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REFINING THE WTO TRADE FACILITATION AGREEMENT
IN THE FACE OF AN UNCERTAIN TRADE ENVIRONMENT:
CHALLENGES AND OPPORTUNITIES

HSING-HAO WU*

In the current protectionist trading environment that undermines the multilateral trading system, the Trade Facilitation Agreement (TFA) is the first and only global trade agreement that has been successfully negotiated since the creation of the World Trade Organization (WTO). The TFA consists of provisions to achieve the objectives of transparency, non-discrimination and expedition of movement of goods by harmonising customs formalities and procedures. The Special and Differential Treatment provision is an innovative and flexible step that grants developing countries and least developed countries (LDCs) the right to self-determine their transition periods for full implementation. However, the implementation of the TFA could face tangible roadblocks with the rise of uncertainty in the multilateral trading environment that could weaken the confidence in WTO institutions like the Trade Facilitation Agreement Facility. The overhaul required to implement the TFA could face potential conflicts with domestic public interests like national security, public health and environmental concerns. The TFA Committee could act as an important conduit to encourage full implementation; along with efforts to strengthen communication lines between custom offices and domestic public authorities. Moreover, given the important role of developing country Members to global trade in the coming decade, the WTO should be more responsive to persuade Members to seriously consider the set agenda for negotiations to develop the proposed TF agreement for trade in services.

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I. INTRODUCTION

The WTO Trade Facilitation Agreement, which aims at the harmonisation of trade procedures, was adopted by all the WTO Member Countries (Members) at the Bali Ministerial Conference in 2013. It came into force on February 22, 2017, following ratification by two-third of the Members. It is the first legally binding WTO agreement reached by the Members since the creation of WTO in 1995. The TFA was endorsed by free trade proponents and the majority of Members as a stride towards reducing trade costs and increasing trade worldwide. In accordance with Organization for Economic Cooperation and Development (OECD) estimates, if the TFA were to be fully implemented, trade costs could be reduced by 12%-18%,¹ and global trade could be boosted by up to \$1trillion per year². The implementation of the TFA may face difficulties due to uncertain and hostile multilateral trading environment. The rapid development of preferential trade

¹ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRADE FACILITATION AND THE GLOBAL ECONOMY 1, 3 (2014), https://read.oecd-ilibrary.org/trade/trade-facilitation-and-the-global-economy_9789264277571-en#page3.

² Gary Hufbauer & Jeffrey Schott, *Payoff of the World Trade Agenda*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (2013), <https://piie.com/publications/papers/hufbauerschott20130422.pdf>.

agreements (PTAs), regional trade agreements (RTAs) and bilateral free trade agreement (FTAs) has indeed replaced the dominant role of the WTO in the context of a multilateral trading system since the entry of Doha Development round. Moreover, the United States has unilaterally imposed three rounds of tariffs on certain imported goods from China, with the amount totalling more than \$250 Billion, without filing complaints to the WTO and seeking authorisation since 2018.³ The trade battle between the two major economic powers and the current wave of protectionism has weakened the world economy and threatens the integrity of the multilateral trading system and free trade.⁴

Facing this uncertain and protectionist trading environment, the TFA is the first and only global trade agreement to be negotiated since the creation of the WTO. Thus, the full implementation of the TFA is deemed to be a model example for regaining the confidence of trade liberalisation in the context of the multilateral trading system. Although the full implementation of the TFA will play a vital role to ensure free and fair trade development, rising economic nationalism and protectionism may result in the exhaustion of incentives for developed states to provide sufficient financial and technological support to developing states undergoing trade facilitation reforms. This could eventually undermine the success of the TFA's implementation in the near future. In addition, the unclear and flexible language adopted by the TFA would also create difficulties in reconciling the TFA and related Multilateral Environment Agreements and domestic legislations that aim at protecting public interests such as environment and public health. This article first provides an overview of the main features of the TFA that aim at harmonising and streamlining customs procedures among Members and the provision of special treatment for developing countries and Least Developed Countries. Part III of the article identifies and critically analyses potential challenges and concerns for the full implementation of the TFA since the Agreement came into force. After examining potential challenges and commodity concerns of implementing the TFA at the present stage, suggestions for future refinement of the TFA from legal and institutional reform perspectives have been provided.

II. AN OVERVIEW OF THE MAIN FEATURES OF THE TRADE FACILITATION AGREEMENT

³A *Quick Guide to the US-China Trade War*, BBC NEWS (Jan. 7, 2019), <https://www.bbc.com/news/business-45899310>.

⁴ Daniel Gallas, *WTO Chief Warns of Worst Crisis in Global Trade Since 1947*, BBC NEWS (Nov. 30, 2018), <https://www.bbc.com/news/business-46395379>.

The basic framework of the TFA contains provisions for expediting the movement, release, and clearance of goods, establishment of coordinated mechanism among customs and other appropriate authorities on trade facilitation. It also contains provisions for technical assistance and capacity building for developing states. There are three sections of the TFA: Section I contains provisions for expediting the movement, release, and clearance of goods, Section II contains special and differential treatment (SDT) provisions that apply to developing country Members and LDCs, and Section III contains provisions establishing the WTO Committee on Trade Facilitation and also requires Members to establish national committee to facilitate domestic coordination and implementation of the TFA. The following section provides an overview of the main themes of the TFA.

The Provisions Related to Harmonising of Transparent, Non-discriminatory, and Expedited Trade Procedures Among Members

The main objective of the TFA is to set up obligations for Members to ensure their trade procedure, mainly the custom processing, operates in a transparent, non-discriminatory, coherent and expedited fashion. In this regard, Section I provisions of the TFA provides baseline model standards for customs procedures, which shall be adopted by all committed Members. The TFA requires Members to modify or to maintain their present custom procedures in order to achieve the following three principles: transparency, non-discrimination, and expedition of movement of goods. As for contents aiming at achieving transparency, the TFA requires Members to publish relevant information concerning export, import and transit of goods procedure and required application documents available through the internet to all traders and related government authorities involved.⁵ Moreover, the TFA requires Members to adopt what is called the 'Advance Ruling' process which ensures that all traders obtain written decisions upon application concerning the goods' classification of the tariff, origin, applicability to duty relief or exemptions, and average goods' clearance time prior to importation of goods.⁶ Information concerning fees or charges for custom procedure shall also be published and the fees shall be limited to the approximate costs of services rendered. The TFA requires that new or amended rules on fees and charges shall be published and adequate time period between the publication date and their entry into force shall be provided. This requirement is critical for the enhancement of transparency and consistency for custom rules adopted by Members.⁷

⁵ Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (Agreement on Trade Facilitation) art. 1.1, 1.2, Feb. 22, 2017, 1867 U.N.T.S. 154 [hereinafter Trade Facilitation Agreement].

⁶*Id.*, art. 3.

⁷*Id.*, art. 6.1, 6.2.

The imposition of non-arbitrary obligations by the TFA on Members is deemed to be an effective approach to remove unnecessary and potentially discriminatory custom regulations or rulings that act as non-tariff barriers to market access. In order to prevent arbitrary and discriminatory treatments required by custom law and regulations or unfair rulings by certain customs officials, the TFA allows traders to comment on proposed law or regulation concerning the movement, clearance, and release of goods including transit adopted by a certain Member.⁸ Moreover, if a trader labels a specific administrative decision for goods made by customs officials to be unfair, the TFA requires Members to grant traders procedural rights to appeal or review such rulings in a non-discriminatory manner at a higher or independent administrative body other than the office making such decision, or seeking judicial appeal or review of the decision.⁹

Moreover, in the case of enhancing the level of control or inspection at borders for food and beverages, or foodstuffs, the TFA requires Members to issue notification or guidance based on found risks, and to promptly terminate or suspend such notification or guidance once the existence of suspected adverse public health concerns has not been proved scientifically.¹⁰ Moreover, the TFA requires Members to promptly inform detention decisions to importers or carriers, who have the right to request a second testing opportunity if the first sample testing result indicates adverse effects.¹¹ In short, the TFA has provided traders with commenting and appealing rights on any proposed custom related law or regulation and specific custom ruling which could potentially constitute arbitrary or discriminatory measures imposed by certain customs officials at proper tribunals within Members' jurisdiction. In facilitating the review process for alleged proposed custom related law or regulation, the TFA has established WTO Trade Facilitation Committee and requires Members to formulate their own Trade Facilitation (TF) Committee.¹²

As mentioned earlier, the main focus of the TFA is to reduce transaction costs by expediting the ineffective and time-consuming custom procedure adopted by certain Members. As regards the simplification and expediting of customs procedures concerning movement, clearance, and release of goods, the TFA first requires Members to establish pre-arrival processing for import documentation and to allow electronic payment for determined duties, taxes, costs and charges collected by customs incurred upon importation and exportation prior to the

⁸*Id.*, art. 2.

⁹*Id.*, art. 4.1.

¹⁰*Id.*, art. 5.1.

¹¹*Id.*, art. 5.2, 5.3.

¹²*Id.*, art.13.

arrival of goods.¹³As regards the custom control, the TFA requires Members to adopt risk management system focusing on high-risk consignments inspections and expedite the release of low-risk consignments. The risk management system shall be based on an assessment of risk through appropriate selectivity criteria such as the Harmonised System Code (HSN), nature, and description of the goods, country of origin, compliance record of traders, and types of means of transport. In practice, customs offices in some Members have already adopted cargo-scan system focusing on high-risk consignments rather than every shipment or high percentage physical inspection practices.¹⁴ In expediting the release of goods, the TFA requires Members to adopt post-clearance audit scheme as operational manners of the risk management system.¹⁵The TFA also urges Members to adopt Authorised Operators system (AO) providing additional TF benefits for release and clearance of goods, such as lower documentation requirements for shipments, lower rate for physical inspection, speedy release time, and clearance on trader's premise.¹⁶ It is also worth noting that the TFA requires Members to grant expedited release of goods treatment for those goods entered through air cargo facilities and perishable goods at the shortest time possible.¹⁷In achieving their commitments to TFA obligations for expedited shipments, Members need to establish or upgrade a competent working environment for customs offices that are capable of operating for longer business hours and provision of proper storage facilities.¹⁸The TFA calls for the establishment of a cooperative and coordinated mechanism among all of the relevant border control agencies of each Member. In implementing the objective, Members may need to harmonise border control procedures, align procedures and business days/hours, exercise joint control, and establish a one-stop border control post.¹⁹ The TFA calls for Members to decrease and simplify formalities and documentation requirements concerning trade, and a single window system assisted by proper information technology that is capable of handling electronic copies of all relevant documents in advance of shipments is also highly encouraged by the TFA.²⁰As for traffic in transit of goods, the TFA requires Members to provide freedom of transit by adopting physically separate

¹³ *Id.*, art.7.1, 7.2.

¹⁴ *Id.*, art.7.4.

¹⁵ *Id.*, art.7.5.

¹⁶ *Id.*, art.7.7. AO system is designed to speed up clearance and release of goods and reduce costs for inspection for those traders enrolled in the system based on international standards and traders' previous tracking records showing the low level of risks concerning trade transactions. See Jose Marcio Ergo Filo, *The Importance of the Agreement on Trade Facilitation to Brazil and the World Economy*, 26 J. INT'L TAX'S 52, 53 (2015) [hereinafter Filo].

¹⁷ Trade Facilitation Agreement, *supra* note 5, art. 7.8, 7.9.

¹⁸ See art. 7 of TRA; Deborah Elms, *After Bali: What Happens Next with Asian Trade Facilitation?* 9 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 429, 436-37 (2014).

¹⁹ Trade Facilitation Agreement, *supra* note 5, art. 8.

²⁰ *Id.*, art. 10; Elms, *supra* note 18.

infrastructure for traffic in transit, free of charges, and least burdensome custom procedure.²¹ As for institutional arrangements, the TFA establishes the Committee on Trade Facilitation (Committee on TF) and asks Members to cooperate and exchange information concerning TF development and establish National Committee on TF in the respective domestic jurisdictions.²²

The Provisions Related to Special and Differential Treatments for Developing Countries and LDCs.

The implementation of the TFA is expected to immediately benefit trade for some Members which have already developed TF procedures long before the conclusion of the TFA in Bali package. A small adjustment and controllable costs are expected to arise for these Members to achieve their commitments in Bali. In the short-term, however, full implementation of the TFA may result in great costs and regulatory transition chaos for developing country Members and LDCs in particular. As mentioned earlier, the establishment of a transparent, speedy and effective trade procedure requires enormous technical, legal and financial assistance for capacity building, for developing country Members and LDCs. For the sake of reaching the consensus during the negotiation in Bali, the final negotiated TFA contains special and differential treatment provisions to reduce the potential negative impacts of the TFA by granting a flexible schedule for implementation following the date on which the TFA entered into force.²³ The special and differential treatment is an innovative approach because it is the first trial for the WTO to grant developing countries the right to determine their own transition periods for full implementation of certain TFA commitments.²⁴ Members have been divided into three categories based on their own commitment concerning when to implement the TFA - Category A for developed countries that are automatically obligated to fully implement when the TFA enters into force; Category B for some developing countries and LDCs committing to implement after a transition period from the date the TFA enters into force; and Category C for developing countries and LDCs that are allowed to implement their TFA commitments after the transition period if they require acquisition of implementation capacity through the provision and assistance of capacity building.²⁵ Members that are listed in Category B have to notify the TF Committee regarding the definite implementation date no later than one year after the 'entry

²¹ Trade Facilitation Agreement, *supra* note 5.

²² Trade Facilitation Agreement, *supra* note 5, art. 23.

²³ *Id.*, art. 13.

²⁴ Ben Czarnik, *Will the Trade Facilitation Agreement's Novel Architecture and Flexibilities Have Unforeseen Consequences? An Analysis in the Context of World Trade Organization Accessions*, 12(1) GLOB. TRADE & CUSTOMS J., 1, 2 (2017).

²⁵ Trade Facilitation Agreement, *supra* note 5, art. 14-16.

into force' of the TFA. Category C, however, can notify the Committee regarding the timeline for implementation and assistance and support arrangements no later than three years from the 'entry into force' of the TFA.²⁶

It is also worth noting that several provisions contained in the TFA provide flexible terms which allow developing country Members and LDCs to implement their TFA commitments based on their institutional and administrative capabilities, such as the use of the following language: "Members shall, within its available resources" or "shall, to the extent practicable."²⁷ The language used implies that the upgrading of hardware facilities such as building or expanding ports and storage facilities are not specifically required by the WTO. Instead, the introduction of modern information technology for facilitating electronic paperwork, investigating and updating existing custom procedure and rules to achieve the objective of transparent and streamlined custom procedure for goods, is much preferable for developing and LDCs to implement the TFA at present stage. Transforming the existing custom procedure by simply adopting software installation without establishing sufficient and proper computers, inspection and storage facilities for implementing any change in legal environment for speeding up border control of goods is considered irrational.²⁸

III. CHALLENGES AND CONCERNS FOR IMPLEMENTATION OF TRADE FACILITATION AGREEMENT

Although there is general consensus so far that the full implementation of the TFA could boost global trade and perhaps economic growth in the long run, challenges and concerns still exist regarding the downside of the TFA for developing countries and LDCs. It could be the result of a delay or lack of assistance for capacity-building programs from developed countries, enormous costs as a result of the implementation of TFA commitments, and potential conflicts between TF obligations and domestic law or regulation aiming at enhancement of border control to protect the environment and public health. There is also scepticism and uncertainty as to how the TFA will bring uniformity and consistency with respect to customs procedure among developed and developing countries. The following discussion will identify and critically discuss these concerns and challenges.

A. Challenges for full implementation of the TFA under Uncertain Trade Environment

There are growing concerns of enforceability of the TFA with respect to increasing unilateral trade sanctions involving major players in trade such as the U.S and

²⁶ *Id.*, art. 16.

²⁷ Trade Facilitation Agreement, *supra* note 5, art. 1.3. 2.1, 7.2, 7.4, 8.2, 9.

²⁸ Elms, *supra* note 18.

China. Since the entering of the Doha Development Round, pending agricultural subsidy disputes between developing states and major agriculture exporting states have underestimated the progress for deepening global trade liberation.²⁹ Recognising the fact that global trade liberalisation progress has been stalled, many countries have thus shifted their interests from pushing global-scale trade negotiation into seeking the proliferation of bilateral and regional free trade agreements to assure their trade benefits and market access to involved countries. Moreover, the uncertain and protectionist trade environment is not conducive for further negotiation and implementation of multilateral trading agreements. In this regard, it is rational to expect that developing country Members and LDCs will encounter difficulties in seeking donors providing assistance and support for capacity buildings to fulfil their commitments to the TFA.

The WTO has established WTO Trade Facilitation Agreement Facility (TFAF) to support developing country Members and LDCs to assess their specific needs for streamlining the trade procedure, and most importantly, to identify possible development donors to assist them in meeting those needs. However, major players in trade tend to settle trade disputes in a unilateral fashion and choose not to seek for remedies within the multilateral trading framework. For instance, the US has to balance trade deficits by imposing additional tariffs on certain products imported from its major trade partners such as China, authorised by US domestic law seeking remedies to market disruption as a result of certain imported products from China.³⁰ Recognising the incompetent role of the WTO Dispute Settlement Body in settling trade disputes among major trading powers in a largely protectionist trade environment, China is compelled to seek unilateral retaliation measures or expanding trade with countries other than the US in response to US'

²⁹ See generally, CHARLES E. HANRAHAN & RANDY SCHNEPF, CONG. RESEARCH REPORT, WTO DOHA ROUND: THE AGRICULTURAL NEGOTIATIONS (2007).

³⁰ See generally, U.S. Trade Act of 1974, 19 U.S.C. 2101; Section 301 of U.S. Trade Act of 1974 establishes three categories of acts, policies or practices of a foreign country that are potentially subject to Section 301 investigations: (i) trade agreement violations; (ii) acts, policies or practices that are unjustifiable and that burden or restrict U.S. Commerce; and (iii) acts, policies or practices that are unreasonable or discriminatory and that burden or restrict U.S. Commerce. If the United States Trade Representative (USTR) determines that certain trade practices of a foreign country are unjustifiable and burdens or restricts United States Commerce, then the President may direct the Trade Representative to take necessary actions to eliminate such act, policy, or practice such as by imposing additional duties on alleged imported products. For detailed findings and explanations of USTR's investigation into China's trade practice under Section 301 of Trade Act, see OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER INTELLECTUAL PROPERTY AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 22, 2018), <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

unilateral trade measures.³¹The decreasing influence of the WTO for settling trade disputes among major economic powers would eventually result in decreasing confidence in multilateral trading systems for future trade liberalisation progress including trade facilitation on goods. In this regard, developed countries may become reluctant to provide assistance and support to capacity building for Members listed in Category B and C of the TFA. Lacking donors or sufficient funding sources to sustain capacity building for Members listed in Category B and C in meeting their commitments to the TFA, developing country Members and LDCs may be forced to postpone the schedule of implementation and eventually hurt the integrity and promises of the TFA. In this regard, the Commission on TF should play a more active role in striving for sustainable funding sources. In response to the potential reluctance of Members to provide financial assistance to Category B and C Members, the Commission on TF should first seek various donors such as private traders, or rely on private funding rather than Members. Additionally, the Commission on TF could facilitate technical assistance workshops for Category B and C Members on its own capacity without seeking for donors to ensure all Members carry proper institutional and administrative capacities to implement the TFA obligations within their promised implementation schedule.

B. Concerns for Balancing Expedition of Customs Procedures and Environmental and Health Concerns.

The core concept of the TFA, as mentioned earlier, is to harmonise Members' custom formalities and procedures in simplifying and expediting the movement, clearance, and release of goods. In meeting the commitments to the TFA, many Members are required to change existing custom law or regulations and this creates a potential conflict of interest between trade and public interests.³²It is foreseeable that traders and companies, notwithstanding their native countries, all welcome the adoption of simple and streamlined trade procedures to reduce trade transaction costs. On the other hand, there are concerns regarding compliance with TFA obligations which may result in weakened border control and thus increase risks for environmental quality, public health, and even national security. As mentioned earlier, the TFA requires Members to adopt risk management system focusing on

³¹ See Reuters, WTO Paralysed as Leaders Try to Defuse US-China Trade War (Dec. 1, 2018), <https://www.scmp.com/news/china/diplomacy/article/2175925/wto-paralysed-leaders-try-defuse-us-china-trade-war>. For detailed discussion on past Unilateral Trade Retaliation Measures imposed by China against U.S. imported products, see Li M., et al. *What Have We Learned from China's Past Trade Retaliation Strategies?*, CHOICES, <http://www.choicesmagazine.org/choices-magazine/submitted-articles/what-have-we-learned-from-chinas-past-trade-retaliation-strategies>.

³² Filo, *supra* note 16.

high-risk consignments instead of adopting intensive physical inspection procedure. Moreover, the TFA asks Members to adopt the risk-based custom procedure for food, beverage and food products and shall suspend or terminate the enhanced level of custom controls on food products if no adverse findings exist.³³ It is expected that the adoption of risk-based custom procedure required by the TFA rather than enhancing custom controls on certain goods such as foods, domestic custom law or regulations of Members shall be developed or amended to authorise custom officials to issue notifications for enhanced custom control or physical inspections only if concrete proof of risks presenting by goods do exist. In doing so, some domestic public administrations such as environmental and public health authorities' discretion to impose precautionary measures against suspicious goods authorised by existing domestic legislation may be restricted or even create conflict of laws.³⁴

The GATT and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) have also provided legitimate causes for Members to impose temporary trade restriction measures to suspected importing foods or food products without proving actual risks of adverse effects to public health.³⁵ There is

³³Trade Facilitation Agreement, *supra* note 5, art. 5, 7

³⁴ Some domestic legislation such as Taiwan Act Governing Food Safety and Sanitation has authorised public administrations to impose precautionary measures for suspicious foods or food products upon discovery of incidents that may be harmful to food safety. Taiwan Act Governing Food Safety and Sanitation Article V states, "The competent authority at all levels shall establish a food sanitation and safety monitoring system based on scientific evidence. Upon discovery of incidents that may be harmful to food sanitation and safety during monitoring, an active inspection shall be conducted and an alert shall be issued or other necessary measures shall be implemented."

The issuance of the active inspection and alert or implementation of necessary measures referred to in the preceding paragraph which will be done by the competent authority shall include conducting sampling and testing, investigating the source of raw material and the flow of the product, publishing testing results, disclosing other relevant information and ordering food businesses to perform testing on their own." The language used in Article V of Taiwan Act Governing Food Safety and Sanitation only states that active inspection measures shall be conducted based on "scientific evidence" but does not necessary to be risk-based as it required by the TFA.

³⁵ GATT Article XX on General Exceptions paragraphs (b) and (g) are two exceptions related to the protection of the environment. Article XX allows Members to adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health or relating to the conservation of exhaustible natural resources paragraph; *See also*, WTO Agreement on Sanitary and Phytosanitary Measures, art.5.7 states, "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopts sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall

lack of clarity in the language of the TFA, as to the extent to which any custom ruling can enhance the level of custom control; or whether inspections shall be suspended or terminated when the adverse conditions no longer exist. What this means in practice for the TFA is unclear. In other words, customs regulation may be amended in conformity with the TFA's requirements with respect to the establishment of a streamlined risk management procedure. Once the amended custom regulation comes into force, there is a potential conflict between domestic custom regulation and other legislations safeguarding public interests. In case of food safety, for instance, WTO SPS Agreement authorises Members to impose precautionary measures within a reasonable period to time to seek for additional information to justify the maintenance of such trade restrict measures.³⁶ A conflict of interests among TF commitment and public interests issues could arise if certain goods are held in detention due to a precautionary action order issued by a food safety responsible administration. However, traders may argue that custom offices shall not sustain detention orders because there is no strong scientific basis for proving adverse effects of the goods in question (based on TFA provisions itself or streamlined custom regulation that is inconsistent with domestic food safety regulation). In reconciling the inconsistency among custom law and other domestic laws which aim at protecting public interests, the domestic food safety-related laws might have to be inevitably amended in order to become consistent with customary law or regulation. In case of failure to reconcile the inconsistency, traders may resort to an administrative appeal or judicial proceeding, or might even create international trade disputes among Members.

In addition to human health concerns, there are also environmental concerns as a result of the risk management system adopted by speedy custom procedure required by the TFA. The current practice of risk management system adopted by many Members for risk-based inspection of goods is through container-scan system for high-risk containers. The widespread and increasing use of container-scanning measures is expected to decrease the frequency of physical inspections. Although the container-scan system is expected to speed up the inspection process for goods and works well for screening out dangerous items such as weapons or explosives, it will also increase the risks of non-detection of hazardous materials contained in importing goods that could only be investigated by environmental

seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

³⁶ Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 5.7, 1867 U.N.T.S. 493.

protection trained personnel.³⁷ For instance, the Taiwan Environmental Protection Administration (TEPA) has noticed that some importers imported the waste in question for recycling or recovery purposes (raw materials) were not required by law to obtain importation permits issued by the TEPA. It is, however, that the imported waste in question had been found mixed with unreported hazardous waste not complying with either the Basel Convention or the domestic waste management law after these illegal wastes had successfully flow into Taiwan's waste management chains.³⁸ In response, the TEPA has been called upon to amend regulation requiring prior approval issued by the TEPA for certain imported waste for recycling uses and further to enhance TEPA's role in coordinated border inspection with customs offices. If the public administration responsible for waste management has found certain wastes being imported to be suspicious, it can ask custom officials to detain the goods in question for enhanced inspection and testing. This detention decision issued by the custom office may be contested by importers on the grounds that certain custom rulings are not based on risk, and thus constitute non-transparent or discriminatory decisions, which are forbidden by the TFA.

In short, the successful negotiation of the TFA does not mean that conflict of interests issues would not occur in the future. The information exchange for all involved agencies, NGOs and the general public, as well as coordinated mechanisms among custom offices and other public administrations for border inspection has not yet been established during the TFA negotiation process for many Members. It is possible that many public administrations lack adequate information about the consequences of implementing commitments to the TFA

³⁷ Hazardous waste is defined as a solid, liquid, sludge or gaseous waste which is specifically listed as hazardous waste or displays a "hazardous characteristic" in accordance with domestic legislation. Hazardous waste, however, could only be identified and classified by highly trained waste generators by using their professional knowledge assisted by sampling and analysing the waste using specified test methods recognised by public authorities.

³⁸ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) established a detailed Prior Informed Consent (PIC) procedure with strict requirements for transboundary movements of hazardous wastes and other wastes. The core of PIC procedure contains four key stages (1) notification; (2) consent and issuance of movement document; (3) transboundary movement; and (4) confirmation of disposal. *See generally* Basel Convention Texts and Annex's; Article 38 of the Taiwan Waste Disposal Act, states that the import, export, transit and transshipment of industrial waste may commence only after receipt of permission granted by the special municipality, county or city competent authority; for hazardous industrial waste, additional approval from the central competent authority is necessary. However, wastes that are officially categorised as industrial raw material by the central competent authority after consultation with the industry competent authority are not subject to this provision.

for many Members countries. It is expected that once the TFA has been fully implemented, challenges from traders based on TFA provisions would eventually result in difficulties for balancing Members' commitments to the TFA and existing public interests safeguarding law and enforcement.

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**IV. SOME RECOMMENDATIONS FOR FUTURE DEVELOPMENT OF
TRADE FACILITATION IN THE CONTEXT OF A MULTILATERAL
TRADING SYSTEM**

This article has identified some of the potential challenges and concerns that needed to be addressed in terms of conflicting interests among Members' commitment to the TFA and domestic public interests safeguarding law and enforcement; as well as the plurality of requirements provided by the TFA, SPS Agreement, Multilateral Environmental Agreements, and domestic law or regulation safeguarding environment and public health. These important issues need to be addressed and there may be a need further refinement for the TFA. A balance needs to be found through policy reforms in reconciling domestic legal environment concerning these trade transactions. The following discussion explores the potential solutions to address these challenges and concerns for the future implementation of the TFA. Some recommendations are provided to address these issues from legal and institutional perspectives.

A. Enhancing the Assurance for Full Implementation of TFA

In order to fully implement the TFA, the TF Committee should play a more active role, or even be able to amend the TFA to establish assurance for sustainable capacity building if Members deem it necessary to provide proper authorisations. The enforcement of the TFA has shown the consensus among all Members for moving forward to harmonise and streamline their existing trade procedures. As has been mentioned earlier, there are still some challenges for full implementation of the TFA in the near future. By meeting their commitments to the TFA, many developing countries and LDCs would have to upgrade custom inspection facilities to comply with TFA requirements. There was no detailed discussion or estimation concerning the exact costs of the same. The full implementation of the TFA may encounter difficulties because developing country Members and LDCs could run into trouble seeking matching development partners to provide them with financial and technical support to improve border inspection facilities, electronic submission system and reform for the legal environment concerning trade procedure.

Recognising the capacity for developing states and LDCs to notify their commitment to implement the TFA, it provides much flexibility for developing country Members and LDCs to determine the time and means to comply with the

TFA obligations. Since the TFA came into force on 22 February, 2017, 141 out of 164 countries have ratified the agreement. It is also worth noting that there are still 22 remaining developing countries and LDCs that have neither ratified the TFA, nor have they notified the WTO regarding their Category B or C commitments. The Members which have notified their commitments as Category B and C, are required by the TFA to notify their definite implementation timeline and donors for Category C countries within no more than three years' timeframe. In this regard, developing country Members and LDCs may be forced to delay or postpone their definite implementation schedule if financing for capacity building programs falls short in the next few years. There is also a notable concern that developing countries with strong service providing industry may lack incentives to accelerate their TFA implementation progress if their expectation from WTO to facilitate multilateral trade negotiations for TF in Services is postponed indefinitely.³⁹

In order to achieve the objective of full implementation of the TFA among all Members, there is a need to enhance the assurance for proper and sustainable capacity building programs and increasing economic incentives for developing country Members and LDCs; to accelerate the progress in reforming their existing trade procedures to comply with TFA requirements. The enhancement of assurance for sustainable capacity building programs for developing country Members and LDCs requires institutional reforms to adjust the original design mechanism provided by the TFA. Although the TFA requires Category C Members to notify their definitive timelines for implementation of their commitments within a maximum of 3 years after enforcement of the TFA, difficulties may occur for Category C Members if they were unable to find donor Members or receive insufficient financial and technological support from development partners to fully comply with TFA obligations.⁴⁰ In this regard, the TFA does not impose any obligation for the TF Committee to facilitate matching of Donor and Recipient Members. There is also no responsibility for the provision of assistance and support for capacity building to developing country Members and LDCs that are facing trouble seeking donor Members or are receiving insufficient assistance and support for implementing their commitments.⁴¹

³⁹ India, for instance, deems the access to service markets of other Members also requires the development of another WTO side Agreement aiming at TF in Services. The proposal has been discussed in Trade in Service Council during the period of Oct. 5-7, 2016.

⁴⁰ Trade Facilitation Agreement, *supra* note 5, art. 22.

⁴¹ In accordance with WTO Trade Facilitation Agreement article 21 and article 22 of the TFA only impose obligations on the TFA Commission to collect reporting of assistance and supports from donors and recipient Members, conducting annual sessions for sharing information among Members and discussing problems in implementing TFA and review the progress of assistance and support for capacity building, and coordinating relevant international organizations for sharing and gathering information purposes.

In enhancing assurance to capacity building to developing country Members and LDCs implementing their Category B and C commitments, the existing institutional role of Commission on TF in terms of overseeing capacity building progress should be rearranged by practical means or through amendment of the contents of the TFA if it is deemed necessary by the Members. The Commission on TF should be authorised to facilitate matching tasks among Members showing their general interests of providing assistance and requiring support to the capacity building. Furthermore, the Commission on TF should be authorised to establish capacity building, fund-receiving grants and donations from various sources including international organisations, companies, private funding, traders, and Members. The capacity building fund is governed by the Commission; which works towards providing sustainable financial assistance for capacity building to developing countries and LDCs that are facing trouble finding donors or receiving insufficient assistance from their notified donors. If the TF Committee could transform into being more active in facilitating capacity building for Category B and C Members, then not only would the remaining 22 countries notify their commitments under the TFA; but the objective of the full implementation of the TFA could also be achieved within the promised schedule provided by Category B and C Members.

Complying with TF Obligations without Compromising Public Interests: Safeguarding Issue of Guidelines for Reconciling Custom Procedures and Other Public Administration Law

The full implementation of the TFA also needs to address the concerns for balancing TF and public interest safeguards from domestic public administrations of Members. It is suggested that balancing of trade interest and other public interests such as environment or public health should not be conducted merely in a manner of establishing joint inspection mechanisms. Instead, custom offices under the TFA should be allowed to consult with the relevant public authority regarding the legality of releasing suspicious goods under the domestic law, if no risks are found within the short period of time envisaged by the TFA.

As mentioned earlier, the adoption of a risk assessment system is considered a vital measure to speed up custom procedure regarding clearance and release of goods. In addition, the AO certified system could also reduce physical inspection frequency and time, and thus speed up import of goods from the AO certified traders. The main purpose of the TFA is to reduce transaction costs through a streamlined and speedy custom procedure. However, speedy and risk-based border inspection might even undermine some of the public administration's legal authority to prevent harmful substances and disease-prone foodstuffs accessing into domestic markets. A certain custom ruling for seizure or detention of

suspicious goods for further inspection or sampling either from initial inspection finding or by request from certain public administrations can be done in accordance with the related domestic law. In such a case, it may be challenged by traders seeking an administrative remedy or compensation due to different perceptions of risks adopted by the TFA and domestic law. The inconsistency between the perception of risk-based decisions between the TFA and domestic law or regulation could result in a reluctance of customs offices to notify public administrations for further inspection of suspicious goods. It may also result in a reluctance to issue detention orders solely by the request from public authorities responsible for environmental protection or public health. Some domestic laws, and even the SPS Agreement, under some circumstances, allow precautionary actions to be taken if there is a certain degree of evidence showing the potential harmful effects to the environment or human health as a result of importing certain goods in questions.⁴²The TFA, on the other hand, does not clearly mandate custom offices to seize or to detain suspicious goods if there is no sufficient evidence proving the actual risks posed by the goods in question. In response to this potential conflict of interest issue, the TFA should be amended to authorise Members to sustain existing domestic law incorporating the concept of the precautionary principle and any precautionary custom ruling based on domestic law shall not be treated as a violation of the TFA *per se*. Meanwhile, the Commission on TF should also start complying with Multilateral Environment Agreements (MEAs) to identify potential inconsistency of MEA obligations and certain provisions contained in the TFA. For instance, the Basel Convention requires a contracting party to comply with Prior-Informed Consent obligations. Prior-Informed Consent requires any proposed international movement of hazardous waste, including a trade for recycling, to notify and obtain approval prior to the shipment from relevant government authorities of exporting,

⁴² See, e.g., the United States Food Safety Moderation Act, authorises FDA to impose administrative detention for suspicious foods presenting harmful effects to human and animal health. See 21 U.S.C. §334 (b) states, “[i]f the officer or qualified employee has credible evidence or information indicating that such article presents a threat of serious adverse health consequences or death to humans or animals. “Precautionary Principle is originated develop from international environmental law, it has been adopted in several international environmental documents and had been incorporated in domestic legislation justifying precautionary actions imposed by government administrations against potentially harmful substances or human activities in the face of scientific uncertainty concerning the estimation of risks. The principle is invoked to authorise government agencies to impose precautionary measures under some circumstances required by law to prevent potential harms resulted from certain substances or human activities. See generally, INTERPRETING PRECAUTIONARY PRINCIPLE, (Timothy O’Riordan & James Cameron eds., 2009); Noah Sach, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 (4)UNIV. ILLINOIS L. REV.1285–338 (2011).

importing, and transit countries.⁴³The TFA, on the other hand, requires Members to establish speedy and risk-based screening custom procedure and relatively lose control on the transit of goods. There is an increased risk for unreported hazardous wastes mixing up in imported waste for recycling that could sneak into domestic markets due to speedy and simplified customs procedure particular to transit countries. Therefore, it is suggested that the Commission on TF shall consult with the MEAs Secretariat concerned with trade in goods such as the Basel Convention and Convention on Biological Diversity to explore potential conflicts and solutions to address the issue. In short, the Commission on TF should work closely with Members and MEAs to identify potential conflicts while implementing the TFA. It should also further establish several *ad-hoc* Working Groups to discuss these issues, develop detailed implementation guideline, and share case studies of successful establishment coordinated mechanism aiming at reconciling the inconsistency among the TFA, MEAs, and domestic legislations safeguarding the environmental quality and public health.

The Development of Trade Facilitation—The Way Forward: TF in Services

The full implementation of the TFA relies on full cooperative progress accomplished by all committed Members and thus strong consensus shall be further consolidated. The solid consensus for all Members willing to pursue TF lies in the fact that all Members should be assured that the TF in goods is not an ending story and TF would expand to other aspects of trade including trade in services and even foreign investment in light of future trade negotiations. Although the TFA has been successfully concluded, suggestions provided by some Members are still worth noting as a way to follow up the development in the post-Bali era. Thanks to the fast growth of the service sectors such as electronic commerce industries, some developing country Members such as China, India and other Southeast Asian countries have boosted a major economic growth in the past decade.⁴⁴ In this regard, these Member countries have called for streamlining custom procedure and providing duty reduction or exemption scheme for e-commerce and digital trade using personal or postal shipment to delivery of goods. The issue, however, has not been specifically addressed in the provisions contained in the TFA.

⁴³ See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 6, Mar. 22, 1989, 28 ILM 657 (1989), 1673 UNTS 126

⁴⁴ The fastest growing E-Commerce companies in Asia such as Alibaba, Taobao, Flipkart, Snapdeal, Lazada are based and operated in China, India, and Southeast Asia countries. See Sandeep Thakur, *Top 10 e-commerce business in Asia*, TECH IN ASIA (Dec. 8, 2018) <https://www.techinasia.com/talk/top-10-ecommerce-businesses-asia-startups-learn>.

India, for instance, has promoted the idea of removing barriers to service trade in order to access key markets for years. Recognising the importance of global trade in services, India believes that in addition to trade facilitation in goods, it should also be promoted in the context of services. India has thus proposed a draft of Trade Facilitation Agreement for Services (TFS) which aims at reducing transaction costs and removing unnecessary and discriminatory regulatory and administrative obligations to trade suppliers and services professionals, and it has been discussed by the Working Party on Domestic Regulation at the WTO.⁴⁵ Apart from India, several other Members have also proposed the simplification of approval processes for the licensing and qualification requirements of services suppliers adopted by some Members' domestic regulation in services.⁴⁶ The proposal has called for the use of a single window, electronic submission system, and ensuring reasonable application fees. Some Members, however, have shown their scepticism concerning the trade benefits for all Members and with respect to adverse implications on members' domestic regulations relating to cross-border health insurance, immigration, and social security measures for implementing TFS commitments.⁴⁷ China, India, and other Southeast Asian Members are in critical positions for full implementation of the TFA since they are fast-growing and major contributors to global GDP growth.⁴⁸ Recognising the important role of these

⁴⁵ India's proposal for Trade Facilitation Agreement for Services (TFS) provides the suggestions for removing high duties or fees, streamlining procedures, and eliminating bottlenecks for complex requirements for setting up business, licensing and movement of persons. The proposed TFS also calls for enhancing cooperation among authorities, facilitating cross-border data flows, and allowing Members to comment on measures before entry into force. WTO news, Members debate new proposals to ease global flow of services, available at, https://www.wto.org/english/news_e/news16_e/serv_05oct16_e.htm#_ftn2h. For more detailed discussion of India's Proposal for TFS, see generally, Aveek Chakravarty, *India's Proposal for Trade Facilitation of Services: A Breath of Fresh Air for Global Trade*, THE CENTRE FOR TRADE AND ECONOMIC INTEGRATION WORKINGPAPER, https://repository.graduateinstitute.ch/record/295737/files/CTEI-2017-10_Chakravarty.pdf.

⁴⁶ The proposal was submitted by Australia, Chile, Colombia, the European Union, Mexico, Norway, Republic of Korea, and Taiwan. *See Id.*

⁴⁷ *See generally*, Working Party on Domestic Regulation, Report of the Meeting held on 25 November 2016: Note by the Secretariat (22 December 2016) S/WPDR/M/69. Available at, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240338,240216,232957,135183,128681,120469,113676,23660,103512,79089&CurrentCatalogueIdIndex=1&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last visited Mar.5, 2019).

⁴⁸ In accordance to Bloomberg's recent report, China's share of global GDP growth is predicted to rise from 27.2 percent to 28.4 while India's share is predicted to rise from 12.9 percent to 15.9 percent by the year of 2023. *See Alexandre Tanzi&Wei Lu, Where Will Global*

Members to global trade in the next decade, it is suggested that the WTO should be more responsive to persuade Members to seriously consider the set agenda for negotiations to develop the proposed TF agreement for trade in services. The full implementation requires full cooperation from these major contributors to global trade. In response to their proposal to trade in services, their full support for harmonising and streamlining custom procedure in return could be expected.

V. CONCLUSION

The TFA is the first global trade agreement since the creation of the WTO, and two-thirds of the Members have already endorsed the Agreement on February 22, 2017, indicating a sign of hope for all Members that they are back on track for the ongoing Doha Round of trade negotiations. Indeed, promoting free and fair trade in the multilateral trading system is arguably a driving force to boost global trade and improve overall living standards in many Member countries. In this regard, the progress for all Members in implementing TFA commitments and global trade benefits may produce a symbolic and leading model for future trade negotiations concerning other trade liberalisation aspects in the context of the multilateral trading system. Although it is vital to achieve the objective of full implementation of the TFA that leads to harmonising and streamlining customs procedure for trade in goods from all committed Members, there are still some challenges and concerns coming from some developing country Members and LDCs. This is due to the uncertain trade environment involving the resurrection of protectionism occurring recently, lack of strong incentives to speed up the implementation process, and scepticism about gaining sufficient assistance to capacity building to implement their commitments to the TFA. In order to regain the confidence of reaching the promise of the multilateral trading system, the WTO should play a more active role to assure sustainable and sufficient support from various sources for capacity building for developing country Members and LDCs. Moreover, TFA implementation requires full support from citizens of all Members. It is thus important for the WTO Commission on TF to consult with National Commissions on TF of Members, NGOs, and related international organisations and MEAs to identify any potential conflicts and finding solutions to prevent increasing risks to public interests safeguarding while implementing TFA requirements in full-swing. The whole world is watching the progress and ultimate outcome of TFA implementation while the multilateral trading system is at a turning point. The WTO and those developed country Members who wish to gain the fruits of trade benefits as a result of full implementation of the TFA, should

work closely in assisting the capacity building for developing country Members and LDCs, and show patient and tangible actions to meet their expectations from the multilateral trading system. There is still some time to act, and we must act now, for otherwise the TFA would not stand to face another blow as it did all the way back in the Doha Round.