notified Category C
Number of members	112	62	52

Among developing countries that have notified category A provision include United Arab Emirates, Antigua and Barbuda, Barbados, Burkina Faso, Burundi, Democratic Republic of the Congo, Congo, Republic of, Côte d'Ivoire, Chile, Cameroon, Dominica, Ecuador, Egypt, Gabon, Grenada, Ghana, Hong Kong–China, Indonesia, Israel, Jordan, Kenya, Kyrgyz Republic, Korea, Republic of, Kuwait, Kazakhstan, Saint Lucia, Namibia, Oman, Panama, Papua New Guinea, Qater, Rwanda, Kingdom of Saudi Arabia, Singapore, Senegal, Suriname, El Salvador, Tajikistan, Tunisia, Turkey, Chinese Taipei, Tanzania, Uganda, Saint Vincent and the Grenadines, Viet Nam, Samoa, and Zimbabwe.

Category B notifications from developing countries and LDCs list the provisions the WTO member will implement after a transitional period following the entry into force of the TFA. Category C notifications contain provisions that a developing country or LDC designates for implementation on a date after a transition period and requiring the acquisition of implementation capacity through the provision and assistance of capacity building.
Thirty eight developing countries that have so far notified Category A, B and C: Gambia , Guatemala, Guyana, Honduras, Jamaica, Cambodia, Saint Kitts and Nevis, Lao People's Democratic Republic, Sri Lanka, Morroco, Republic of Moldova, Montenegro, Madagascar, Mali, Myanmar, Mongolia, Mauritius, Malawi, Mozambique, Niger, Nigeria, Nicaragua, Nepal, Peru, Philippines, Pakistan, Paraguay, Solomon Islands, Seychelles, Sierra Leone, Swziland, Chad, Togo, Tonga, Trinidad and Tobago, Ukraine, Vanuatu, and Zambia.

This 'menu-driven' approach means that individual countries have their own tailor-made form of special and differential treatment, which some how is uncharted territory for the World Trade Organisation. Where technical and financial assistance and capacity building

has not been provided or lacks the requisite effectiveness, developing countries and LDCs are not bound to implement the provisions notified under Category C. While this approach appears, in the face value, to offer flexibility for developing countries especially least developed countries, in the long-run, these countries are going to end up with some serious level and magnitude of commitment and this is unprecedented in the history of the WTO rule-making.

4.2 Utility and development relevance of S&DT provisions

S&DT was expected to go beyond transitional periods. Paragraph 2 of Annex D of the decision states that members recognise the principle of S&DT treatment should extend beyond the granting of traditional transition periods for implementing commitments. It goes on the say that, "in particular, the extent and timing of entering into commitments shall be related to the implementation capacities of developing and least developed members." What developing countries expected was an innovative S&DT provisions.

This is not the only area that WTO agreements seem to have provided an incorrect diagnosis (and ending with an inappropriate remedy) for the problems developing countries face. In the customs agreement, the discipline covers only valuation, but project experience in developing countries has proved that "valuation is perhaps the last centimeter in a whole meter of customs processes that requires reform" (to borrow from Finger, 2001). Developing country projects here deal with more basic issues of physical security, objectivity and accountability – determination against an explicit standard rather than through informal negotiation with customs officials. Fitting the WTO-required valuation accounting into present customs systems would likely increase rather than reduce the opportunities for a negotiated, as opposed to an objective outcome (Finger 2001).

4.3 Implementation capacity and provision of support

Developing countries wanted the implementation of Category C provisions to be conditional on the acquisition of sustained implementation capacity by developing countries and LDCs and the provision of adequate technical and financial assistance and capacity building measures by developed countries. Yet, provision of support and capacity building remains unbinding. No real self-assessment of implementation capacity. Developing countries can end up in a situation where they have to implement but did not receive adequate support and technical assistance. Also, the provision of support and capacity building is not binding. No commitments to financial assistance like in Multilateral Environmental Agreements (e.g. UN Desertification Convention), which despite pledges for 'complementary assistance' by 27 governments and organizations during the 4th Global Aid for Trade meeting in July 2013 (e.g. USD 381 million in 2011) the outcome is disappointing.

In 'Category C', developing countries are to take on permanent binding commitments upon receipt of time-limited assistance. The question of whether their implementation capacity can be sustained over the long-term has not been addressed. The position of developing countries on self-assessment has been considerably eroded. Developing countries and LDCs should have been allowed to self-assess their implementation capacity. As it stands, the implementation capacity is to be reviewed by a third party – an Expert Group who gives its recommendation to the TF Committee. Developing countries and LDCs can end up in a situation where they have to implement but did not receive adequate support and technical assistance. LDC-flexibility in this area was not addressed.

4.4 Decisions in favour of least developed countries

In Marrakesh Ministerial meeting (which led to establishment of the WTO), Ministers decided that least-developed countries would only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities. This is contained in their Decision on Measures in Favour of Least-Developed Countries. In 1 August 2004 Decision of the General Council (July Package), Members reaffirmed their commitments made at Doha concerning

LDCs, including due account to be taken of LDC concerns in the negotiations, assurance that the July Decision not to negatively affect LDCs in any way.

In sum, developing countries were by and large not demandeurs of the Trade Facilitation rules. Most of the Section I rules have come from developed countries and are in fact, to a large degree, the current practices of many developed countries. Developing Countries and LDCs were concerned from the beginning about lack of operational clarity and that obligations e.g. technical assistance to help them implement the commitment remains legally non-binding. Developed countries, on the other hand, maintained from the start that S&DT could-not be the reason for not taking commitments.

5 Conclusions and implications for policy

The WTO TFA adds to a number of existing United Nations-administered agreements and conventions that are in place to support international transit traffic and transport. These agreements, which for the major part are open to all United Nations member countries, has contributed to simplifying, standardizing and harmonizing transit procedures between the countries that had accepted the agreements.

Whether TFA framework will be different and deliver development gains hoped for will depend on individual countries' efforts to use lessons from past endeavours and set clear and objective targets in its transit policy, TF programmes, with core trade facilitation reforms which can be operationalized and implemented, in collaboration with private sector stakeholders. For cost effectiveness it is imperative to have a consolidated regional approach, which has often been lacking.

Provision of technical expertise, capacity-building support and financial resources to furthering progress in collaborative solutions between landlocked and transit developing countries in the framework of the TFA will remain a key intervention area for these countries in years to come. These collaborative arrangements based on international best practices with core trade facilitation reforms especially in the area of transport and customs would assist dialogue on facilitation issues and initiatives between countries, and between private and public stakeholders – and in addressing systemic issues, including the design and implementation vehicles of transit regimes, based on international best practices. This is one area that international development agencies, in collaboration with relevant regional organizations, need continue and intensify their contributions, to ensure development return from the TFA framework in both transit and landlocked countries.

Developing transit corridor performance measurement systems that are cost effective and sustainable, will help facilitate benchmarking of performance between corridors. Maintaining a repository of best practices regarding transit facilitation and related policy areas is an essential component in this effort including improving the knowledge about TFA in landlocked developing countries and transit countries through training and capacity-building.

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Annex 1

Table 1A. WTO Members that have ratified the TFA

	Country/ WTO Member (date of ractification)		
1	Afghanistan (29 July 2016)	35	Ghana (4 January 2017)
2	Albania (10 May 2016)	36	Grenada (8 December 2015)
3	Antigua and Barbuda (27 November 2017)	37	Guatemala (8 March 2017)
4	Argentina (22 January 2018)	38	Guyana (30 November 2015)
5	Armenia (20 March 2017)	39	Honduras (14 July 2016)
6	Australia (8 June 2015)	40	Hong Kong, China (8 December 2014)
7	Bahrain, Kingdom of (23 September 2016)	41	Iceland (31 October 2016)
8	Bangladesh (27 September 2016)	42	India (22 April 2016)
9	Barbados (31 January 2018)	43	Indonesia (5 December 2017)
10	Belize (2 September 2015)	44	Israel (8 December 2017)
11	Benin (28 March 2018)	45	Jamaica (19 January 2016
12	Bolivia, Plurinational State of (30 January 2018)	46	Japan (1 June 2015)
13	Botswana (18 June 2015)	47	Jordan (22 February 2017)
14	Brazil (29 March 2016)	48	Kazakhstan (26 May 2016
15	Brunei Darussalam (15 December 2015)	49	Kenya (10 December 2015)
16	Cambodia (12 February 2016)	50	Korea, Republic of (30 July 2015)
17	Canada (16 December 2016)	51	Kuwait, the State of (25 April 2018)
18	Central African Republic (11 January 2018)	52	Kyrgyz Republic (6 Dec 2016)
19	Chad (22 February 2017)	53	Lao People's Dem. Rep (29 Sept 2015)
20	Chile (21 November 2016)	54	Lesotho (4 January 2016)
21	China (4 September 2015)	55	Liechtenstein (18 September 2015
22	Congo (5 October 2017)	56	Macao, China (11 April 2016)
23	Costa Rica (1 May 2017)	57	Madagascar (20 June 2016)
24	Côte d'Ivoire (8 December 2015)	58	Malawi (12 July 2017)
25	Cuba (12 March 2018)	59	Malaysia (26 May 2015)
26	Djibouti (5 March 2018)	60	Mali (20 January 2016)
27	Dominica (28 November 2016)	61	Mauritius (5 March 2015)
28	Dominican Republic (28 February 2017)	62	Mexico (26 July 2016)
29	El Salvador (4 July 2016)	63	Moldova, Republic of (24 June 2016)
30	European Union (formerly EC) (5 October 2015)	64	Mongolia (28 November 2016)
31	Fiji (1 May 2017)	65	Montenegro (10 May 2016)
32	Gabon (5 December 2016)	66	Mozambique (6 January 2017)
33	Gambia (11 July 2017)	67	Myanmar (16 December 2015)

34	Georgia (4 January 2016)	68	Namibia (9 February 2018

Contd.

	Country/ WTO Member (date of ractification)		Country/ WTO Member
69	Nepal (24 January 2017)	101	Togo (1 October 2015)
70	New Zealand (29 September 2015)	102	Trinidad and Tobago (29 July 2015)
71	Nicaragua (4 August 2015)	103	Turkey (16 March 2016)
72	Niger (6 August 2015)	104	Ukraine (16 December 2015)
73	Nigeria (16 January 2017)	105	United Arab Emirates (18 April 2016)
74	Norway (16 December 2015)	106	United States (23 January 2015)
75	Oman (22 February 2017)	107	Uruguay (30 August 2016
76	Pakistan (27 October 2015)	108	Viet Nam (15 December 2015)
77	Panama (17 November 2015)	109	Zambia (16 December 2015
78	Papua New Guinea (7 March 2018)		
79	Paraguay (1 March 2016)		
80	Peru (27 July 2016)		
81	Philippines (27 October 2016)		
82	Qatar (12 June 2017)		
83	Russian Federation (22 April 2016)		
84	Rwanda (22 February 2017)		
85	Saint Kitts and Nevis (17 June 2016)		
86	Saint Lucia (8 December 2015)		
87	Saint Vincent & the Grenadines (9 January 2017)		
88	Samoa (21 April 2016)		
89	Saudi Arabia, Kingdom of (28 July 2016)		
90	Senegal (24 August 2016)		
91	Seychelles (11 January 2016)		
92	Sierra Leone (5 May 2017)		
93	Singapore (8 January 2015)		
94	South Africa (30 November 2017)		
95	Sri Lanka (31 May 2016)		
96	Swaziland (21 November 2016)		
97	Switzerland (2 September 2015		
98	Chinese Taipei (17 August 2015)		
99	Thailand (5 October 2015)		
100	The former Yugoslav Republic of Macedonia (5 October 2015)		