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Recapturing the Momentum in the Post-Bali Process of the WTO

The Bali Trade Facilitation Agreement and Rulemaking in the WTO
Milestone, Mistake or Mirage?

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The Trade Facilitation Agreement: Reflections on process and outcome

At the Bali Ministerial meeting in December 2013 WTO members successfully concluded the first multilateral agreement since the launch of the Doha Round in 2001. The Agreement on Trade Facilitation (TFA) continues the trend that was initiated in the Uruguay Round for negotiated disciplines to center on so-called "positive integration" – agreement to pursue specific practices and approaches to a policy area as opposed to agreement to refrain from using certain policies (e.g., quotas, export subsidies) or commitments not to exceed a negotiated level of protection for a product (e.g., tariff bindings).

The TFA is noteworthy in a number of ways beyond being the first agreement on new rules to have been negotiated under WTO auspices in almost 20 years.

- It is part of a small package of decisions centering on matters of interest to developing country WTO members that was "harvested" from the broader set of issues on the table in the Doha Development Agenda (DDA) negotiations.
- It has universal WTO membership and its disciplines apply in principle to all WTO Members, but it embodies an extensive à la carte approach to determining the timing of implementation by developing countries of its various disciplines.
- It goes beyond setting trade policy disciplines, calling for joint action by donor countries, development assistance providers and developing country WTO members to assist the latter to implement some provisions of the agreement.
- It incorporates a mechanism for experts to assess whether and why a developing country is not able to implement commitments according to the timeframe it scheduled before recourse can be made to the dispute settlement to enforce implementation.
- Despite having been agreed by consensus at the 9th WTO Ministerial conference, it continues the pattern established during the Doha Round of not meeting deadlines set by Ministers. The Bali Ministerial declaration called for a Protocol of Amendment incorporating the TFA into the WTO to be adopted before July 31, 2014. India blocked such adoption at the WTO General Council meeting held at the end of July 2014—not because it was opposed to the TFA but because it insisted on the WTO Members meeting its demands in another area (agriculture).

The TFA reflects a major effort by WTO Members to craft an agreement that extends WTO rules in a way that addresses the concerns of developing nations regarding implementation costs and capacity constraints. It may be the shape of things to come for multilateral cooperation on trade policy matters. It may also constitute the end of efforts to conclude universal agreements under WTO auspices on regulatory policies. Very different views can be (and have been) expressed regarding the TFA by trade policy analysts and commentators, regarding both the substance of its provisions and the implications of the Indian refusal to agree to adoption of the TFA Protocol in July 2014.

The narrative coming from the WTO Secretariat (e.g., Neufeld, 2014), international organizations and most governments is that the TFA is a major milestone for the WTO because it addresses an area of policy that is of great importance from an economic development perspective and national welfare. It is also a milestone in demonstrating that WTO Members are able to agree on new rules and disciplines that apply to <u>all</u> countries and that the organization is capable of fulfilling its legislative function in addition to its transparency and dispute settlement

functions. It demonstrates an ability to be innovative in recognizing differences in implementation capacity across nations by calling on developing countries to determine when they will apply specific provisions of the agreement and by linking implementation of some disciplines to the delivery of assistance from developed nations.

But some analysts who are otherwise strong supporters of action on trade facilitation and believe this is a key priority from an economic development perspective worry that the TFA may be a mistake for the WTO. They point to the fact that it moves the WTO away from binding, enforceable commitments (as many of its provisions have elements of "best endeavors" language); does not do enough to limit special and differential treatment (SDT) to the countries that need it; and further moves the WTO Secretariat into the realm of development assistance, something in which it has little capacity and no comparative advantage (Finger, 2002; Winters, 2007). Specific criticism has been expressed regarding the linkage that is established in the TFA between assistance from developed countries and the timing of implementation of commitments by developing countries, particularly the implication (and possible precedent) that governments need to be "paid" to undertake reforms that will benefit their traders and consumers (Finger, 2014).

Reservations have also been expressed that putting trade facilitation on the table in the WTO may have created perverse incentives to refrain from or delay taking action to reduce national trade costs in a misguided effort to use trade facilitation as a negotiating chip to obtain concessions in other areas of the DDA, with potentially significant opportunity costs (e.g., Finger, 2008; Hoekman, 2011). Indeed, as discussed below, doubts can be expressed regarding the appropriateness of addressing trade facilitation in the WTO given that most of its provisions do not internalize an international policy spillover—dealing with a prisoner's dilemma situation where cooperation generates payoffs that exceed what a country can obtain through unilateral action. As a result, many of the provisions of the TFA are not self-enforcing, raising the question why this issue area should be dealt with in the WTO.

Others question the very premise that the subject matter addressed by the TFA is important from a development perspective and argue it is a mirage, doing little if anything to improve economic outcomes. There are different flavors of this argument. One points to the fact that major emerging economies may determine for themselves when to implement the TFA. Insofar as implementation is left to take place far into the future, the global gains will be much less than what has been projected in the policy research literature. Another points to "internal imbalances" in the provisions of the agreement, especially neglect of export competitiveness constraints, will result in an asymmetric distribution of benefits in favor of high-income countries and/or large multinationals and will worsen the balance of trade in developing countries (e.g., South Centre, 2011, 2013). A related line of argument is that the case for trade facilitation is grossly overblown by proponents, that the net benefits for developing countries are very uncertain and that the TFA may divert attention away from higher rate of return policy interventions in developing countries (e.g., Capaldo, 2013). Even if attention is limited to the area of trade facilitation, the specific matters addressed in the TFA may do little to reduce trade costs in a country or region because other factors – internal transport costs, corruption, etc. – account for the lion's share of total trade costs.

A basic motivation for large multilateral trade rounds that span many countries and subjects is that this helps to agree on a set of disciplines that internalize policy spillovers by permitting issue linkages (Sebenius, 1983). A large negotiating set expands the potential for issue linkage, allowing losses in one area to be more than offset by gains in another area. In the case of the

DDA a package deal has not been feasible to construct so far, leading to calls for smaller "self-balancing" packages that are Pareto-improving in the sense that they benefit many if not all countries without making any nation worse off. However, proposals to move away from the Single Undertaking – "nothing is agreed until everything is agreed" – have been opposed by many WTO Members because of worries that this would lead to a situation where issues of most importance to them would be left off the table.[1]

The TFA was negotiated in Bali as part of a small "development package" of ten decisions that mostly addressed matters of concern to developing countries (WTO, 2013). These included an understanding on tariff-rate quota administration (for agricultural products), a call for WTO members to put in place preferential rules of origin for least-developed countries (LDCs); a decision on operationalization of the LDC services waiver (calling for preferential treatment of LDC services exports); more extensive monitoring of duty-free and quota-free market access initiatives for LDCs; and the establishment of a WTO Monitoring Mechanism to review the implementation of the many provisions in the WTO calling for SDT of developing countries. One prominent Bali decision concerned public stockholding programs for food security purposes, in which it was agreed to revisit the provisions of the WTO Agreement on Agriculture pertaining to domestic production support. This decision reflected concerns by India that its food stock-holding program threatened to exceed the maximum permitted production subsidy under current WTO rules (10 percent of the value of domestic production), thus opening up the country to potential dispute settlement action.[2] WTO Members agreed in Bali to a four-year "peace clause" for developing country public food stock-holding programs for food security purposes as long as certain transparency-related reporting requirements were met, and committed themselves to negotiating a permanent solution to this matter before the 2017 WTO Ministerial conference. In July 2014 India blocked adoption of the protocol that would have incorporated the TFA into the WTO because of purported concerns that WTO members had not made enough progress in discussing the agricultural support question in the 6-month period following the Bali conference. At the time of writing it is unclear what will happen to the TFA.

An important development that occurred in July 2014 was the decision by the government of India to refuse to approve the adoption of a Protocol needed to incorporate a new Agreement on Trade Facilitation (TFA) into the WTO, which it had agreed to 6 months before at the Bali Ministerial meeting of the WTO. India took this action in an effort to increase pressure on WTO Members to address its concerns regarding the prevailing WTO rules on agricultural production support. The TFA was a carefully constructed, innovative compact that was conceived to be a stand-alone agreement in the sense that its provisions were designed to be Pareto-improving for all WTO Members (Hoekman, 2014a). The fact that standard issue linkage tactics nonetheless led to non-adoption of the Protocol for an agreement that all WTO Ministers had signed off on was a significant setback for proponents of multilateral rules on trade facilitation.

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[1] Para. 47 of the DDA makes allowance for "early harvests" such as the TFA without prejudicing the ability of a WTO Member to assess the overall balance of whatever eventually might emerge from the DDA as a whole. This leaves open however, the question whether such harvests are applied provisionally or become permanent features of the WTO in case the DDA never comes to a successful conclusion.

[2] The Indian government buys food staples from domestic farmers at administered prices. The resulting public stockholdings are used to supply consumers with food staples at highly subsidized prices.

Possible implications for cooperation looking forward

What does the TFA suggest for future rule-making in the WTO? Four aspects of the TFA experience appear particularly relevant to this question: (i) the feasibility/desirability of universal membership agreements as opposed to plurilateral cooperation; (ii) the balance between hard law and self-enforcing agreements versus "softer" forms of cooperation; (iii) linkages between the implementation of new rules and aid for trade; and (iv) the challenge of achieving "policy coherence" within governments, within the WTO and across the development community. These issues are all interrelated.

More universal membership, self-balancing agreements?

The TFA is noteworthy from a systemic perspective because it demonstrates that the WTO membership is capable of negotiating new rules of the game that apply to all countries *and* devising mechanisms to assist those members that need it to implement what all have agreed are good practices. This is an important precedent. There has been much discussion in the literature about the need for the institution to do a better job in recognizing the diversity across its membership *and* the need to do more to agree to rules of the game for policies that can generate negative international spillovers. Numerous voices have suggested that greater consideration be given to the pursuit of plurilateral cooperation under the umbrella of the WTO (e.g., Hoekman and Mavroidis, 2013). During the period when the DDA deadlock prevented movement on trade facilitation suggestions were made that a plurilateral agreement could be an alternative (e.g., Finger, 2008).

A plurilateral agreement might have allowed a "tighter" agreement to be concluded, with less in the way of best endeavors language. However, it may well be that much of what is best endeavors in the TFA would have stayed that way in a plurilateral as OECD nations do not see eye-to-eye on a number of provisions that ended being best endeavors – e.g., customs cooperation. It will be interesting in this regard to see what will be achieved in those areas in the TPP and TTIP. There is much to be said for having multilateral agreement on a set of good practices, even if many Members may take a significant length of time to implement them and many of these practices have a significant best endeavors dimension.

The real question is the extent to which WTO Members are willing to pursue Pareto-improving deals on a stand-alone basis. This is a question that affects both plurilaterals and efforts to conclude universally applicable agreements and is very much a function of both the feasibility of constructing a Pareto-enhancing deal and the willingness of countries to abstain from efforts to link agreement to areas that lie outside the ambit of whatever is the focus of a deal. The TFA illustrates that issue linkage incentives can be expected to be strong in the context of the WTO and may be a binding constraint on the pursuit and successful conclusion of stand-alone agreements. This constraint applies also to the plurilateral track. For example, a potential response to a continuing situation where the Indian government's concerns regarding its ability to pursue its food stockpiling and distribution programs precludes adoption of the TFA would be for the majority of WTO Members to pursue the TFA on a plurilateral basis. However, making the TFA a formal Annex 4 plurilateral WTO agreement will require consensus, and it seems clear that no such consensus will obtain. As discussed at greater length in Hoekman and Mavroidis (2013) and Hoekman (2014), for plurilateral options to become more feasible in the WTO the consensus constraint needs to be addressed. If this cannot be done the result is likely to

be ever more preferential trade agreements and a greater focus to pursue issue-specific cooperation on areas such as trade facilitation *outside* the WTO framework.[3]

Best endeavors commitments and the self-enforcing nature of WTO commitments

The TFA contains a mix of binding and best endeavors language. A simple count of best endeavors provisions (measured by the use of the word "should") in related WTO agreements (on customs valuation and import licensing) makes clear that the TFA has about twice as many such provisions than these comparators. An implication is that there is less emphasis on "hard law" and more of a focus on cooperation aimed at achieving a set of good practices that all governments support. Examples are not just the emphasis on aid for trade facilitation (Category C provisions) but also the provisions for early warning/notification of problems; the use of an Expert Group to assess the situation in a Member once notified implementation periods have expired, and use of the TFA Committee as a forum for the exchange of experiences and deliberation. Clearly the DSU is (will be) applicable to all binding provisions over time, and some of the best endeavors provisions with conditional language such as "to the extent practicable" or "to the extent possible" may be enforceable in that a country could ask a panel to assess whether implementation by the country concerned has become practicable and possible. But it is clear that the TFA is an agreement with less of an emphasis on the standard mechanism to ensure compliance – it is much less of a self-enforcing agreement than is the case with other WTO agreements. One reason for this is that the standard remedy in cases of noncompliance – withdrawal of concessions – is not really available: why would a country throw rocks in its harbor in retaliation for noncompliance by another nation? Thus, implicitly, and to some extent explicitly, different channels are foreseen to sustain cooperation.

Assessing whether the rather large number of best-endeavors commitments and the linkages to aid for trade constitute an effective and efficient approach to improving policies and practices as opposed to a more straightforward set of binding disciplines is impossible ex ante. In some areas of regulation that generate trade costs and negative spillovers it may be impossible for governments to agree on hard (binding) cooperation. What is needed is agreement on principles and processes to foster greater communication and exchange of information, to identify redundant and duplicative procedures, and to work together in implementing new norms. The many best endeavor provisions in the TFA can be criticized as being non-enforceable, but in practice they may work more effectively than binding norms would do to lower trade costs for

[3] In the case of the TFA it is difficult to adopt the agreement on a critical mass basis as there is no mechanism for Members that wish to do so to schedule their trade facilitation commitments. The only channel to do so is GATT XXVIII on Modification of Schedules. GATT schedules are primarily designed to list tariff and related product-specific commitments, not general non-tariff concessions of the type that are the focus of the TFA. In principle GATT XXVIII could be used to list such commitments but will require prior agreement on the modalities for doing so. The Accession Protocols that have been used for countries that joined the WTO after 1995 might offer a model for the modalities to make "additional commitments". Matters are more straightforward under the GATS where Members may make "additional commitments" that are applied on a MFN basis (Art.XVIII GATS). If the efforts to adopt the TFA were to fail, another option would be to move it outside the WTO. One consequence would be losing access to the DSU. As the grace periods for disputes under the TFA are long this would not be an immediate constraint. In the longer term, other mechanisms exist that could be used by countries if they want to employ them as part of a non-WTO TFA – e.g., by bolstering the dispute resolution system of the WCO or by using the arbitration services of the International Centre for the Settlement of Investment Disputes (ICSID) under its "additional facility rules." These provide for dispute settlement services in non-investment related matters. An advantage of such an approach is that it would offer the opportunity for the TFA to be amended to permit companies to raise non-implementation concerns.

traders over time insofar as the TFA provides a focal point for domestic stakeholders to hold governments accountable for better trade facilitation outcomes.

The extent to which the TFA will help countries around the world improve the operation and governance of national border management systems and reduce uncertainty and trade costs for traders will depend on what countries decide to do – how long transitional implementation periods will last and the extent to which assistance is successful in helping developing countries to implement the agreement. Arguably most important is the extent to which the norms contained in the TFA are seen to benefit traders and consumers. The effectiveness of the transparency and surveillance mechanisms associated with the TFA – both domestic and in the WTO – are likely to be particularly important in helping to converge towards the norms that are incorporated in the TFA.

Linkages between policy commitments and aid for trade

Finger (2014) argues the TFA is a repeat of what negotiators have done in the past under the GATT/WTO: to create the appearance of legal obligations for developing countries but at the same time to avoid substantive disciplines. This is because the TFA's provisions are not made legally binding by developing countries accepting technical assistance and capacity building support. If developing countries obtain assistance but end up not complying with TFA provisions, there is no mechanism in the agreement to force governments to return the equivalent of the resources that were provided for implementation assistance. Conversely, if a country makes commitments conditional on receiving assistance, there is no mechanism to force developed countries to provide the required resources. While in such cases there is no threat of dispute settlement and enforcement, non-implementation implies no benefit from participating in the TFA.

These are important considerations and some of the provisions of the TFA suggest they were recognized by negotiators—e.g., having an Expert Group determine what would need to be done to permit implementation in instances where a developing country ends up notifying it cannot meet the timetable it has scheduled. As noted previously, a key feature of the TFA is that it establishes norms that all WTO Members agree make sense. Whether the approach that was adopted will work is an empirical question. The proof of the pudding will be in the eating—once the TFA is incorporated into the WTO we will learn whether such concerns are valid. Insofar as they are validated, it would prove the critics of embedding aid linkages in WTO agreements correct in that there are potentially serious opportunity costs associated with the approach that was taken. In practice there are no constraints on the availability of technical and financial support from the development agencies. Tapping those resources may involve borrowing, but as noted above the return on investment will be high. Not investing because of perceptions or the reality of donors not providing grants makes no sense from an economic development perspective. But the extent to which governments will actively sustain implementation of the norms that are embodied in the TFA will depend more on how effective the TFA-related institutional features – especially the domestic ones – will be in dealing with situations where vested interests resist trade facilitation.

Coherence

The extent to which aid for trade linkages will have a positive impact on trade facilitation outcomes in low-income economies will depend importantly on the degree to which the TFA will help domestic firms and traders pressure government agencies to implement its norms and

principles. But it will also depend in part on the effectiveness of the assistance that provided, which in turn depends on the willingness and ability of the government to manage the donors. Here one worry is that the TFA will lead to a proliferation of development assistance facilities and greater coordination challenges for governments. The new TFA facility that will be established in the WTO implies one more development assistance fund under the WTO umbrella, adding to the already existing Enhanced Integrated Framework facility (for LDCs) and the Standards and Trade Development facility (STDF). The WTO facilities are part of an increasingly crowded scene. There are already many funds and facilities that have been put in place by the international organizations and bilateral development programs.[4]

Low income developing countries face a major problem in managing the plethora of donors and assistance providers given weak institutional capacity. In their Joint Statement (2014), the International Trade Centre (ITC), the OECD, the United Nations Economic Commission for Europe (representing the UN Regional Commissions), UNCTAD, the World Bank Group and the WCO committed themselves to coordinate their support to developing and transition economies in implementing the TFA, in close collaboration with the WTO and the donor community. How this coordination is to be achieved it not spelled out. It will not happen without putting in place institutional mechanisms that create incentives for the various providers to do so. Currently such incentives are quite weak. Note that the joint statement only involves a subset of the international agencies providing support – e.g., the regional development banks were not included. How the various national providers of funding and assistance will co-ordinate within their own governments the allocation of assistance so as to support their national trade policy objectives and their international trade commitments is another challenge. In practice, at the end of the day coherence will require developing country governments to determine their priorities and manage the complicated menu of options they are presented with.

The TFA deals with a rather narrow set of policies centered on border clearance processes and transit regimes. As discussed previously, the trade facilitation agenda goes far beyond the subjects dealt with by the TFA, which is constrained by the Doha ministerial mandate to issues captured by GATT Articles V, VIII and X. Other relevant GATT disciplines – for example, on customs valuation, pre-shipment inspection, import licensing, product standards – also have a direct bearing on the costs associated with getting goods into foreign markets. The same is true of the GATS – which offers the opportunity to make specific commitments on important logistics-related services such as transport, distribution, warehousing, etc. that research has shown often accounts for a major share of total trade costs confronting firms (e.g., Francois and Hoekman, 2010; Freund and Rocha, 2011). The TFA does not require governments to do anything to improve services-related policies that impact on trade costs. Indeed, a number of the policy areas that matter for trade facilitation are not on the WTO table at all – such as competition policy or restrictions on foreign investment in logistics, transport and distribution services. One message that consistently comes from the research literature on trade costs, competitiveness and trade facilitation is that a broad view of the trade facilitation agenda at the national, regional and multilateral levels is needed.

[4] Global programs include the EIF (WTO); the Trade Facilitation Facility (World Bank); the Trade Facilitation Support Program (World Bank) and the UNCTAD-ITC Partnership on Trade Facilitation. In addition there are many regionally-focused programs, e.g., the Trade Facilitation Programme (EBRD); the Africa Trade Fund (AfDB); TradeMark East Africa (DFID), the Support to West African Regional Integration Programme (DFID); the West Africa Customs Administration Modernization project (WCO), the South Asia Subregional Economic Cooperation Trade Facilitation Program (Asian Development Bank); and numerous bilateral trade support programs funded by donor agencies and the EU.

From this perspective a key question is whether the TFA will reduce the attention that is given by governments to the trade cost agenda broadly defined. The creation of national trade facilitation committees and the process of implementing the TFA may do so. In practice it will be inevitable that matters not covered by the TFA will arise in national deliberations and inform the design of trade facilitation projects. The extent to which such positive spillover effects will arise depends on the willingness of government agencies to look at the trade facilitation agenda more broadly. Here again this is primarily a domestic challenge. It does not help that there are so many different WTO agreements that have a bearing on trade facilitation, with Committees serviced by different parts of the WTO Secretariat.

From the perspective of international business and consumers around the world, attention is needed within governments and in the WTO – and more generally in trade agreements – to address the potential "silo problem" that can lead to a focus on the trees instead of the forest. Fostering regular communication and interaction between the various committees dealing with different dimensions of trade facilitation can help governments to identify gaps and possible overlaps that are important from a trade cost reduction perspective. This could be addressed through periodic joint sessions of the various committees; by the TFA Committee considering matters with a direct bearing on trade facilitation that are covered in other agreements; and/or through complementary mechanisms that bring in the business community and take a 'whole of the supply chain' view of assessing progress made in facilitating trade, without regard to whether policies are covered by WTO agreements (Hoekman, 2014). A complementary mechanism to enhance coherence could be to expand the mandate of the Trade Policy Review Body to incorporate not just a focus on what countries are doing to implement the TFA but to include a whole of the supply chain assessment of prevailing policies in WTO Members, thereby helping governments to identify areas where there is the greatest potential to lower trade costs.

Conclusion

The TFA: milestone, mistake or mirage? Clearly only time will tell. The TFA is innovative for the WTO by encompassing a set of rules that apply to all WTO members while allowing for extensive differentiation in terms of timing of implementation and explicitly addressing developing country concerns regarding their ability to implement specific provisions. If more such agreements can be crafted the TFA would be a milestone by demonstrating that new rule-making need not be confined to preferential trade agreements. Numerous analysts have called for greater effort by policymakers to conclude plurilateral agreements under the WTO as a way of addressing the difficulty of crafting new policy disciplines that make sense for all 160 WTO Members. One reason for this is that It often will not be desirable to negotiate one-size-fit-all rules of the game on regulatory matters given the heterogeneity of the WTO's membership.[5] But even where it is desirable, the first 20 years of the WTO have made many increasingly pessimistic about the prospects of negotiating agreements on rules among the membership as a whole. The Bali deal on the TFA proves the pessimists wrong.

While the TFA is a landmark for the WTO, it may not be a milestone in the sense of defining the shape of things to come. The difficulty in getting to yes on a subject that so unambiguously will improve welfare for all countries suggests the scope for WTO Members to agree on rules of the game for other policy areas may be quite limited, even if there is willingness to replicate the TFA-precedent of self-defined implementation periods. Other policy areas are likely to entail

[5] See Hoekman and Mavroidis (2013) for discussion and references to the literature.

much greater variance in the distribution and incidence of costs and benefits of proposed rules and greater differences in the preferences of governments regarding the substance of new norms. If so, even if there is continued willingness by developed countries to provide implementation assistance, there will be more limited prospects of getting to yes on a stand-alone basis.

For proponents of active pursuit of trade facilitation initiatives and projects the trade facilitation negotiations were rather depressing. Why negotiate about actions that unambiguously promote economic welfare? Why insist on strong commitments by developed countries to provide assistance for implementing trade facilitation measures that are often low cost and have very high rates of return for the countries concerned? Why pay governments to remove rocks that they have themselves dumped in their harbor? Development practitioners have a hard time justifying the convoluted deal that is the TFA, especially the aid for trade linkages. From a more conceptual perspective one can question whether an agreement that is not self-enforcing should be part of the WTO. Many would argue that this is an area where policymakers should figure out what make sense and then just do it, with assistance from the development community if needed, which is there to do just that and does not need any help from the WTO. As the social rates of return to trade facilitation are high, any resources needed for implementation are well spent. Those who take this view would argue that Section II of the TFA is a mistake.

These are all valid concerns, but it must also be recognized that the TFA does more than simply define a set of good practices that benefit the countries that adopt them no matter what their trading partners do. It also identifies areas where joint action will reduce trade costs – e.g., through cooperation between Customs in areas like information exchange and collaboration between border agencies. It creates a focal point for governments in an area that matters importantly from a trade cost reduction perspective, and offers an opportunity for businesses and traders to get governments to engage on trade facilitation more broadly, thus providing a mechanism to help address the reasons why governments have not been able to address trade facilitation domestically. How effective the institutional mechanisms associated with the TFA are in ensuring that trade facilitation gets more attention by governments and supporting the intra-government communication and coordination needed for identifying actions to reduce trade costs for firms will be an important factor.

Another important factor will be whether the TFA will help or hinder efforts by governments to coordinate the many suppliers of technical and financial assistance in this area. Both cross-country research and experience clearly reveals that trade facilitation as defined by the TFA is just part of the agenda. The large potential trade and welfare gains that are identified in the research literature require a focus on trade facilitation more broadly defined. This is the bread and butter of multilateral development banks, which have the capacity and mandate to take a more holistic approach that considers logistics, distribution and transport services and infrastructure in addition to the Customs and border management-related matters that are covered by the TFA. Realizing big gains from trade facilitation requires going beyond what is covered by the TFA. But also important is that within the narrower ambit of the TFA providers of assistance do not duplicate their activities and do more than talk the talk of coherence and adherence to the principle of comparative advantage. The potential for intra- and inter-agency turf tussles and empire building should never be underestimated – or the problems of the left hand not knowing what the right hand is doing. The proliferation of trade facilitation assistance facilities that have

been announced by agencies and donors illustrates how difficult it is – and will be – to ensure greater coherence.[6]

The TFA demonstrates both the potential for, and the challenge of, constructing Pareto-sanctioned agreements that address substantive policy matters and apply on a stand-alone basis. One reason it took 10+ years to negotiate the TFA is because a lot of learning was required regarding why trade facilitation matters for income growth and economic development, what constitutes good practices, and what kinds of disciplines would benefit all WTO Members. This learning took time, and occurred with the support and active engagement of an epistemic community comprising the international Customs community, trade facilitation practitioners in international development agencies and research analysts. But this was not sufficient. The issue linkage that was required to get agreement in Bali puts into question the feasibility of (incentive to negotiate) stand-alone agreements in the WTO.

The TFA experience is particularly pertinent in this regard because the subject it addresses does not lend itself well to issue linkage dynamics. Trade facilitation predominantly benefits firms and consumers in the country that takes measures to lower trade costs. In contrast to tariffs or subsidies that benefit domestic industries and that can shift the terms of trade in a nation's favor, a neglect of trade facilitation simply raises costs for all industries, domestic as well as foreign. The absence of terms of trade effects should imply that the "linkage value" associated with withholding agreement on trade facilitation is limited—nobody should be willing to "pay" much (i.e., make concessions in other areas like agriculture) to get a deal done. Nonetheless, many developing countries tried to pursue issue linkage tactics in the trade facilitation talks because they wanted other things that mattered more to them. This is rational in the context of the mercantilist dynamics that drive WTO negotiations, but it was not very effective because of the 'win-win' nature of trade facilitation. This allowed the TFA to be negotiated as a stand-alone agreement. But the July 2014 decision by India reveals the strength of issue-linkage incentives and how these can result in the blocking of an agreement that all WTO Members regard as Pareto-improving.

Both the Indian decision in July 2014 and the efforts of a number of developing countries during the negotiations to link the TFA to other issues of importance to them suggests doubts whether the TFA will be the first of more stand-alone agreements in the WTO – assuming the Protocol is eventually adopted. The Indian action may induce other countries to pursue similar tactics in the future. Even the prospects of such behavior may have a chilling effect on the willingness of governments to engage in efforts to negotiate stand-alone compacts. The end result may be to induce even more of a focus on regional/plurilateral cooperation on rule-making. Alternatively, it may lead WTO Members to go back to the drawing board and work on crafting a broad agenda that offers better prospects of a Single Undertaking to be negotiated than has been the case with the DDA—something that many analysts and commentators have been advocating for some time.[7]

From the perspective of trade facilitation outcomes "on the ground" it may not matter too much whether the TFA becomes part of the WTO. Insofar as one takes the view that the primary value of the TFA is to provide a focal point at the country level for trade facilitation reforms,

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[6] An example is offered by the World Bank, which announced a new trade facilitation support program in July 2014 when it already had a donor-funded trade facilitation assistance facility in place – with different donors involved in the two mechanisms, perhaps reflecting the unwillingness of donors contributing to the TFA specific fund to put resources into the already existing facility because it had a broader mandate in terms of the coverage of trade facilitation measures.

[7] See for example Evenett (2014) and Wolfe (2013).

much of value of the TFA lies in the hard work of agreeing on a set of good practices and norms and the implementation mechanisms that the TFA calls for. The weakness of the TFA in terms of offering foreign export interests strong mechanisms to enforce its provisions and thus to make the TFA self-enforcing means other institutional arrangements can and must be used to support implementation, including regional integration arrangements and concerted action by multilateral development agencies. The epistemic community that supported the TFA effort does not need the WTO to continue to provide support to governments and stakeholders that aims to improve trade facilitation performance.

More plurilaterals?

The inability of WTO Members "to get to yes" in the Doha Round has led to numerous calls to revisit the Single Undertaking practice and consensus-based decision-making. Plurilateral agreements (PAs) offer a mechanism for subsets of WTO Members to cooperate and engage in ***rule-making*** (as opposed to market access) that goes beyond current WTO disciplines. The pursuit of cooperation on regulatory policies and administrative procedures is not likely to be very valuable from an issue linkage perspective—as most of the gains (and current costs of non-action) accrue to the countries that would join the agreement. Viewed from this perspective, PAs could be the 'regulatory hothouse' for the WTO, the forum where initial plurilateral agreements become multilateralized over time. Deeper integration will inevitably occur within clubs, and if the WTO cannot permit such clubs to form its relevance can only decline. Deep integration is contracted now in PTAs, but can also be pursued through PAs. The WTO should build its bridges with both instruments, and do more to privilege PAs for all the reasons mentioned above.

The case for greater recourse to PAs as a way of allowing sub-sets of countries to move forward on an issue and permit progress to be made on rule-making under the umbrella of the WTO is not new – see e.g., Lawrence (2006; 2013) and Levy (2006). The argument has not had much traction because there is significant opposition to expanding the number of PAs in the WTO. This opposition contrasts with the general acceptance and pursuit of PTAs. Acceptance of the current situation where countries are prevented from moving forward in a PA will simply result in more and deeper PTAs, or issue-specific agreements *outside* the WTO to address regulatory policies that are not covered by existing WTO disciplines. In both scenarios the WTO increasingly will become a set of 'minimum standards' – a global trade institution that establishes only certain baseline conditions.

The need for explicit approval of a PA for it to be incorporated into the WTO provides a strong assurance that PAs that are considered to be detrimental to the interests on non-members can be rejected. In our view this assurance does not require consensus. It would still be guaranteed if the WTO Membership moved towards a weaker majority rule for acceptance of new PAs. The challenge is to get the consensus required to change the consensus rule for PAs. Given that this may be impossible, a more pragmatic approach would be to focus on facilitating the incorporation of new critical mass agreements (CMAs) that deepen disciplines in areas already covered by the WTO and that are applied on a non-discriminatory basis, and to allow more use to be made of the PA option (where disciplines and benefits are limited to signatories). Launching a process to agree on modalities for new WTO+ CMAs and a code of conduct for the design and approval of new PAs would allow the WTO to do more to embrace rather than ignore the demand for variable geometry in the global trading system.