



Evaluating the Implementation Obligations of the Trade Facilitation Agreement in the Context of Existing Multilateral Trade Rules

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International Centre for Trade
and Sustainable Development

Issue Paper

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TABLE OF CONTENTS

| | |
|--|-----|
| LIST OF TABLES | iv |
| LIST OF ABBREVIATIONS | v |
| FOREWORD | vi |
| EXECUTIVE SUMMARY | vii |
| 1. INTRODUCTION | 1 |
| 2. BACKGROUND AND OVERVIEW OF THE TFA OBLIGATIONS | 3 |
| 2.1 Section I: Technical Trade Facilitation Measures | 3 |
| 2.2 Section II: Special and Differential Treatment | 4 |
| 2.3 Section III: Institutional Arrangements and Final Provisions | 6 |
| 3. THE TRADE FACILITATION MEASURES COMPARED TO EXISTING WTO OBLIGATIONS | 7 |
| 3.1 General Observations | 7 |
| 3.2 Articles 1 to 5 of the TFA and Article X of the GATT | 8 |
| 3.3 Articles 6 to 10 of the TFA and Article VIII of the GATT | 9 |
| 3.4 Article 11 of the TFA and Article V of the GATT | 9 |
| 4. WOULD THE NEW OBLIGATIONS ALREADY BE COVERED BY OTHER WTO OBLIGATIONS? | 11 |
| 4.1 Other Obligations Related to Non-Discrimination | 11 |
| 4.2 Other Obligations Related to Prohibitions and Restrictions | 12 |
| 5. THE EFFECT OF THE TFA ON EXISTING POLICY SPACE | 14 |
| 5.1 The Policy Space in the TFA to Promote Industrial Development | 14 |
| 5.2 The Policy Space in the TFA to Pursue Legitimate Non-Economic Objectives | 15 |
| 6. CONCLUSION | 16 |
| REFERENCES | 17 |
| ANNEX 1. COMPARISON OF TFA ARTICLES WITH GATT OBLIGATIONS | 18 |

LIST OF TABLES

Table 1: Trade Facilitation Measures “Clarify and Improve” Aspects of the GATT

Table A.1: Comparison of TFA Articles with GATT Obligations

LIST OF ABBREVIATIONS

| | |
|------|--|
| GATT | General Agreement on Tariffs and Trade |
| LDC | least developed country |
| MFN | most favoured nation |
| SDG | Sustainable Development Goal |
| SDT | special and differential treatment |
| SME | small and medium-sized enterprise |
| SPS | Sanitary and Phytosanitary |
| TBT | Technical Barriers to Trade |
| TFA | Trade Facilitation Agreement |
| TFAF | Trade Facilitation Agreement Facility |
| WTO | World Trade Organization |

FOREWORD

The Trade Facilitation Agreement (TFA) governed by the World Trade Organization (WTO) is the most significant multilateral trade accord to have entered into force in recent years. The agreement, effective as of February 2017, covers the administration of border procedures and its implementation is expected to have an important impact on trade as well as contributing to economic growth and the achievement of sustainable development objectives.

Full implementation of the TFA is subject to transition periods and capacity building needs under a novel approach to special and differential treatment accorded to developing and least developed countries in the agreement. While this approach is expected to improve implementation in the long run, it could create short-term uncertainty.

The International Trade Law Programme at ICTSD has identified the need for trade policymakers, negotiators, and other stakeholders to better understand the legal implications of the TFA on the existing rights and obligations of members under WTO agreements. This insight could help ascertain the legal security of provisions contained in the TFA as well as how the agreement could affect the policy space of WTO members. In a broader context, an analysis of this nature can shed light on discussions in the area of investment facilitation at the multilateral level.

Authored by Robert McDougall, senior fellow at ICTSD and a former international trade lawyer at Global Affairs Canada, the paper examines the trade facilitation measures contained in the TFA and compares them with existing obligations covered by the General Agreement on Tariffs and Trade, as well as relevant provisions in the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures. The paper further evaluates the potential interaction of trade facilitation obligations with other substantive WTO obligations, especially as they might arise in dispute settlement, and explores the effect of the TFA on existing policy space.

The research presented in this paper is both innovative and practical. The aim is to contribute to the ongoing evaluation of TFA implementation and capacity building needs so that sustainable development is advanced. The paper can also provide food for thought for discussions on an investment facilitation agreement. We hope that you will find the paper thought-provoking and informative, and that it will prove useful for your work.



Ricardo Meléndez-Ortiz

EXECUTIVE SUMMARY

The entry-into-force of the Trade Facilitation Agreement (TFA) is a significant development for the multilateral trading system. In order to expedite the movement, release, and clearance of goods, the TFA clarifies and improves existing WTO obligations related to publication and administration, fees and formalities, and freedom of transit. Once fully implemented, it will have an important impact on trade and will contribute to the attainment of many of the Sustainable Development Goals.

The TFA also contains novel provisions on special and differential treatment (SDT). This SDT regime allows developing and least developed countries (LDCs) to self-designate their implementation timetable according to three categories. It also creates a framework for the provision of support for capacity-building to facilitate implementation. Additionally, the TFA provides the possibility for extensions to the notification and implementation deadlines, assistance in addressing difficulties, and transitional exemptions from dispute settlement. While the TFA's approach to SDT will improve implementation in the long run, in the short run it may create additional uncertainty.

This paper is intended to assist in the category notification, capacity-building, and implementation efforts by evaluating the relationship between the obligations in the TFA and existing obligations in the WTO. It finds that many of the basic trade facilitation measures now required by the TFA are already required by existing obligations, either in the GATT provisions on which it is based, in some circumstances by the TBT and SPS agreements, or in other obligations that prohibit restrictions that limit trade.

Several features of the TFA affect expectations related to implementation and capacity-building needs: whether the legal obligations are best endeavours, mandatory provisions subject to qualifiers, or unqualified mandatory provisions; whether they are prohibitions and restrictions, or minimum standards, the latter of which are found disproportionately in the TFA; and whether they are identical, enhanced, or entirely new compared to existing WTO obligations. Since the SDT regime does not exempt members from the similar existing obligations, notification and implementation should be easier and faster in areas where there is minimal divergence between requirements of the TFA and existing WTO obligations. Areas of greater divergence might require more time and support.

Specifically, obligations related to publication, comment, and appeal/review are not new, whereas those related to advance rulings and notice of enhanced control are. Many of the obligations related to fees are similar to those in the GATT, whereas most related to formalities are considerably enhanced from existing obligations. The obligations related to freedom of transit build considerably upon obligations in the GATT related to the same subject. The enhanced and new obligations might understandably need more time, effort, and support to implement.

Furthermore, some TFA measures may also already be required by WTO obligations other than the GATT obligations on which the TFA is based. While there may be very little overlap between the existing non-discrimination obligations of the GATT and the new TFA measures, the GATT prohibitions on import and export restrictions may already effectively require similar measures in cases where inefficient border procedures have a limiting effect on the quantity of imports or exports.

Finally, to the extent that there may be some hesitation about proceeding to full implementation out of concern that the TFA might limit policy space to pursue other legitimate policy objectives, this is found not to be the case. There is already very little room in the GATT to use border measures to provide an advantage to domestic producers as part of industrial policy, and the TFA has not added to these disciplines. Nor does the TFA alter the existing balance between the obligations to liberalise trade and the right to regulate in pursuit of other legitimate non-trade policy objectives, such as protecting public health and the environment, and providing consumer information, etc. The right to pursue legitimate policy objectives that are not otherwise inconsistent with a member's WTO obligations remains as unfettered under the TFA as it is under the existing obligations.

Realising the full benefits of the TFA and preserving the certainty and predictability of the multilateral trading system are important objectives for all WTO members. The full implementation of the TFA in the shortest delay possible should be the goal of developing countries and LDCs, and the members and international organisations that support them. This assessment has found that for a significant number of the obligations in the TFA, it should be relatively easy to notify and proceed to early implementation, concentrating resources on the more difficult issues.

1. INTRODUCTION

As the first new multilateral trade agreement since the establishment of the World Trade Organization (WTO), the Trade Facilitation Agreement (TFA) is a significant development for the world trading system but also for international law more generally.¹ The objective of the TFA is to expedite the movement, release and clearance of goods, including goods in transit, by eliminating unnecessarily burdensome border procedures and controls. The technical trade facilitation measures at the heart of the TFA are meant specifically to clarify and improve existing WTO disciplines governing the administration of trade at the border. Despite its focus only on issues of border procedures and control, the impact of the TFA on trade, once it is fully implemented, is still expected to be significant.²

Beyond its implications for trade, the TFA is also significant for the novel special and differential treatment (SDT) that it accords to developing countries and least developed countries (LDCs). The agreement contains an elaborate mechanism that allows these countries to self-designate their implementation timetable, which can be conditioned on acquiring the capacity to do so. The agreement further encourages other members to provide assistance and support for this capacity building, and a Trade Facilitation Agreement Facility (TFAF) has been created to coordinate this assistance and support (Trade Facilitation Agreement Facility 2017).

While this flexibility and capacity building will contribute in the long run to more comprehensive implementation by developing countries and LDCs, in the short run it may create additional uncertainty. The associated capacity-building work will generate an unprecedented amount of activity and focus on implementation, but also a degree of uncertainty and complexity around implementation over this period. On the other hand, once capacity has been obtained, transition periods have passed, and implementation has been achieved, all WTO members will be subject to the same obligations with respect to trade facilitation measures, with only a few of the SDT provisions applying to their ongoing operation.

The eventual full implementation of the TFA's technical trade facilitation measures will also contribute to the achievement of the Sustainable Development Goals (SDGs), including, among others, increasing Aid for Trade support for developing countries (target 8.a), implementing the principle of special and differential treatment for developing countries (target 10.a), and mobilising additional financial resources for developing countries from multiple sources (target 17.3) (UN 2015).³

This paper is intended to contribute to the understanding of how the TFA fits within the comprehensive set of existing multilateral trade disciplines by reviewing the nature

1 The finalisation of the TFA is even more remarkable given the slowdown in new international law-making over the last 15 years (Joost, Wessel, and Wouters 2014).

2 A study by the WTO found that the benefits of the TFA, in particular for developing countries and LDCs, include diversification of exports, better integration into global value chains, expanded participation of small and medium-sized enterprises (SMEs) in international trade, increased foreign direct investment, improved revenue collection and reduced corruption (WTO 2015).

3 The TFA will also contribute to other targets such as: encouraging the formalisation and growth of micro-, small- and medium-sized enterprises (target 8.3); increasing the integration of small enterprises into value chains and markets (target 9.3); increasing access to information and communications technology and providing access to the Internet (target 9.c); improving equal opportunity by eliminating discriminatory laws, policies, and practices (10.3); promoting the rule of law at the national and international levels (target 16.3); reducing corruption and bribery (target 16.5); developing effective, accountable, and transparent institutions at all levels (target 16.6); ensuring public access to information (target 16.10); strengthening domestic capacity for tax collection (target 17.1); and increasing the exports of developing countries (target 17.11).

of the various obligations, with a view to assisting in the ongoing category notification, capacity-building, and implementation efforts. It will create a better understanding of the implications of the TFA for existing rights and obligations under the WTO Agreement, including the balance between the obligation to liberalise trade and the right to regulate and pursue legitimate policy objectives.

To that end, Section 1 provides a brief background and overview of the nature and elements of the TFA, focusing on the technical trade facilitation measures and the SDT regime

for implementation and capacity building. Section 2 looks more closely at the nature of the new trade facilitation obligations in relation to the existing obligations on which they build, with a focus on the mandatory provisions of the TFA. Section 3 evaluates the potential interaction of these trade facilitation obligations with other substantive WTO obligations, especially as they might arise in dispute settlement. Section 4 evaluates the effect of the TFA on existing policy space. Finally, the conclusion highlights the important place that the TFA occupies in the world trading system.

2. BACKGROUND AND OVERVIEW OF THE TFA OBLIGATIONS

The study of trade facilitation measures began as early as the 1996 Singapore Ministerial Conference, leading to the launch of formal negotiations in 2004. After almost a decade of negotiations, the TFA was adopted at the Ministerial Conference in Bali in December 2013. A Preparatory Committee on Trade Facilitation was tasked with adopting a Protocol of Amendment to insert the TFA into the WTO legal framework, preparing the TFA's entry into force, and receiving notifications from developing countries and LDCs (Trade Facilitation Agreement Database 2017a).

In November 2014, a few months behind schedule, the Protocol of Amendment to the WTO Agreement was adopted by the General Council, thereby inserting the TFA into Annex 1A of the WTO Agreement.⁴ The Protocol of Amendment was therefore open for acceptance by members in November 2014 and entered into force on 22 February 2017, once two-thirds of the members had deposited instruments of acceptance.⁵ Members that have implemented the TFA are required to extend the benefits on a Most Favoured Nation (MFN) basis to all WTO members, even to those that have not yet ratified. As an integral part of Annex 1A of the WTO Agreement, the TFA is a "covered agreement" for the purposes of Article 1 of the Dispute Settlement Understanding. Therefore, subject only to the exceptions for developing countries and LDCs set out in the agreement, and discussed below, the obligations of the TFA are subject to formal dispute settlement proceedings.

The purpose of the TFA is to expedite the movement, release, and clearance of goods, including goods in transit. The agreement consists of three sections: Section I contains the technical trade facilitation measures that make up the bulk of the implementation obligations; Section II contains an elaborate regime for SDT, defining the roles and responsibilities of

developing, least developed, and developed countries related to implementation transitions and support for capacity building; and, Section III contains institutional arrangements and final provisions, including some important provisions on the relationship between the TFA and rights and obligations under other WTO agreements.

2.1 Section I: Technical Trade Facilitation Measures

The technical trade facilitation measures contained in Section I impose obligations that are meant to increase transparency, improve governance and decision-making, streamline and modernise border procedures and controls, and enhance the movement of goods in transit. The twelve provisions that make up Section I contain roughly 36 trade facilitation measures, which for the purposes of the TFA's novel implementation regime, discussed below, can be further broken down into roughly 240 notification obligations (Trade Facilitation Agreement Database 2017b).

The trade facilitation measures contained in first eleven provisions are explicitly meant to "clarify and improve" relevant aspects of Articles X, VIII, and V of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Specifically, Articles 1-5 deal with issues covered by GATT Article X on publication and administration of trade regulations, Articles 6-10 deal with issues covered by GATT Article VIII related to fees and formalities connected with trade, and Article 11 deals with issues covered by GATT Article V related to freedom of transit. Article 12 is a new obligation that covers custom cooperation, encouraging greater border cooperation, and exchange of information. The specific trade facilitation measures and their relationship to the underlying GATT provisions are set out in Table 1. The table in Annex 1 provides a more detailed comparison of these relationships.

4 Adopted pursuant to Article X:1 of the Marrakesh Agreement Establishing the World Trade Organization (WTO 2014a).

5 The TFA entered into force in accordance with Article X:3 of the WTO Agreement (WTO 2017).

Table 1. Trade Facilitation Measures “Clarify and Improve” Aspects of the GATT

| GATT Article X: Publication and Administration of Trade Regulations: | |
|--|--|
| TFA Article 1: | Publication and Availability of Information |
| TFA Article 2: | Opportunity to Comment, Information before Entry into Force and Consultation |
| TFA Article 3: | Advance Rulings |
| TFA Article 4: | Procedures for Appeal or Review |
| TFA Article 5: | Other Measures to Enhance Impartiality, Non-Discrimination and Transparency |
| GATT Article VIII: Fees and Formalities Connected with Importation and Exportation: | |
| TFA Article 6: | Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties |
| TFA Article 7: | Release and Clearance of Goods |
| TFA Article 8: | Border Agency Cooperation |
| TFA Article 9: | Movement of Goods Intended for Import under Customs Control |
| TFA Article 10: | Formalities Connected with Importation, Exportation and Transit |
| GATT Article V: Freedom of Transit: | |
| TFA Article 11: | Freedom of Transit |
| New Obligation | |
| TFA Article 12: | Customs Cooperation |

The legal nature of the trade facilitation measures contained in the TFA is relevant for the provision-by-provision evaluation of implementation obligations and capacity-building needs. In this regard, two additional observations are in order.

First, the extent to which the measures are binding can be distinguished by whether they are: 1) “best endeavour” provisions containing only “encouragements;” 2) mandatory provisions subject to qualifiers such as “where practicable,” “to the extent possible,” “where appropriate,” and “subject to its laws and regulations;” and, 3) unqualified mandatory provisions containing “shall.” Although all three types are legal obligations that could be subject to review in dispute settlement proceedings, the expectations related to compliance will differ. For “best endeavours” provisions, there is at a minimum an expectation not to act in a manner contrary to the obligation; for mandatory provisions with qualifiers, there may be some liability to demonstrate that the condition of the qualifier (e.g. “where appropriate”) has been met; whereas unqualified mandatory provisions will be subject to full review.

Second, WTO obligations can also be distinguished by whether they are: 1) prohibitions or restrictions (i.e. disciplines) on what a member can do; 2) minimum standards (i.e. affirmative requirements) of what a member must do; and, 3) exceptions to either of the first two types of obligations. While the most common form of obligation in WTO agreements related to trade in goods is of the prohibition and restriction type, the TFA contains almost an equal mix of the prohibitions and minimum requirements, plus a few exceptions. The disproportionate reliance on minimum requirements in the TFA will be relevant to the evaluation of implementation and capacity-building needs.

2.2 Section II: Special and Differential Treatment

The SDT provisions of Section II recognise the potential difficulties that developing countries and LDCs may face in implementing the trade facilitation measures in Section I. The novel and unprecedented, at least in the WTO, regime for SDT that emerges provides developing and LDCs with largely self-determined and variable transition periods for implementation,

either according to specified time periods or conditional upon obtaining the assistance and support for building the capacity necessary to do so. At the same time, it creates an infrastructure for the provision of technical assistance, capacity building, and financial support to developing countries and LDCs for implementation of the trade facilitation measures.

Article 13 of the TFA firmly establishes the general principle of SDT, providing that the “extent and timing of implementation” by developing and LDCs is “related to [their] implementation capacities” and where a developing country or LDC lacks the capacity to implement, “it shall not be required to do so until implementation capacity has been achieved.” Articles 14-19 then establish the implementation conditions, the key feature of which is that developing countries and LDCs self-designate the TFA provisions in one of three Categories, signalling their ability to implement according to the implementation schedule and conditions associated with that Category. The Category designations only affect the timing of implementation and do not alter the nature of the obligation being notified. Once fully implemented, the obligations are the same for all members. The three Categories are:

- Category A contains provisions that must be implemented upon entry-into-force of the TFA or optionally for LDCs within one year of entry-into-force;
- Category B contains provisions that must be implemented following a transitional period after entry-into-force; and
- Category C contains provisions for which developing and LDC members require assistance and support for capacity building.

The TFA requires developing countries, at the time of entry-into-force, to have notified and

implemented Category A designations, notified all Category B and C designations, notified indicative implementation dates for Category B and C, and provided a summary of their support needs for provisions designated as Category C. Updated notifications containing definitive implementation dates and support needs and activities are required one year after entry-into-force and again two-and-a-half years after entry-into-force.

At the time of entry-into-force, LDCs have no notification, designation, or implementation requirements, but instead these are staggered over several years: one year after entry-into-force, Category A implementation, Category B and C designations, and indicative implementation dates for Category B are due; two years after entry-into-force, Category C support needs are due; three years after entry-into-force, confirmation of Category B and C designations and Category B implementation dates are due; four years after entry-into-force, Category C support arrangements entered into are due; and five-and-a-half years after entry-into-force, definitive Category C implementation dates and updates on the progress made in supporting Category C provisions are all due.⁶

In addition to this flexible self-determined implementation schedule, the TFA provides additional safety valves in the event a developing country or LDC finds itself unable to notify commitments or implement provisions by the prescribed deadlines. First, developing countries and LDCs that are experiencing difficulties in complying with notification deadlines may receive assistance or an extension of the notification deadlines (Article 16.3). Second, if they are experiencing difficulties in implementing a provision they may receive extensions to those implementation deadlines (Article 17).⁷ Third, even in cases where an extension has not been granted and they are still having difficulties, an Expert

⁶ Article 24.4 provides that any member that ratifies the TFA after its entry into force must count the various implementation periods from the date of entry into force of the Agreement, and not its ratification date.

⁷ Requests for extensions are granted automatically up to 18 months for developing countries and up to 36 months for LDCs.

Group may be appointed to evaluate and make recommendations to address the difficulties (Article 18).⁸ Finally, developing countries and LDCs may switch Category designations, thereby changing the nature of their notification and implementation obligations (Article 19).

While the TFA is in general subject to formal dispute settlement, in still further recognition of the challenges and special circumstances of developing countries and LDCs, several provisions exempt measures from dispute settlement in certain circumstances. First, in the specific case where an Expert Group has been composed under Article 18, the member requesting the review is not subject to dispute settlement for the obligations subject to review for specified periods of time, which differ between developing countries and LDCs. More generally, Article 20 provides grace periods during which implementation of any TFA measure is not subject to dispute settlement: for provisions designated under Category A, two years after entry-into-force for developing countries and six years after entry-into-force for LDCs; for LDCs alone, provisions designated under Categories B and C are not subject to dispute settlement for eight years after their *implementation*.

Articles 21 and 22 of the TFA cover the provision of assistance and support for capacity building to developing countries and LDCs to assist them in implementing the trade facilitation measures in Section I. Donor members, usually

but not exclusively developed countries, can provide support bilaterally or through international organisations. The provision of this support should follow principles that take account of existing development activities, promote regional and sub-regional integration, engage local private sectors, promote coordination between members and relevant economic institutions, and support ongoing reform and technical assistance programs within a country. These provisions also provide for regular discussion of implementation and capacity building issues in the WTO Committee on Trade Facilitation and establish a mechanism for information exchange and notifications by donor members to the Committee of their assistance and support activities.

2.3 Section III: Institutional Arrangements and Final Provisions

The institutional arrangements and final provisions are set out in Section III. Article 23 establishes the WTO Committee on Trade Facilitation to discuss the operation of the TFA and the fulfilment of its objectives, and requires members to establish national committees on trade facilitation. Article 24 contains the standard Final Provisions of the treaty including—importantly given that this is the first formal treaty agreed in the WTO since its founding—those related to the relationship between this agreement and other WTO agreements, which is discussed in more detail in the remaining sections.

⁸ Article 18 provides that even when an extension has not been granted, or there are unforeseen circumstances that would prevent the grant of an extension, a developing country or LDC may “self-assess” that it lacks capacity to implement and notify this to the Committee, which “shall establish an Expert Group immediately.”

3. THE TRADE FACILITATION MEASURES COMPARED TO EXISTING WTO OBLIGATIONS

The trade disciplines contained in the TFA are obviously not entirely new. As already indicated, the TFA clarifies and improves, but does not replace, relevant aspects of the GATT that provide the basic framework of rules—in place for seventy years already—for the publication and administration of trade regulations (Article X), fees and formalities related to import and export (Article VIII), and the freedom of transit (Article V).

In addition, many border measures are designed to verify conformity with domestic technical regulations and sanitary and phytosanitary measures taken within the frameworks established respectively by the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) Agreements. Therefore, as analyses of these agreements have tentatively concluded (Ayrat 2016 and WTO 2014b), many of the measures now required by the TFA were already required, at least in some form and in some cases identically, by those agreements with respect to the treatment of goods that are subject to TBT and SPS regulations.

The SDT features of the TFA mean that full implementation by developing countries and LDCs will be delayed, perhaps for some time in certain cases. Indeed, despite the obligation for developing countries to have notified the categories for all TFA measures by entry-into-force, at the time of writing only 55 percent of the notifiable categorisations have been presented by developing countries. This suggests ongoing uncertainty about whether implementation has already been achieved, or whether transition periods or assistance and capacity-building are still required. As important and novel as the SDT regime is, it should not distract from the fact that the ultimate objective is full implementation in the shortest delay possible to realise the full benefits of the TFA and to preserve the certainty and predictability of the multilateral trading system.

The implementation and categorisation efforts and the capacity-building needs of developing countries and LDCs should be informed by a clear understanding of the relationship between the obligations of the TFA and the existing obligations in the WTO. Where there is similarity or minimal divergence between the TFA requirements and existing obligations, a short implementation period, if any, or a minimal amount of capacity-building should be sufficient to achieve compliance. Conversely, areas of greater divergence would suggest greater need for one or both. This section reviews the scope of the implementation obligations of the TFA relative to the pre-existing WTO obligations on which it is based.

3.1 General Observations

When compared to the existing WTO obligations, the obligations contained in the TFA may be identical, enhanced (i.e. more prescriptive versions of what is already required by the GATT), or entirely new (i.e. not currently required by the GATT). This GATT-plus characteristic, combined with the delayed implementation and the delayed application of dispute settlement, may lead to certain questions about the relationship between the various agreements.

First, since the TFA contains more specific, more prescriptive, and more recent obligations, a domestic measure should in most cases be evaluated first under the TFA prior to considering its consistency with the GATT. TFA and GATT obligations remain separate obligations and can be applied separately, but should be interpreted harmoniously and in a consistent manner. Given the nature of the TFA obligations relative to those in the GATT, it is likely that a measure that is consistent with the TFA will also be consistent with the GATT, although the converse may obviously not always be true.

Second, the delayed implementation of the TFA and short-term exemptions from dispute settlement do not affect the ongoing application of the related obligations under the GATT. This is made clear by the first sentence of Article 26.4 of the TFA, which provides that the TFA shall not be “construed as diminishing” the obligations in the GATT.⁹ Therefore, since the original GATT obligations continue to apply, effectively only the obligations in the TFA that are enhanced and new may be subject to delayed implementation and exempted from dispute settlement.¹⁰ With these general observations in mind, the remaining sections evaluate the relationship between specific provisions.

3.2 Articles 1 to 5 of the TFA and Article X of the GATT

Articles 1 to 5 of the TFA cover publication, comment, advance rulings, appeal and review, and notification of enhanced control. They correspond to GATT Article X related to publication and administration of trade regulations. Some of the TFA obligations are very similar, if not identical, to the pre-existing GATT obligations, and as such should already be implemented, or be relatively easy to implement in the case of some of the more prescriptive requirements.

Many of the basic publication obligations in Article 1 of the TFA are identical to those already required by the GATT or the TBT and SPS agreements, and as such are longstanding obligations of WTO members. Article 1.1 of the TFA does provide more specificity to the information that needs to be published, and adds some items that may not have been required in the past, but the national infrastructure for publication of the types of

information required should already be in place in all countries. On the other hand, publication of some information on the Internet, the establishment of enquiry points and notification to the Committee are new obligations, but the experience gained in the context of existing obligations under the TBT and SPS contexts should facilitate implementation.

The pre-publication requirement in Article 2 is also largely identical to Article X:2 of the GATT, and while the opportunity to comment is new, at least relative to the GATT, it would likely be considered part of the fundamental requirements of due process that the Appellate Body has established for the adoption of regulations affecting trade.¹¹ Likewise, the mandatory components of the appeal and review process in Article 4 of the TFA track closely the requirements of Article X:3(b) of the GATT supplemented by the fundamental requirements of due process. The TFA is more prescriptive about certain issues—such as the requirement of non-discrimination and to provide reasons—but these would likely be required as a part of fundamental due process.

Therefore, the obligations related to publication, comment, and appeal/review are existing obligations that should already, to a large degree, form part of members’ national laws and regulations. On the other hand, the issues of advance rulings and notice of enhanced control are mostly new obligations that might need more time, effort, and support to implement. Almost all of these obligations involve minimum requirements, which oblige members to affirmatively take regulatory action to implement. Given the capacity concerns that underpin the TFA, a margin of deference in the implementation would be understandable.

9 Article 24.6 provides that “Notwithstanding the general interpretative note to Annex 1A..., nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994.” The general interpretative note to Annex 1A provides that in the event of a conflict between the GATT and another Agreement listed in Annex 1A, the other Agreement shall prevail.

10 Technically, obligations in the TFA that are identical to those already in the GATT may be subject to delayed implementation and exempted from dispute settlement, but claims may still be brought under the GATT during these periods.

11 See Appellate Body Report, *US – Underwear*, p. 21 and Appellate Body Report, *US – Shrimp*, paras. 182-183.

3.3 Articles 6 to 10 of the TFA and Article VIII of the GATT

Articles 6 to 10 of the TFA cover fees and penalties, release and clearance, border agency cooperation, movement of goods, and formalities connected with trade and transit. They correspond to existing obligations in GATT Article VIII related to fees and formalities connected with trade. The TFA supplements considerably the existing GATT obligations related to fees and formalities, however, there are still a few areas of overlap that should simplify the implementation requirements.

The basic obligations related to fees and penalties in Article 6 of the TFA that fees be “limited in amount to the approximate cost of services rendered” is identical to the obligation in Article VIII:1(c) of the GATT, with some clarification of the reference for calculating costs. While pre-publication of fees and charges is new, as indicated in the previous section, national mechanisms to publish trade regulations already exist, due to obligations under Article X of the GATT, to make this easily implemented. The review of fees and charges, with a view to reducing number and diversity, is also a pre-existing obligation, albeit one that is now a standing obligation rather than upon request of another member. Similarly, while the prohibition in the GATT on “substantial penalties for minor breaches” has been recast as an obligation that penalties be “commensurate to the degree and severity of the breach,” the effect should be largely the same. On the other hand, the TFA adds additional requirements on the imposition of penalties, although arguably many of these would have been found to be included on principles of fundamental due process.

Beyond the issues of fees and penalties, the obligations in Article VIII of the GATT related to formalities connected to import, export, and transit are more limited compared to those now required by the TFA. Whereas Article VIII only requires members to “recognise” the need to simplify and minimise the formalities and documentation requirements, the TFA has added several detailed provisions, containing

several dozen notifiable obligations. Some of these are already required in the context of assessing conformity with TBT and SPS requirements, but most of them can be considered either as more stringent or new obligations than those already in the GATT, and the TBT and SPS agreements, for which time and implementation support may be required.

3.4 Article 11 of the TFA and Article V of the GATT

Article 11 of the TFA covering freedom of transit clarifies and improves upon obligations in Article V of the GATT related to the same subject. Certain TFA provisions simply replicate GATT obligations, some are similar but more prescriptive, while others create entirely new obligations. First, certain basic principles found in GATT obligations are reproduced in the TFA, such as the prohibition on customs charges and unnecessary delays or restrictions (compare TFA 11.7 to GATT V:3), exemptions from fees and charges not commensurate with administrative expenses (compare TFA 11.2 to GATT V:3), and equal treatment (compare TFA 11.4 to GATT V:6).

Other obligations already present in the GATT are “clarified” in the TFA, such as expanding on the requirement of the “reasonableness” of restrictions to require them to be “less trade restrictive” and “not disguised restrictions on trade,” the prohibition on “voluntary restraints,” and the non-application of technical regulations to goods in transit. The remaining provisions of Article 11 of the TFA contain largely new obligations, some of which are affirmative obligations, for example, allowing advance filings and processing, that may require time for the acquisition of capacity to implement.

In summary, the TFA builds on the existing framework of rules by in a few cases simply reproducing the obligations of the GATT, in other cases improving these through more prescriptive disciplines or minimum requirements, and in some cases by adding new obligations that reflect the nature of modern cross-border trade not originally foreseen in the GATT. Therefore, WTO members in

the process of planning their support and implementation activities can be expected to notify implementation of TFA measures that were already obligations under the WTO.

Doing so would ensure the full implementation of the TFA in the shortest possible time, and contribute to certainty and predictability in the multilateral trading system.

4. WOULD THE NEW OBLIGATIONS ALREADY BE COVERED BY OTHER WTO OBLIGATIONS?

Another way to evaluate the scope of the implementation obligations of the TFA is to consider whether the new obligations contained in the agreement¹² may already be required by existing WTO obligations other than those on which the TFA is itself based. In other words, whether in the absence of the new trade facilitation measures, the failure to expedite the “movement, release, and clearance of goods” would raise concerns under, for example, the obligations in Article I (MFN) and Article III (national treatment) of the GATT related to non-discrimination or in Article XI of the GATT related to prohibitions and restrictions on import and export.

4.1 Other Obligations Related to Non-Discrimination

In reviewing the potential relationship between new TFA measures and the non-discrimination obligations of Articles I and III of the GATT, there are at least three considerations.

First, the measures now subject to the TFA would have to come within the scope of Articles I and III. On the one hand, the MFN obligations of Article I prohibit discrimination between the goods of different countries in the “rules and formalities in connection with importation and exportation.” The broad interpretation given to “formalities” likely means that many of the TFA measures would at least be subject to Article I.¹³ On the other hand, Article III prohibits discrimination between foreign and domestic goods in the “laws, regulations and requirements affecting internal sale, offering

for sale, purchase, transportation, distribution or use.” In this case, the meaning given to “affecting internal sale” would probably exclude many of the TFA measures from coverage under Article III.¹⁴

Second, like the GATT provisions on which it is based, the TFA largely concerns itself with the application and administration of trade regulations, and not with their substantive content.¹⁵ In some circumstances, WTO adjudicators have even found that obligations related to the administration of trade regulations and the obligations related to the substantive content of those regulations, such as those found in Articles I and III, are mutually exclusive and should be assessed separately under the different obligations.¹⁶

Third, one consequence of this distinction is that discrimination in the context of the *administration* of trade regulations generally concerns discrimination between traders and not between countries.¹⁷ So to the extent that any of the new TFA obligations do prohibit discrimination, it would not be considered a broad non-discrimination obligation, but rather would cover the day-to-day application of the laws, rules, and regulations. For example, the requirement in Article 5.1(d) to publicise terminations of enhanced controls in a non-discriminatory fashion applies to discrimination between traders.

In any event, very few of the new trade facilitation measures required by the TFA deal directly with the issue of discrimination, and

12 Section 2 above identified new obligations of the TFA relating to advance rulings and notice of enhanced control, release and clearance, border cooperation, movement of goods, minimised and simplified formalities and document requirements, and enhanced rules of transit of goods.

13 See Panel Reports, *EC – Bananas III*, para. 7.189, Panel Report, *Colombia – Ports of Entry*, para. 7.342 and Panel Report, *US – Poultry (China)*, paras. 2.2-2.3 and 7.410.

14 See Appellate Body Report, *EC – Bananas III*, para. 211.

15 See Appellate Body Report, *EC – Bananas III*, para. 200 and Appellate Body Report, *EC – Poultry*, para. 115.

16 See Appellate Body Report, *EC – Poultry*, para. 115. But compare also *Argentina – Import Measures*, at para. 5.262, where the Appellate Body confirmed that Articles V and XI of the GATT are not mutually exclusive.

17 See Panel Report, *Argentina – Hides and Leather*, paras. 11.67-11.68 and 11.81-11.84.

when they do they concern the day-to-day treatment of individual traders and operators in the application of trade regulations. It is certainly possible that a given implementation of a trade facilitation measure now required by the TFA would also be reviewable under the pre-existing non-discrimination obligations of the GATT, but this would result in a finding of a different kind of inconsistency than those now contemplated by the TFA. As a result, there is little overlap between the existing non-discrimination obligations and the new measures, at least not in the form required by the TFA.

4.2 Other Obligations Related to Prohibitions and Restrictions

Perhaps more relevant to the assessment of the TFA implementation needs is an evaluation of the relationship between the new trade facilitation measures and the existing obligations in Article XI of the GATT related to restrictions on import and export.

Article XI:1 of the GATT provides that “no prohibition or restriction... shall be instituted or maintained” on imports and exports. This provision does not prohibit “every condition or burden” on imports and exports, but restrictions that have a “limiting effect” on trade, implying a reduction in the quantity of trade, will likely fall afoul of this provision.¹⁸ This reduction in the quantity of trade need not be observed, but can be determined through a review of the “design, structure, and architecture” of the measure.¹⁹

Importantly, contrary to the earlier jurisprudence that suggested that Article I and Article X of the GATT might be mutually exclusive, the Appellate Body has found that Article VIII and Article XI of the GATT apply “harmoniously and cumulatively.”²⁰ In doing so,

it confirmed that “formalities and document requirements,” such as those covered by Article VIII of the GATT and the TFA, that have a “limiting effect” on trade may “well be subject to both provisions” and found to be inconsistent with Article XI.

Therefore, the failure to facilitate the movement of goods through the trade facilitation measures now required by the TFA could also be subject to claims under Article XI of the GATT if inefficient border procedures, by their design, structure, and architecture, have the effect of limiting the quantity of imports or exports. And since the implementation of the TFA is estimated to contribute significantly to growth in world trade, the absence of the measures now required to improve border procedures and controls can be considered to have a “limiting effect” on trade.

The Appellate Body has considered that border formalities and requirements are a “routine aspect” of international trade and not every burden they cause will create an inconsistency.²¹ Beyond that, it has declined to comment on the conditions in which a formality or requirement that has the effect of limiting trade will become a quantitative restriction for the purposes of Article XI. To some extent, the TFA helps identify this threshold as it provides greater clarity on the circumstances in which burdens, in some cases even restrictions, imposed on trade by formalities and document requirements are legitimate.

In summary, some of the new trade facilitation measures now required by the TFA may previously have been required or advisable by existing WTO obligations other than the ones on which the TFA is based. The non-discrimination obligations of Articles I and III of the GATT would not likely be relevant to the new measures, at least not in the form now required. On the

18 See Appellate Body Reports, *Argentina – Import Measures*, paras. 5.242-5.243.

19 See Panel Report, *Indonesia - Import Licensing Regimes*, paras. 7.46-7.50.

20 See Appellate Body Reports, *Argentina – Import Measures*, para. 5.262.

21 See Appellate Body Reports, *Argentina – Import Measures*, paras. 5.242-5.243.

other hand, the prohibition in Article XI of the GATT on quantitative restrictions may already apply to new trade facilitation measures that

purport to remove any border procedures and controls, for example fees and formalities, that have limited the quantity of trade.

5. THE EFFECT OF THE TFA ON EXISTING POLICY SPACE

The previous sections were about the relationship of the additional obligations acquired in the TFA to *obligations* that already existed in the WTO. This section focusses on whether those new obligations constrain the existing *rights* of members to regulate for the benefit of their citizens. That is, whether the TFA limits their “policy space” in any way.

The debate over whether international trade rules provide sufficient flexibility to pursue other policy objectives is a longstanding one. It ebbs and flows depending, in part, on the ever-evolving appreciation of the relative benefits of international trade liberalisation versus regulation in the domestic interest. New international obligations inevitably place some constraint on the freedom to regulate by the states bound by them; that is the point after all. The objective though is to constrain policies that would negatively affect the potential for global prosperity through international exchange, while not unnecessarily constraining the right to adopt policies in the public interest, however that may be defined.

For the purposes of this assessment, a distinction can be made between the right to pursue economic policies, such as those designed to promote industrial development, and the right to pursue non-economic policies, such as those designed to protect public health and the environment, among others.

5.1 The Policy Space in the TFA to Promote Industrial Development

In the context of the trade facilitation measures required by the TFA, having the policy space to promote industrial development would presumably mean using border procedures and controls to raise the cost and inconvenience of importation, either through limitations or

delay, to generate an advantage to domestic producers. Nothing in the TFA affects the existing range of manoeuvre to use border measures in this way.

There is already very little room in the GATT itself for the administration of trade regulations in a manner designed to provide an advantage to domestic producers. As described in previous sections, the existing trade rules already prohibit unreasonable fees, formalities and document requirements that limit trade, withholding information about regulations from traders, or other measures that protect domestic suppliers or are disguised restrictions on trade. For example, GATT rules were used to strike down import formalities and requirements in Argentina because they had a limiting effect on trade by creating uncertainty for importers.²² The TFA has not added any substantial obligations to the existing GATT prohibitions against discrimination and import restrictions, and therefore has not altered the scope for policies that affect the movement, release, and clearance of goods in a manner to generate advantage for domestic producers.

In any event, to the extent that border procedures and control could be used to affect importation to such a degree that it promoted domestic industrial production, this would be a blunt instrument in the toolkit of industrial policies, whose impact on the domestic economy would be uncertain and perhaps even detrimental. Instead, recent studies have demonstrated other sources of flexibilities in the trade rules that would allow policies in support of industrial development (Singh and Jose 2016 and Bohanes 2015). These involve far more targeted flexibilities in the substantive content of trade regulations, to which the TFA, like the provisions of the GATT on which it is based, does not apply.

22 See Appellate Body Reports, *Argentina – Import Measures*, paras. 5.207-5.288.

5.2 The Policy Space in the TFA to Pursue Legitimate Non-Economic Objectives

The existing trade rules, and the jurisprudence that has emerged around them,²³ strike a balance between the obligations to liberalise trade and the right to regulate in pursuit of other legitimate non-trade policy objectives, such as protecting public health, public morals, the environment, consumer information, national security, etc. The general exceptions (Article XX) and national security exception (Article XXI) of the GATT may be used to justify measures that are otherwise inconsistent with other provisions of the GATT. Likewise, the provisions of the TBT and the SPS agreements embody this balance. Nothing in the TFA upsets this balance or undermines the right of governments to pursue other objectives as allowed by the flexibility in the existing trade rules.

First, in many cases it is unclear and debated whether the exceptions in the GATT are available to justify measures that are inconsistent with other goods-related WTO agreements. Whether this is so has usually turned on whether there is an explicit textual basis that links the GATT with the other agreement.²⁴ There is no uncertainty about this in the case of the TFA.

Article 24.6 of the TFA provides that “nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT.” More specifically with respect to the GATT exceptions, Article 24.7 provides that “all exceptions and exemptions” under the GATT, and all waivers granted under the GATT, apply to the provisions of the TFA. To dispel any doubt about what might constitute an exception or exemption, the footnote confirms that the carve-outs in Articles V:7, X:1, and the Ad note to Article VIII of the GATT also apply to the TFA.

Second, the requirements of the TFA to expedite the movement, clearance, and release of goods may, in some circumstances, create a conflict with the right to require that goods conform to technical regulations and sanitary and phytosanitary measures. The latter will often be implemented in pursuit of non-trade objectives such as consumer safety, or human and animal life and health, through measures that are governed and authorised by the TBT and SPS agreements.

To address these potential conflicts, Article 24.6 of the TFA provides that “nothing in this Agreement shall be construed as diminishing the rights and obligations” under the TBT and SPS agreements. More specifically, Article 7 of the TFA contains numerous requirements designed to expedite the release and clearance of goods. To allay any concerns that these provisions might prevent members from ensuring these goods comply with their regulations, two provisions (7.3.6 and 7.8.3) preserve the right to examine, seize, detain, or confiscate or deal with imported goods in “any manner not otherwise inconsistent with the Member’s WTO rights and obligations.”

Therefore, numerous provisions of the TFA itself make clear that in the event of a conflict between the obligation to implement trade facilitation measures and the right to pursue another legitimate policy objective that is not otherwise inconsistent with a member’s WTO obligations, the right to regulate remains unfettered by the TFA. Any policy objectives that could successfully be used to justify a measure contrary to provisions of the GATT articles on which the TFA is based, can also successfully be used to justify measures that are otherwise inconsistent with the TFA. In that respect, the TFA has not affected the “policy space” of WTO members.

23 See for example *US – COOL* and *EC – Seal Products*.

24 See Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 226-227, Appellate Body Reports, *China – Raw Materials*, paras. 284-285, and Appellate Body Reports, *China – Rare Earths*, paras. 5.55-5.58.

6. CONCLUSION

The entry into force of the TFA is a significant development for the multilateral trading system. It has the potential to add significantly to the value of world trade by expediting the movement, release, and clearance of goods, with the benefits going predominantly to developing countries and LDCs. Equally important is the novel framework for SDT, which includes both the flexible implementation timelines and the organised effort in support of this implementation. The assistance, support, and financial contributions to build the implementation capacity of developing countries and LDCs will bring about a level of implementation that might not have been attained in the absence of this SDT framework. Achieving the fullest implementation possible will also contribute to achieving many of the targets of the SDGs.

At the same time, however, the framework for SDT inverts, for many countries, the process of implementation and entry-into-force. The result of this inversion is that implementation will be delayed, and the risk is that it may be delayed significantly longer than would have otherwise been the case. The lower than expected category notifications to-date in the Trade Facilitation Agreement Facility suggest this may already be happening. In the meantime, flexible implementation will be a source of uncertainty for traders, may undermine the attainment of the full objectives of the TFA, and fails to make as much of a contribution to

the SDGs as it could otherwise. To preserve the certainty and predictability that is so central to the multilateral trading system, the temptation to delay implementation and the notification of implementation needs to be resisted.

As a contribution to the ongoing evaluation of implementation, categorisation, and capacity-building needs, this paper presents a preliminary assessment of the relationship between the TFA and a variety of other existing obligations in the WTO. Two broad conclusions emerge from this assessment. On the one hand, many of the basic trade facilitation measures now required by the TFA are already required by existing obligations, either in the GATT provisions on which it is based, in some circumstances by the TBT and SPS agreements, or in other obligations that prohibit restrictions that limit trade. On the other hand, to the extent that some hesitation about proceeding to full implementation is based on a concern about giving up policy space to pursue other objectives, this review has found that the TFA does nothing to significantly limit the right to regulate in order to pursue other legitimate policy objectives, even if it means restricting trade. Developing countries and LDCs, and the other countries and international organisations that support them, can focus on building the capacity to implement fully the TFA in the shortest delay possible to benefit from the promise that the agreement holds.

REFERENCES

- Ayral, Serra. 2016. "TBT and Trade Facilitation Agreements: Leveraging Linkages to Reduce Trade Costs." *WTO Working Paper*. Geneva: WTO Economic Research and Statistics Division.
- Bohanes, Jan. 2015. *WTO Dispute Settlement and Industrial Policy*. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
- Pauwelyn, Joost, Ramses A. Wessel, and Jan Wouters. 2014. "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking." *European Journal of International Law*, 25(3).
- Singh, Harsha Vardhana, and Rashmi Jose. 2016. *Industrial Policy and the WTO Rules-Based System*. E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
- Trade Facilitation Agreement Facility. 2017. <http://www.tfafacility.org>
- Trade Facilitation Agreement Database. 2017a. "The Trade Facilitation Agreement Timeline." <https://www.tfadatabase.org/timeline>
- Trade Facilitation Agreement Database. 2017b. "Share of Cat. A, B and C." <https://www.tfadatabase.org/notifications/by-measure>
- United Nations. 2015. "Transforming our World: the 2030 Agenda for Sustainable Development." <https://sustainabledevelopment.un.org/post2015/transformingourworld>
- World Trade Organization. 2014a. "Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization." WT/L/940. Geneva: WTO.
- World Trade Organization 2014b. "The Relationship Between the Trade Facilitation Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)." *Background Note*. Geneva: WTO. https://www.wto.org/english/tratop_e/sps_e/tf_sps_e.pdf
- World Trade Organization. 2015. *World Trade Report 2015*. Geneva: WTO. https://www.wto.org/english/res_e/publications_e/wtr15_e.htm
- World Trade Organization. 2017. "WTO's Trade Facilitation Agreement Enters into Force." *WTO: 2017 News Items*. Geneva: WTO. https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm

ANNEX 1. COMPARISON OF TFA ARTICLES WITH GATT OBLIGATIONS

| TFA Articles | TFA Nature of Obligations | Existing GATT Obligations | Comparison with Existing GATT Obligations | Assessment |
|---|---|--|--|--|
| Article 1: Publication and Availability of Information | Regulates the type of information published by members, the way it is published, where this information can be obtained by interested parties, and the notification requirements to the WTO Committee on Trade Facilitation | GATT Article X: Publication and Administration of Trade Regulations | Existing GATT obligation (and TBT and SPS Agreement) | Generally, Article 1 reflects the longstanding obligations of WTO members |
| | | | Enhanced obligation | Provides more specificity to information needing to be published |
| | | | New obligation | Publication of information online, establishment of enquiry points, notifications to TFA Committee |
| Article 2: Opportunity to Comment, Information Before Entry into Force and Consultation | Provides opportunities for interested parties to comment on new trade-related measures enacted by WTO members, requires that newly enacted trade measures be made public as early as possible before their entry into force, and requires that border agencies consult with traders on certain matters affecting the specific parties | GATT Article X: Publication and Administration of Trade Regulations | Existing obligation | Generally, Article 2 reflects the longstanding obligations of WTO members; pre-publication requirement is largely identical to GATT Article X:2 |
| | | | New obligation | Opportunity to comment on new trade-related measures enacted by WTO members |
| Article 3: Advance Rulings | Allows traders the opportunity to receive binding rulings, with exceptions and valid for a reasonable period, from Customs on tariff classification, origin, or other customs treatment | GATT Article X: Publication and Administration of Trade Regulations | New obligation | Written ruling by Customs on request of a trader (tariff classification, origin, other matters); rights of notification if Customs takes certain actions against traders' rights |
| Article 4: Procedures for Appeal or Review | Provides traders certain rights of appeal and review of decisions made by Customs of a WTO member | GATT Article X: Publication and Administration of Trade Regulations | Existing obligation | Mandatory components of review process reflect GATT Article X:3(b) |
| Article 5: Other Measures to Enhance Impartiality, Non-Discrimination, and Transparency | Regulates the issuance of notifications by WTO members to concerned authorities enhancing controls and inspection of imported goods, detention of such goods, and testing of imported goods (such as food, beverages, and feedstuff) | GATT Article X: Publication and Administration of Trade Regulations | New obligation | Introduces certain disciplines to which enhanced control notifications by WTO members are subject to opportunities for a second test (goods subject to laboratory testing), and notification of detention of goods at border |

| TFA Articles | TFA Nature of Obligations | Existing GATT Obligations | Comparison with Existing GATT Obligations | Assessment |
|--|--|---|---|--|
| Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties | Regulates the fees and charges on or in connection with importation and exportation, charged for services rendered, and penalties imposed for violation of the WTO member's custom laws | GATT Article VIII: Fees and Formalities Connected with Importation and Exportation | Existing obligation | Article 6 reflects the existing obligations in GATT Article VIII:1(c); prohibition on “substantial penalties for minor breaches” is re-worded to a standard of proportionality (same effect as previously worded GATT obligation) |
| | | | Enhanced obligation | Article 6 clarifies the reference for calculating costs; reviewing fees and charges is a pre-existing obligation under the GATT and rendered a standing obligation under the TFA |
| | | | New obligation | Pre-publication of fees and charges and publishing new fees and charges “an adequate time” before their entry into force; additional requirements for imposing penalties for violation of customs law |
| Article 7: Release and Clearance of Goods | Regulates the process of release and clearance of goods, such as pre-arrival processing, means by which a trade can pay fees, custom practices regarding the determination of goods subject to control, post-clearance customs verification, encouraging members to publish average time it takes to release goods, and the adoption of special customs treatment for reliable traders, expedited release of certain goods, and perishable goods | GATT Article VIII | Existing obligation | Similar to GATT VIII:1(c) in minimising the complexity of import and export formalities |
| | | | Enhanced obligation | Enhanced obligations to reduce the number and diversity of fees, such as a risk management system to reduce the possibility of arbitrary and unjustifiable discrimination |
| | | | New obligation | Advanced lodging of documents electronically by traders to expedite release of goods; release of goods, under a guarantee, for early release; post-clearance audit; creation of a category of “authorised operators;” and new and enhanced procedures for the importation of perishable goods, which further strengthens SPS and TBT obligations |

| TFA Articles | TFA Nature of Obligations | Existing GATT Obligations | Comparison with Existing GATT Obligations | Assessment |
|---|---|---------------------------|---|--|
| Article 8: Border Agency Cooperation | Regulates the activities of the WTO member's border agencies with the authority related to importation, exportation, and transit transactions, and regulates the cooperation between two WTO members sharing a border | GATT Article VIII | New obligation | GATT Article VIII recognises the need to reduce charges, documentation requirements, etc. but TFA provides for new specific obligations for border cooperation, on mutually agreed terms, between two members that share a border to facilitate cross-border trade |
| Article 9: Movement of Goods Intended for Import under Customs Control | To the extent practicable, a member shall allow the movement of goods within its territory to a custom office where the goods would be released or cleared | GATT Article VIII | New obligation | New specific provision for movement of goods within a member's territory, which is not provided for in GATT VIII |
| Article 10: Formalities Connected with Importation, Exportation, and Transit | Regulates various aspects of formalities and documentation requirements connected with importation, exportation, and transit, including the acceptance of copies of supporting documents by border agencies, streamlining of submission of documents to a "single window," common border practices at all entry and exit points, procedures for the return of rejected goods, and procedures for temporary entry of goods destined for a specific use | GATT Article VIII | New/Enhanced obligation | Obligations in GATT Article VIII are more limited than obligations in Article 10, introducing several notifiable obligations (enhancing existing obligations in GATT, SPS, and TBT) |

| TFA Articles | TFA Nature of Obligations | Existing GATT Obligations | Comparison with Existing GATT Obligations | Assessment |
|--|--|---|---|--|
| Article 11: Freedom of Transit | Limits and controls the regulations and formalities that are applied by Customs, and the use and discharge of guarantees required by Customs relating to transit operations | GATT Article V: Freedom of Transit | Existing obligation | Prohibition on customs charges is similar to obligation in GATT Article V:3; exemption from fees and charges not proportionate to administrative expenses is similar to GATT Article V:3; requirement for equal treatment is similar to GATT Article V:6 |
| | | | Enhanced obligation | Article 11 clarifies and enhances several obligations in GATT Article V, including elimination of all unnecessary “regulations or formalities”, requirement that measures be “less trade restrictive” and not “disguised restrictions on trade,” prohibition on “voluntary restraints,” and non-application of technical regulations on goods in transit |
| | | | New obligation | Allowing advance filings and processing; endeavour to enhance freedom of transit and appoint national transit coordinators; limitation of guarantee requirements to fulfilment of transit requirements. |
| Article 12: Customs Cooperation | Covers the exchange of information between the custom agencies of members with the purpose of verifying import and export declarations of traders, where a member requests to another member, and subject to conditions, information concerning declarations | | New obligation | |

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