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GREAT EXPECTATIONS: HOW THE WORLD TRADE ORGANIZATION'S TRADE FACILITATION AGREEMENT IMPACTS TRADE AND TRADE COOPERATION

NORA NEUFELD*

Increasingly recognized as delivering a wide range of economic benefits, there are growing indications that the Trade Facilitation Agreement (TFA/the Agreement) also impacts trade cooperation and commerce in a broader sense. As governments progress with the implementation of the Accord, one finds it to change the way in which countries approach cooperation and negotiations at the multilateral level. By pursuing a new approach—resting on the premise that 'free trade', on its own, is not enough and that global trade also requires global trade cooperation to function effectively—the Agreement has already transformed the policy debate and spawned a new generation of 'facilitating' initiatives. The article reviews the state of the TFA's implementation process and analyses whether initial expectations have been met. It also looks at the bigger picture and examines indications of new approaches, such as a paradigm shift in the focus of trade agreements and altered mindsets about how trade cooperation should advance in the future.

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I. I. INTRODUCTION

Long considered a side issue and likened to the ‘plumbing of international trade’, trade facilitation is increasingly being recognised as key to unlocking a country’s economic potential. With traditional barriers having come down in many parts of the world, attention increasingly shifted to reducing the remaining barriers on the non-tariff side. This led to the launch of negotiations in the WTO, resulting in a multilateral Agreement. The many implications of this new Agreement will be analysed in this Issue, which I have the privilege to be the guest editor for.

When the WTO’s Trade Facilitation Agreement entered into force on February 22, 2017, the International Chamber of Commerce hailed it as a “watershed moment for global trade”.¹ Similar reactions came from other key players in the commerce world.² As the first new multilateral trade accord in twenty years—and perhaps most significant rule-making achievement of the WTO—it was warmly welcomed as an important impetus for facilitation efforts and trade reform overall.

Two years on, the contours of an even broader impact begin to emerge. As WTO Members advance with the implementation of the Agreement, there are growing signs that it has helped change the way countries approach trade cooperation, trade negotiations and perhaps even the world trading system itself.

There were considerable expectations from the start. As were the voices of scepticism. Significant work was required to get the Agreement off the ground, and much remains to be done to ensure its full implementation. With the TFA now in force for over two years, this seems an opportune moment to attempt a first evaluation of whether those expectations are being met. As most of the predicted benefits are based on the full application of the Accord, this analysis will focus on

¹ *ICC Hails Entry Into Force of WTO Trade Facilitation Agreement*, INT’L CHAMBER OF COMMERCE (Feb. 22, 2017), <https://iccwbo.org/media-wall/news-speeches/icc-hails-entry-force-wto-trade-facilitation-agreement-watershed-moment-world-trade/> (Statement made by ICC chairman Sunil Bharti Mittal). He went on to note that “[b]y cutting unnecessary red-tape at borders, the TFA will have a transformational effect on the ability of entrepreneurs in developing countries to access global markets”.

² For an overview of reactions, see Finbarr Bermingham, *WTO Passes Historic Trillion-Dollar Trade Facilitation Pact*, GLOBAL TRADE REV. (Feb. 22, 2017), <https://www.gtreview.com/news/global/wto-passes-historic-trillion-dollar-trade-facilitation-pact/>.

an assessment of the implementation progress as reflected in the ratification advancements and commitments made by WTO Members in their notifications. A look will also be taken at the broader implications beyond the narrow sphere of the TFA.

II. II. A NEW APPROACH

Trade agreements in the past were often about getting governments out of the way of trade by steadily reducing tariffs and other barriers. The TFA, on the other hand, is largely about governments working together to encourage and 'facilitate' trade—by streamlining processes, sharing information, and co-ordinating regulations. It rests on the premise that 'free trade' on its own is not enough—especially in an age of integrated production networks and global value chains. Global trade also requires global trade cooperation to function effectively—a complex, seamless, and mutually reinforcing network of enabling policies, information flows, and financial, logistical, and transport support.

More importantly, these 'process'—as opposed to 'policy'—reforms can deliver enormous and previously untapped gains. A WTO study³ forecasts that the TFA, fully implemented, will be equivalent to eliminating all remaining global tariffs.

By focusing on cutting red-tape, streamlining customs procedures, and speeding up trans-border shipments with flexible approaches to implementation, the TFA represents a preliminary, even rudimentary, response to much broader 'facilitation' challenges. But in doing so, it has already transformed the policy debate and spawned a whole new generation of 'facilitating' initiatives from calls for a 'TFA-plus' to proposals for services,⁴ investment,⁵ and even e-commerce facilitation agreements⁶.

III.

III. AGAINST THE ODDS

³ Marc Auboin, Marc Bacchetta, Cosimo Beverelli, John Hancock, Christian Henn, Alexander Keck, Jose-Antonio Monteiro, Coleman Nee, Simon Neumueller, Roberta Piermartini, Robert Teh & Nora Neufeld, *World Trade Report 2015: Speeding Up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement*, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/world_trade_report15_e.pdf (last visited Nov. 6, 2019).

⁴ World Trade Organization, Joint Ministerial Statement on Services Domestic Regulation, WTO Doc. WT/MIN(17)/61.

⁵ World Trade Organization, Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/MIN(17)/59.

⁶ World Trade Organization, Joint Ministerial Statement on Electric Commerce, WTO Doc. WT/MIN(17)/60.

The growing prominence of trade facilitation—and its pervasive influence on trade policymaking—are all the more striking given that this issue was virtually invisible two decades ago. When a handful of proponents first called for exploratory work on trade facilitation at the WTO's 1996 Singapore Ministerial Conference,⁷ most Members treated the idea with scepticism at best and easily ranked it lowest on their long list of multilateral trade priorities, certainly far behind marquee issues like industrial tariffs, agricultural subsidies, and services liberalisation. These reservations continued and even after seven long years of discussion, key Members remained unconvinced of the need to negotiate a WTO accord. India, for instance, believed that trade facilitation measures “were best left to Members for autonomous implementation . . .”⁸ and that “developing countries . . . would require a flexible approach when harmonizing their national systems with international guidelines, as opposed to a set of binding obligations.”⁹ Pakistan held a similar view, calling for the adoption of WCO recommendations as non-binding and stating that “[o]ne should concentrate on technical assistance and capacity building and *then* move towards binding rules, rather than the other way around.”¹⁰ Sceptical views were also put forward by Brazil, who considered herself “unconvinced of the need for binding rules in the area of trade facilitation.”¹¹ Rather than engage in rule-making, Brazil felt that, “the most productive way forward would be to work towards some non-binding guidelines.”¹²

Even after opposition softened over the course of subsequent months and WTO Members warmed to the prospect of Trade Facilitation negotiations, many sought to limit their terms. A proposal by over hundred countries (India, Indonesia, Jamaica, Malaysia, the Philippines, Trinidad and Tobago and the entire African and LDC Group), submitted only days before the decision on a launch of negotiations was to be taken, called for significant limitations.¹³ Emphasis was placed on

⁷ World Trade Organization, Ministerial Declaration of 13 December 1996, WTO Doc. WT/MIN(96)/DEC/WTO (1996), 36 ILM 218 (1997), https://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf.

⁸ Council for Trade in Goods, Minutes of the Meeting, G/C/M/70, ¶ 4.26 (June 12–13, 2003), https://www.trade.gov.tw/App_Ashx/File.ashx?FilePath=../Files/TradeOldFile/00/22/99/GCM70.doc.

⁹ *Id.*

¹⁰ *Id.*, ¶ 4.29.

¹¹ *Id.*, ¶ 4.6.

¹² *Id.*, ¶ 4.6.

¹³ World Trade Organization, Communication to Improve Annex D of Document Job(04)/96, submitted by India, Indonesia, Jamaica, Malaysia, Nigeria (on behalf of the

identifying needs and priorities of developing and least-developed countries as well as on assessing implementation costs. Extent and timing of entering into commitments were requested to relate to the respective capacities of those Members, with LDCs only being required to commit “to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities”.¹⁴The proponents of the proposal further requested the provision of financial and technical assistance, including support for infrastructure development, to be “an a priori condition for developing and least-developed countries to implement the results of the negotiations”.¹⁵They also questioned the applicability of dispute settlement procedures—a cornerstone of a rules—based trading system and a key reason why advocates had sought a negotiating mandate in the first place.¹⁶At India’s initiative, the group further wished to link the outcome of work on facilitation to progress on rules of origin, requesting that the results of TF negotiations “would not come into effect earlier than the dates of harmonised non-preferential rules of origin”.¹⁷

Many of the initial reservations towards rule-making were gradually overcome, but scepticism remained. When finally adopting a negotiating mandate after more than eight years of debate, Members could not even agree on the envisaged end product. The terms were deliberately left open, stating that negotiations were being launched “without prejudice to the possible format of the final result . . .and allow[ing] consideration of various forms of outcomes”.¹⁸

The advocates of a Trade Facilitation Agreement sought to address lingering concerns by pointing to the many benefits they expected to arise as a result. Korea spoke for many when arguing that “[t]he launch of negotiations on trade facilitation promises not just significant economic gains, but greater relevance of the WTO in global trade as well”.¹⁹It was also argued that domestic trade

African Group), the Philippines, Tanzania (on behalf of the LDC Group), and Trinidad and Tobago, JOB(04)/101, 23 July 2004.

¹⁴*Id.*, ¶6.

¹⁵*Id.*, ¶ 2.

¹⁶*Id.*, ¶10.

¹⁷*Id.*, ¶12.

¹⁸World Trade Organization, General Council Decision of Aug. 1, 2004 on Doha Work Programme, WTO Doc. WT/L/579, [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42383,81935&CurrentCatalogueIdIndex=1&FullTextSearch=\[hereinafter Doha Work Programme\]](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=42383,81935&CurrentCatalogueIdIndex=1&FullTextSearch=[hereinafter Doha Work Programme]).

¹⁹Council for Trade in Goods, Minutes of the Meeting, WT/GC/M/87, ¶ 161 (July 27, Aug. 1, 2003), https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDdocuments/44282/Q/WT/GC/M87.pdf.

facilitation reforms would be accelerated and reinforced if they moved in a concerted and coordinated direction and if they were firmly locked into a binding international agreement (thus shielding them from possible dilution or backsliding due to changing domestic priorities).²⁰ Another frequently invoked benefit is related to the enforceability of WTO rules, distinguishing them from other legal instruments.²¹ All of those factors were said to be of particular benefit to small and medium-sized enterprises (SMEs).²²

Over time, more and more Members became convinced that the predicted gains from a Trade Facilitation agreement outweigh the potential costs, paving the way for the emergence of a new set of rules.

IV. IV. REALITY CHECK

A. Ratification

An analysis of the ratification process²³ is a good starting point for an evaluation of whether expectations have been met. It serves as an important indicator of progress with the implementation of the TFA and reflects domestic priorities. Feedback can be gathered from the entire range of the WTO membership as it applies to each of its 164 parties.

The modalities were set at the Bali Ministerial Conference, which did not only conclude the Trade Facilitation negotiations but also established a road map for the resulting Agreement to become effective. Ministers decided to integrate it into

²⁰See, e.g., WTO Secretariat, *Factual Summary of the Informal Meetings of the Council for Trade in Goods in September and December 1998 and April 1999*, WTO DOC. G/C/W/153, ¶ 25 (May 12, 1999), <http://docsonline.wto.org/imrd/directdoc.asp?DDEDocuments/t/g/c/w153.doc>.

²¹*Id.*

²²The WTO Secretariat's summary of work in the relevant WTO body during that period recorded the argument that "an improved administrative framework for trade facilitation would benefit especially small and medium-sized enterprises, as these were usually at a disadvantage in coping with non-transparent trade procedures and would as a result often opt to stick to their traditional markets." *Id.*, ¶ 8.

²³Technically speaking, it is not the Trade Facilitation Agreement itself that needs to be ratified but the instrument used to insert it into the pre-existing legal architecture. To achieve that purpose, the overarching WTO Agreement was amended by means of a protocol, incorporating the TFA into Annex A1 and adding it to the list of so-called 'covered' Agreements.

the existing legal architecture by inserting it into the list of treaties covered by the overarching Marrakesh Agreement²⁴ (which had to be amended to that end). In doing so, they agreed on a ratification threshold of two thirds of WTO Members for the Trade Facilitation Agreement to enter into force.²⁵In concrete numbers, this amounted to acceptance by 110 Members.

Requirements for reaching that stage differ as they are determined by domestic laws. In most countries they involve the legislature, often requiring its approval. In others, ratification is an exclusive competence of the executive. Some call for a combination of both steps or foresee a slightly different set of requirements. In all cases, the process is domestic in nature, governed by national prerequisites. Priorities were no longer set in Geneva and did not involve a multilateral act, which made advances in ratification largely dependent on individual ground realities.

Hong Kong, China was the first to cross the finishing line. It deposited a valid acceptance instrument little more than a week after the process had been launched.²⁶Several other Members followed in quick succession, including many from the developing world (see Table 1).

Table 1: First ten WTO Members to have deposited a valid acceptance instrument

	WTO Member	Ratification date
1	Hong Kong, China	December 8, 2014
2	Singapore	January 8, 2015
3	United States	January 23, 2015
4	Mauritius	March 5, 2015
5	Malaysia	May 26, 2015
6	Japan	June 1, 2015
7	Australia	June 9, 2015
8	Botswana	June 18, 2015
9	Trinidad and Tobago	July 27, 2015
10	Korea	July 30, 2015

²⁴Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S.154 [hereinafter Marrakesh Agreement].

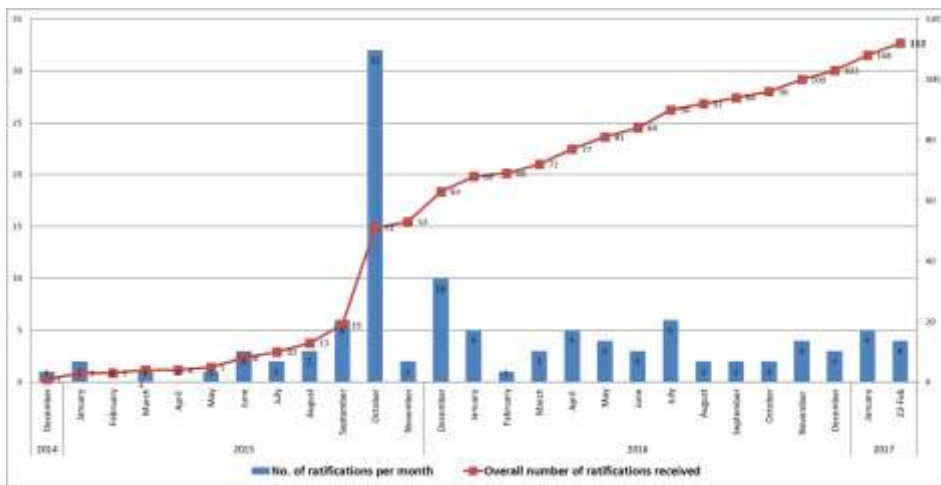
²⁵*Id.*,art. X:3.

²⁶A preceding step and legal requirement was the adoption of the so-called ‘Amendment Protocol’, which set out the related terms. General Council Decision of Nov. 27, 2014 on Protocol amending the Marrakesh Agreement Establishing the World Trade Organization, WORLD TRADE ORGANIZATION, WTO Doc. WT/L/940 [hereinafter Amendment Protocol].

Source: Trade Facilitation Agreement Database²⁷

A look at the ratification timeline shows a relatively steady inflow of deposits during the years that followed. The only considerable peak occurred in October 2015 when the European Union submitted the documentation for itself and its twenty eight Member States.²⁸ A smaller spike was recorded at the time of the Nairobi Ministerial Conference—which several Members considered an ideal time to convey their acceptance. India concluded its process on April 22, 2016.

Figure 1: Timeline of deposits of ratification instruments²⁹



Source: Trade Facilitation Agreement Database

²⁷Ratifications, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/ratifications> (last visited Apr. 17, 2019) [hereinafter Ratifications].

²⁸The particular situation of the European Union, who is a WTO Member in its own right, in addition to the individual membership of the twenty eight states representing the Union, required specific terms for reflecting the act. Amendment Protocol, *supra* note 26, n.1, set out that “[f]or the purposes of calculation of acceptances under Article X.3 of the WTO Agreement, an instrument of acceptance by the European Union for itself and in respect of its Member States shall be counted as acceptance by a number of Members equal to the number of Member States of the European Union which are Members to the WTO”.

²⁹The dates reflect the day the WTO Depository received a valid instrument accepting the Amendment Protocol.

The critical threshold was reached on February 22, 2017 when a number of developing countries (Rwanda, Oman, Jordan and Chad) deposited a valid acceptance instrument, raising the total number of acceptances to 112.³⁰

It supported the view that a deadline for ratifications was not required, and could have even been counterproductive, for seeing the Trade Facilitation Agreement enter into force without undue delay. This had not always been the approach of first choice. An end date had initially been envisaged by Ministers at the 2013 Bali Ministerial Conference,³¹ but was subsequently dropped when specifying the terms of the acceptance protocol. Experiences with a similar exercise—the ratification of the Protocol Amending the TRIPS Agreement,³² where deadlines had been set and missed for over a decade³³—had demonstrated that the existence of an end date does not necessarily produce an accelerative effect. There were also concerns about extensions, each requiring a consensus decision, creating risks for hostage-taking and delays.

Seeing the Trade Facilitation Agreement receive the required number of ratifications in little more than two years reaffirmed the chosen approach. A comparison with processes involving other multilateral treaties with a similar membership attested a relative swiftness of the exercise. The WCO's Revised Kyoto Convention,³⁴ for instance, had required almost seven years to reach a much lower ratification threshold (forty of 170 Members³⁵ versus 110 out of 164).

What was even more encouraging was the continued inflow of acceptance instruments after the Agreement had entered into force. Within a year, their number had grown to almost 130. When the TFA celebrated its second

³⁰Ratifications, *supra* note 27.

³¹World Trade Organization, Ministerial Decision of 7 December 2013 on Agreement on Trade Facilitation, WTO Doc. WT/MIN(13)/36WT/L/911 [hereinafter Bali Ministerial Conference, 2013], had envisaged that the Protocol would be open for acceptance until July 31, 2015. Members, however, subsequently decided not to include a deadline when drawing up the terms of the Protocol. The text agreed in November 2014 merely states that “[t]his Protocol is hereby open for acceptance by Members”. Amendment Protocol, *supra* note 26.

³²World Trade Organization, General Council Decision of 8 December, 2005 on Amendment of TRIPS Agreement, WTO Doc. WT/L/641.

³³Adopted in December 2005, it took until January 2017 for the Protocol Amending the TRIPS Agreement to enter into force.

³⁴International Convention on the Simplification and Harmonization of Customs Procedures, June 26, 1999, 2370 U.N.T.S. 27.

³⁵The WCO's membership subsequently increased further and currently stands at 182.

anniversary, over 140 instruments had been received, representing 86% of the WTO's membership.³⁶

This was, and continues to be, of particular significance when considering that ratification is an indispensable step for the TFA to take effect for an individual Member, even after the Agreement as such had already entered into force.³⁷ The decision for this approach had been preceded by intense discussions and was accompanied by concerns on the part of some delegations. A first proposal submitted by Norway³⁸ a few months before the Bali Ministerial Conference suggested language to reduce the prospect, or at least the duration, of non-simultaneous application to keep late ratifiers from being the beneficiaries of their partners' earlier commitments.³⁹ It ultimately failed to generate the required consensus, but concerns about free riding remained. They can, however, now be put to rest when looking at the continuous stream of ratifications with no signs of any 'tactical' delays.

This is not to suggest that the ratification process is not without challenges or that it does not take some Members a significant amount of time. Difficulties are in fact frequent, affecting over a third of all cases (to varying degrees). Some cause considerable delays. There are, however, no real indications of such obstacles originating from obstructionist intent or bad faith. Rather, they often result from practical challenges associated with domestic ground realities that have nothing to do with the Trade Facilitation Agreement per se.

³⁶Ratifications, *supra* note 27.

³⁷According to the Marrakesh Agreement, *supra* note 24 Art. X:3, which the Protocol invokes, "[a]mendments . . . shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it" (emphasis added).

³⁸Negotiating Group on Trade Facilitation, *Communication from Norway to the NGTF: Proposal on How to Tackle Institutional Issues Regarding a WTO Agreement on Trade Facilitation (TFA), Including Preamble, Scope, Institutional and Final Provisions based on 17th Revision of the Draft Consolidated Negotiating Text of the Draft Agreement on Trade Facilitation*, WTO Doc. TN/TF/W/194 (Oct. 11, 2013).

³⁹The objective was to avoid a situation where Members with a complete ratification record would have to apply the TFA on an MFN basis when the Agreement had not taken effect for those that had not yet concluded the process. To achieve that goal, Norway had proposed to invoke language from the Marrakesh Agreement which states that "[t]he Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference." Marrakesh Agreement, *supra* note 24, Art. X:3.

It should not be forgotten that ratification involves a number of parameters in many countries whose complexity—or interplay—can lead to delays (such as a right of parliamentarians to introduce international treaties for ratification, constitutions maintaining specific regimes for commerce treaties or treaties relating to international organisations, mandatory prior or posteriori reviews by a state council, a compulsory constitutional review by a constitutional court or council, a mandatory review of a parliamentary committee, or a requirement of an explanatory memorandum to the bill or the requirement of presidential assent). The fact that ratification involves several documents (Agreement and Amendment Protocol) and that there are different versions of the TFA—the text agreed by Ministers at the 2013 Bali Ministerial⁴⁰ and the final text adopted a few months later following a legal review⁴¹ did not facilitate the task. Many of the submitted instruments referenced the wrong document, throwing the process back to square one.

In addition, several Members had to battle challenges at a broader level, ranging from political turmoil—or even armed conflict—to constitutional overhaul or natural disasters. Many of the remaining twenty two Members that are yet to complete their ratification process have been affected by at least one of those circumstances (see Table 2).

Table 2: WTO Members that are yet to complete the ratification process (as of March 28, 2019)

Number	WTO Member
1	Angola
2	Burundi
3	Cabo Verde
4	Colombia
5	Democratic Republic of Congo
6	Egypt
7	Guinea
8	Guinea-Bissau
9	Haiti
10	Liberia
11	Maldives
12	Mauritania
13	Morocco
14	Solomon Islands
15	Surinam

⁴⁰Bali Ministerial Conference, 2013, *supra* note 31.

⁴¹Amendment Protocol, *supra* note 26.

16	Tajikistan
17	Tanzania
18	Tonga
19	Tunisia
20	Vanuatu
21	Venezuela
22	Yemen

Source: Trade Facilitation Agreement Database⁴²

Against this background, it does not seem unreasonable to interpret current ratification numbers as a sign of commitment to the TFA. With close to 90% of all WTO Members now having completed their ratification process, several more being in the final stages and no Member indicating unwillingness to follow suit, there are clear signs of ongoing willingness to see the Agreement's reforms become a reality.

B. Notifications

Notifications are another primary source of information on implementation progress, especially with respect to commitment pledges (often referred to as "category ABC notifications" or "implementation notifications"). They also indicate assistance needs and domestic priorities.

Unlike information from the ratification process, notification data is not received from all WTO Members as some are not entitled to engage in the exercise. This is particularly the case for the category notifications which can only be submitted by developing and least-developed countries. They are nevertheless of considerable importance in setting out those Members' implementation plans. Collectively, these notifications portray a global picture of when WTO Members intend to put the TFA into practice, how much emphasis is placed on seeing the reforms applied in their countries and what they consider to be a priority.

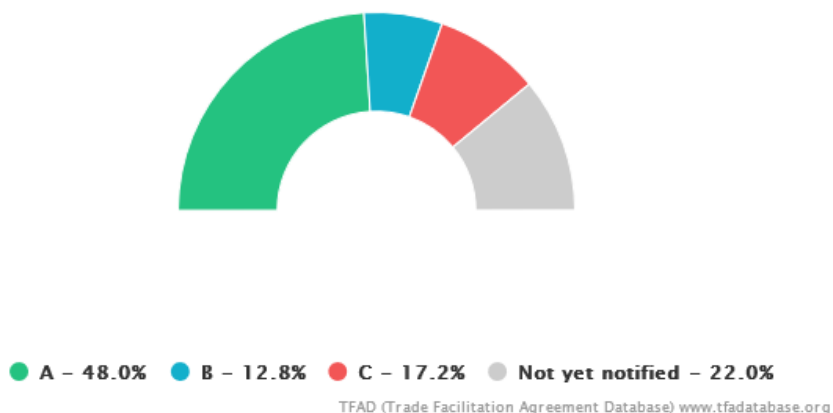
Measures that can be immediately applied are designated as falling under category A. In the case of need for additional time, and time alone, the measure is placed in category B. Should a Member further require capacity building support, it can notify a provision as representing a category C commitment and seek related help. The TFA does not provide for any caps in this context, i.e., there is no limit to how many, or how few, TFA segments are notified under each of the three categories.

⁴²Ratifications, *supra* note 27.

Most Members made use of all three categories when submitting their implementation notifications and designated almost half (48%) of their notified measures⁴³as falling under category A (see Figure 2). Category B designations were significantly lower (13%), as was the share of measures put under category C (17%).

Figure2: Share of categories A,B and C⁴⁴

Based on % of all notifiable items



Individual approaches vary. Some Members designed all notifiable items as belonging to category A(Chile, Korea, Hong Kong, China, Chinese Taipei, Israel, Mexico, Saudi Arabia, Singapore, and Turkey). Others used two of the three categories (usually A and B), refraining from designating any measure under category C (Argentina, Brazil, Brunei Darussalam, China, Colombia, India,

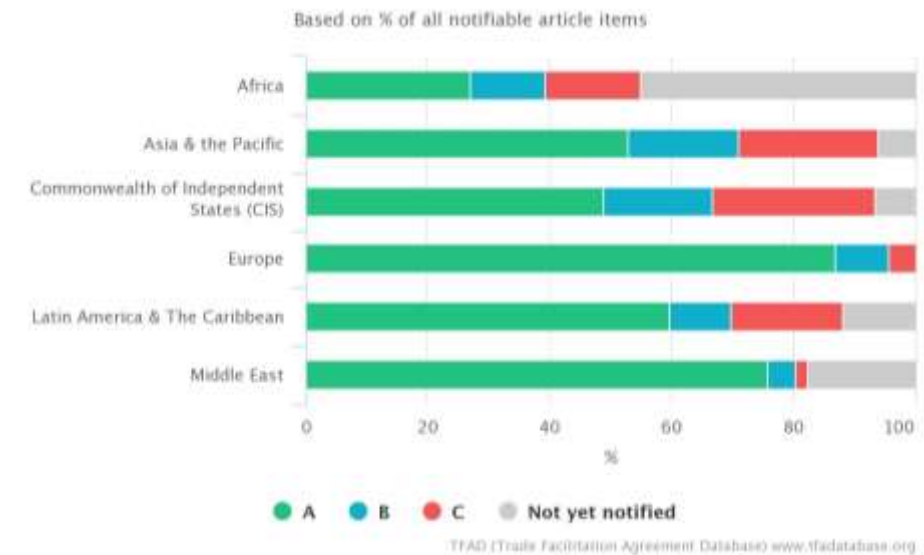
⁴³22% are yet to be notified.

⁴⁴Notifications, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/notifications/global-analysis> (last visited Apr. 17, 2019).

Indonesia, Macao, China, Oman, South Africa, Thailand, and Uruguay). A few Members (Costa Rica and Georgia) further used a combination of categories A and C.

There are also regional differences, often reflecting differences in levels of development. Areas with higher shares of least-developed countries (such as Africa) show lower category A rates, whereas regions with low LDC ratios and higher GDP rates (such as the Middle East) tend to have larger category A shares.⁴⁵(See Figure 3).

Figure 3: Share of categories A, B and C by region⁴⁶



This becomes more evident when analysing category shares by groups of development (developing countries versus LDCs). LDCs tend to designate less than a quarter of all provisions as representing category A shares commitments (22% on average) compared to almost 60% (58% in the case of their developing partners). Over a quarter of all items (26%) are notified under category C (compared to only 14% in the case of developing countries). LDCs also have slightly higher category B shares—15% versus 12%. (See Figure 4).

⁴⁵Numbers for Europe are of limited value due to the low number of eligible Members in that region. Only four countries (Albania, Montenegro, North Macedonia and Turkey) have developing status and are therefore entitled to present a category notification.

⁴⁶Notifications, *supra* note 44.

Figure 4: share of categories A, B and C by development group⁴⁷



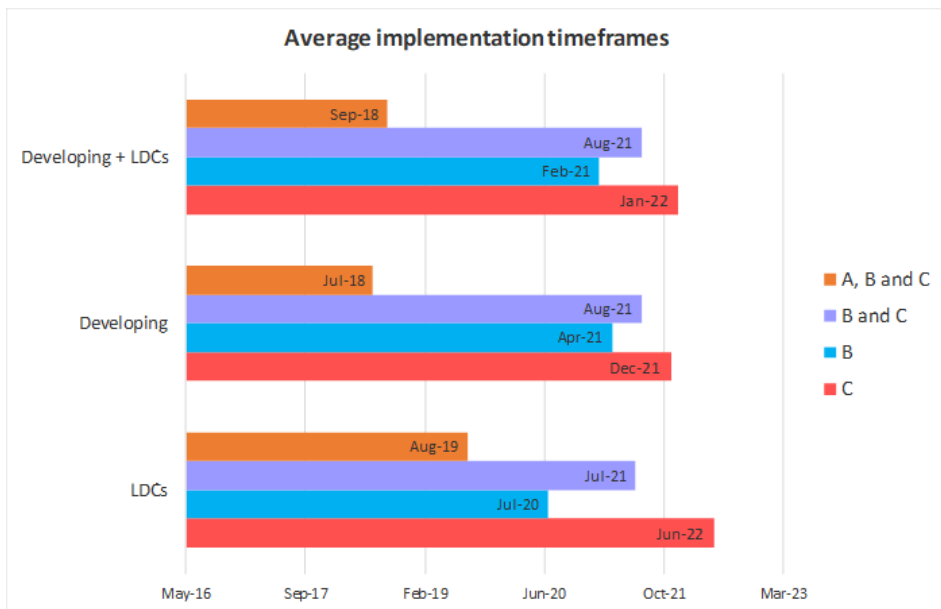
An important indicator of preparedness and priorities is the selected implementation time. The TFA allows developing and least-developed countries to self-determine when they will be able to apply its disciplines.⁴⁸ The fact that this is done without any upper limits was controversially debated during the negotiations and gave rise to considerable concerns. Several Members feared that the absence of caps could lead to extensive transition periods and unreasonable time frames.

⁴⁷Notifications, *supra* note 44.

⁴⁸This right extends to section I of the TFA, which sets out a series of TF reforms over the course of 12 articles.

A look at how Members actually chose to exercise this right in practice should alleviate those fears. An analysis of time frames for ABC commitments (combined) shows averages of around eighteen months. A focus on category B commitments brings average dates up to four years. An additional year was typically requested for category C commitments. No Member made use of the possibility to seek an extension of selected time frames so far.

Figure 5: Average implementation timeframes



Source: Trade Facilitation Agreement Database

Developing and least-developed countries are equally allowed to identify capacity-building that they consider necessary for the implementation of the TFA. As in the case of the entitlement to self-determine time frames, this had caused worries about such right being used in overly extensive ways.

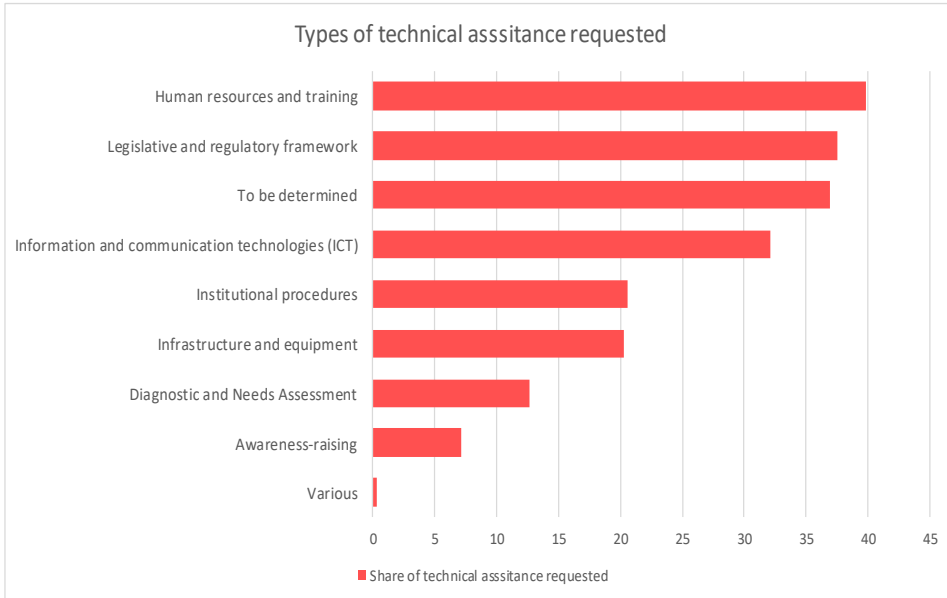
Concerns had especially been voiced with respect to infrastructure support. Divergent positions on entitlements to such assistance had already surfaced before the TFA negotiations even started and required laborious discussions before a compromise could be found. The finally agreed terms reflected a delicate balancing

act.⁴⁹ Questions about entitlement to infrastructure support resurfaced during the final phase of the negotiations when Members sought to define the term “assistance and capacity building support” while setting out the terms of implementation aid. The ultimately adopted terms did not mention infrastructure explicitly but used a formulation that allowed it to be subsumed under the selected broader term.⁵⁰

Given the sensitivities, it seems worth taking a look at the assistance requested so far. An analysis of the identified capacity building needs shows demands for: 1) human resources and training topping the list, 2) support for work on legislative and regulatory matters, 3) aid for information and communication technologies, and 4) institutional procedures. Requests for infrastructure and equipment rank in the lower third of the list, accounting for 20% of all indicated needs. (See Figure 6).

⁴⁹The mandate first stated that “[s]upport and assistance should . . . be provided to help developing and least-developed countries implement the commitments resulting from the negotiations” before adding that this was merely meant to happen “in accordance with their nature and scope”. The mandate then “recognized that negotiations could lead to *certain* commitments whose implementation would require support for infrastructure development on the part of *some Members*” (emphasis added) before going on to say that “[i]n these limited cases, developed-country Members will make every effort to ensure support and assistance directly related to the nature and scope of the commitments in order to allow implementation” and that “in cases where required support and assistance for such infrastructure is not forthcoming, and where a developing or least-developed Member continues to lack the necessary capacity, implementation will not be required”. It then, however, concluded that “it is understood that the commitments by developed countries to provide such support are not open-ended.” Doha Work Programme, *supra* note 18, at Annex D, ¶6.

⁵⁰“For the purposes of this Agreement, ‘assistance and support for capacity building’ may take the form of technical, financial, or any other mutually agreed form of assistance provided”. Agreement on Trade Facilitation n.16, Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, annex, WTO Doc. WT/L/940 [hereinafter TFA].

Figure 6:Type of assistance requested ⁵¹

Source: Trade Facilitation Agreement Database

C. Implementation Commitments Overall

All of the analysed data originates from the WTO's developing membership and does not consider commitments by their developed partners, who are obliged to implement the entire Trade Facilitation Agreement from day one. When adding their engagement into the equation to allow for an overall evaluation of the implementation status, one finds that over 60% (62%) of the TFA is already committed for current application. Assuming that WTO Members honour their obligations, this should also imply that almost two thirds of the disciplines are already put into practice. The actual numbers are likely to be even higher as not all countries have already provided all notifications and everyone is already implementing at least some of the measures, as we know from extensive needs

⁵¹Notifications, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/notifications/category-c> (last visited Apr. 17, 2019).

assessment exercises.⁵² Broken down by group of development, one finds that developing countries have an average commitment rate of 61.5% with LDCs currently standing at 23%. Developed countries are required to already execute all measures in full. (See Figure 7.)

Figure 7: Rate of implementation commitments by group of development ⁵³



An analysis of the most frequently implemented provisions shows that a number of customs-related matters top the list. These include movement of goods intended for import under customs control (article 9), disciplines on pre-shipment inspection (article 10:5), use of customs brokers (article 10:6), detention—a proposal initiated by India (article 5:2), and temporary admission of goods and inward and outward processing (article 10:9).

Figure 8: Top 5 measures with highest implementation rate⁵⁴

⁵²Such exercises have been conducted in almost all WTO Members and took stock of the parts of the TFA that are already applied and those that require more time (and possibly also capacity building support).

⁵³Implementation, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/implementation/commitments-by-grouping> (last visited Apr. 17, 2019).

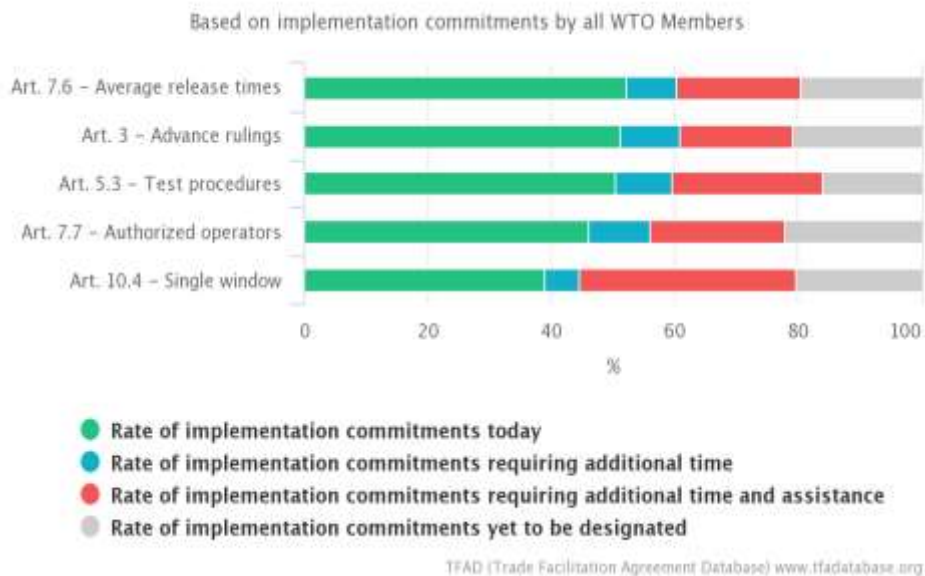
⁵⁴*Id.*



On the bottom side of the commitment spectrum, one finds the following measures: Single Window (article 10:4), authorised operators (article 7:7), test procedures (article 5:3), advance rulings (article 3), and establishment and publication of average release times (article 7:6).

Figure 9: Bottom 5 measures with lowest implementation rate⁵⁵

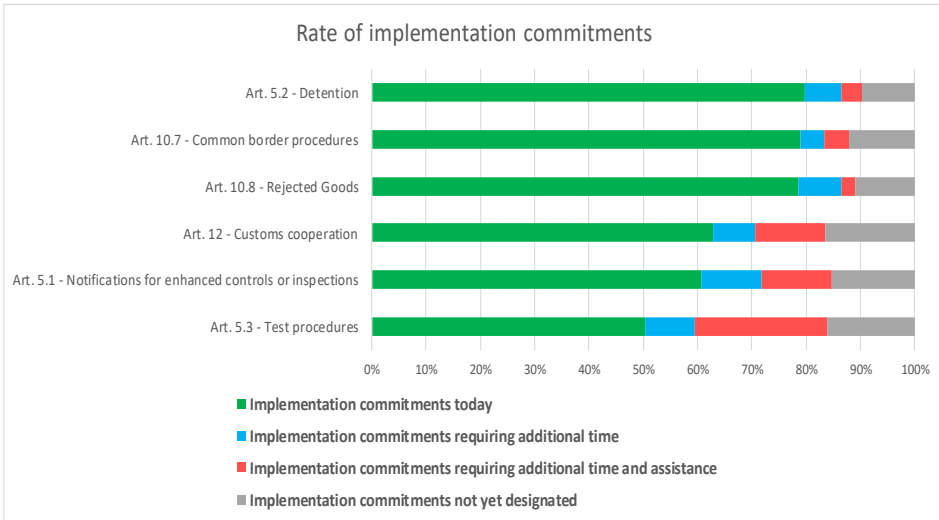
⁵⁵*Id.*



An analysis of measures initiated by India shows considerable implementation rates. Half of them have immediate commitment numbers close to 80%: 79.8% for article 5:2 (detention), 78.9% for article 10:7 (Common Border procedures and Uniform Documentation Requirements), and 78.5% for article 10:8 (rejected goods). Another measure of particular interest to India—article 12 (Customs cooperation)—has a 63% commitment rate. Even measures with relatively lower category A designations show figures above 50% (60.6% for article 5:1:notifications for enhanced controls and 50.3% for article 5:3 test procedures).

Figure 10: Implementation commitments for measures initiated by India⁵⁶

⁵⁶Members, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/members/india> (last visited Apr. 17, 2019).



Source: Trade Facilitation Agreement Database

D. Unfinished Business

Information from the notification process remains incomplete as not all input has been provided. 17% of all implementation commitments are yet to be notified. Eleven Members did not submit any category-related information. Data is especially outstanding on capacity-building needs of LDCs: 80% of them are yet to submit their respective notification. There is also still a considerable amount of pending input on implementation dates.⁵⁷

An even higher share of information remains to be provided on another notification type, relating to transparency. The TFA obliges all Members, irrespective of their levels of development, to present data on four particular articles: 1:4 (publication places and information on enquiry points), 10:4.3 (operation of Single Window), 10:6.2 (use of customs brokers), and 12:2.2 (contact point for customs cooperation).⁵⁸ More than half—on some provisions even two thirds—of all WTO Members have not handed in their respective notifications. There is also outstanding input on the TFA's third notification category, relating to assistance and capacity building support.⁵⁹

⁵⁷ Notification Matrix, TRADE FACILITATION AGREEMENT DATABASE, <https://www.tfadatabase.org/notifications-matrix> (last visited Apr. 17, 2019).

⁵⁸TFA, *supra* note 52.

⁵⁹Part of that information has to be provided by 'donor Members'. TFA, *supra* note 52, Art. 22:1, asks them to update the Trade Facilitation Committee on TFA-related implementation assistance on an annual basis. They are also requested to inform of contact

Work further remains to be carried out on the ratification front: 22 WTO Members are yet to complete their process, representing 14% of the overall membership. But none of that suggests a lacking commitment to the Trade Facilitation Agreement and its underlying objectives as such.

V. DIRECT IMPACT

Assessing the TFA's impact faces a number of challenges. With it being little more than two years since the Agreement entered into force and many parties entitled to additional time for its full implementation, statistical evidence remains fragmented.

When making the case for a Trade Facilitation Agreement, emphasis had been placed on its anticipated benefits, especially with respect to:

- 1) lower transaction times and costs;
- 2) increased participation in international trade (especially for small and medium-sized enterprises, SMEs); and
- 3) giving domestic and regional facilitation efforts a sustained basis and a common direction.

One of the very first advocacies for a prospective Agreement, originating from the European Union and submitted during the early phase of WTO work when Members were debating whether to launch negotiations, estimated that "trade facilitation measures could lower costs on export transactions by 6-10%".⁶⁰ Members further expected such savings to "exceed the costs of tariffs".⁶¹

Those estimates were backed by research once negotiations had started and the contours of their likely outcome were starting to become clear. An Organisation for Economic Cooperation and Development (OECD) study from 2011 found the cost reduction potential to reach almost 10% of total trade costs.⁶² The numbers increased further two years later when the final content of the Trade Facilitation Agreement had emerged. Reductions were now estimated to amount to 14.5% of

points as well as of process and mechanisms for requesting assistance and support for capacity building. TFA, *supra* note 52, Art. 22:2. The article also sets out a notification requirement for Members intending to avail themselves of aid. TFA, *supra* note 52, Art. 22:3 mandates them to submit information on contact point(s) of the office(s) responsible for coordinating and prioritizing such assistance and support.

⁶⁰Council for Trade in Goods, *Communication from the European Communities: Trade Facilitation in Relation to Development*, WTO Doc. G/C/W/143 (Mar. 10, 1999).

⁶¹Work took place in Council for Trade in Goods at that time. Factual Summary, *supra* note 20, ¶6.

⁶²E. Moisé, T. Orliac & P. Minor, *Trade Facilitation Indicators: The Impact on Trade Costs* (OECD Trade Policy Papers, OECD Publishing, Paper No. 118, 2011).

total trade costs for low income countries, 15.5% for lower middle-income countries and 13.2% for upper middle-income countries.⁶³ Another two years later, the WTO analysed cost reductions in a post-negotiating environment where Members were actually implementing the Trade Facilitation Accord. The 2015 World Trade Report confirmed the OECD's earlier research, finding the full implementation of the TFA to have the ability to reduce members' trade costs by an average of 14.3%—more than the elimination of all remaining applied MFN tariffs worldwide.⁶⁴ The Report also quantified savings in trading time. Fully implementing the Agreement, it found, will reduce import times by almost half (47% over previous averages) and cut export times by over 90% (91%).⁶⁵

Statistical evidence was further found for expectations regarding enhanced participation in international trade, particularly in the case of SMEs. Proponents of Trade Facilitation negotiations had long argued that an Agreement would allow many previously excluded traders to integrate into global supply chains.⁶⁶ The WTO 2016 World Trade Report confirmed that belief.⁶⁷ It found that the TFA addresses one of the main obstacles to SMEs exports and boosts the entry into the export markets for small firms that would otherwise only sell in the domestic market.⁶⁸

There is also statistical evidence to support the predicted benefit of providing domestic and regional facilitation efforts with a sustained basis and a common direction.⁶⁹ Studies on trade facilitation provisions in Regional Trade Agreements⁷⁰

⁶³ E. Moisé & S. Sorescu, *Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Countries' Trade* (OECD Trade Policy Papers, OECD Publishing, Paper No. 144, 2013).

⁶⁴ World Trade Report 2015, *supra* note 3.

⁶⁵ *Id.*

⁶⁶ See, for example, the views expressed by the EU in 1999 when making the case for launching negotiations on Trade Facilitation, European Communities, *supra* note 60, and the WTO Secretariat's report on other Members positions during that period, Factual Summary, *supra* note 20.

⁶⁷ Marc Auboin, Marc Bacchetta, Cosimo Beverelli, Barbara D'Andrea, Christophe Degain, Alexander Keck, Andreas Maurer, José-Antonio Monteiro, Coleman Nee, Roberta Piermartini, Robert Teh, Antonia Carzaniga, Joscelyn Magdeleine, Juan Marchetti, Lee Tuthill & Ruosi Zhang, *World Trade Report 2016: Levelling the Trading Field for SMEs*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/res_e/booksp_e/world_trade_report16_e.pdf.

⁶⁸ *Id.*, at 4, 8.

⁶⁹ "A set of basic WTO rules on trade facilitation would guide reform efforts in a consistent direction and provide the necessary sustained political commitment that was instrumental for successful administrative reform in this area". Factual Summary, *supra* note 20, ¶25.

⁷⁰ See, e.g., Nora Neufeld, *Trade Facilitation in Regional Trade Agreements – Traits and Trends* (WTO Staff Working Paper, Paper No. ERSD-2014-01, Jan. 2014); Nora Neufeld, *Trade*

show a growing conversion of reforms. First signs of such alignment can already be seen shortly after the launch of the WTO negotiations. The Geneva talks with their scaled-up learning and member-driven discussions significantly impacted the evolution of TF provisions in regional accords. Convergence was also observed in the other direction as countries sometimes brought topics to the Geneva negotiating table that they had previously tested in RTAs. Looking at current TF provisions in RTAs, one finds the TFA to have become a common basis on which regional partners expand upon.

VI. THE BIGGER PICTURE

Perhaps the most significant impact of the TFA lies not in the way it has lived up to its often-advertised trade benefits—though this is undoubtedly a critical litmus test—but in the way it signalled a paradigm shift in the focus of trade agreements and altered mindsets about how trade cooperation should advance in the future. The TFA ultimately succeeded because Members recognised that while they would benefit by individually reforming their trade procedures, they would benefit even more by collectively taking these steps. This emphasis on cross-border policy cooperation—on governments working together to facilitate trade, not just working to get out of the way—is relevant to many new policy challenges in services, investment facilitation or e-commerce as well. Indeed, paradoxically, trade cooperation in the future could begin to resemble trade cooperation in the distant past—partners actively working together to build the new trade ‘routes’ that link the planet. Today’s focus on trade facilitation would not be entirely unfamiliar to Vasco da Gama or Ferdinand Magellan. When governments,⁷¹ business representatives,⁷² and multilateral institutions⁷³ welcomed the TFA as “the greatest

Facilitation Provisions under the Umbrella of Regional Trade Agreements – Origins and Evolution, in REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM 111 (Rohini Acharya ed., 2016).

⁷¹See, for example, the statement by Hong Kong China, qualifying it as a “significant milestone”. Press Release, Hong Kong Welcomes Entry into Force of WTO Trade Facilitation Agreement (Feb. 23, 2017), <https://www.info.gov.hk/gia/general/201702/23/P2017022300271.htm>. The European Union called it “the most significant multilateral trade deal concluded since the establishment of the World Trade Organization”. Press Release, EU Welcomes Entry into Force of the WTO Trade Facilitation Agreement (Feb. 22, 2017), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1626>.

⁷²The International Chamber of Commerce hailed the agreement as a “watershed moment for world trade”. ICC, *supra* note 1.

⁷³Press Release, Major Global agreement Comes into Force Making Trade Cheaper, Easier and Faster, UNCTAD/PRESS/PR/2017/001 (Feb. 22, 2017), <https://unctad.org/en/Pages/PressRelease.aspx?OriginalVersionID=398>. UNCTAD

trade reform for a generation”—even “the biggest reform of global trade this century”⁷⁴—they were on to something. While the jury is still out on whether it will deliver on all its potential—and especially on whether it will serve as a model for future WTO negotiations and agreements—the first two years at least look promising.

“welcomed the entry into force of the Trade Facilitation Agreement as a huge step forward in making trade around the world cheaper, easier and faster”.

⁷⁴*From Vision to Reality: Event Celebrates Success of the Trade Facilitation Agreement*, WORLD TRADE ORGANIZATION (June 2, 2017), https://www.wto.org/english/news_e/news17_e/fac_02jun17_e.htm. Statement made by WTO Director-General Roberto Azevêdo in a press conference to mark the Agreement’s entry into force.