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THE TRADE FACILITATION AGREEMENT: IS THE DOHA DEVELOPMENT ROUNDSUCCESSING?

MAUREEN IRISH*

The Trade Facilitation Agreement (TFA) entered into force on February 22, 2017. It has re-oriented thinking on special and differential treatment at the World Trade Organization (WTO). Developing and least-developed countries can make their obligations conditional on the receipt of effective technical assistance that creates the necessary relevant capacity. They can also choose the implementation periods for provisions of the TFA in accordance with their own needs. These innovative approaches may be suitable for adoption in other agreements.

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I. INTRODUCTION

The Doha Development Round has been a disappointment. When it was initiated in 2001, there were expectations, or at least hopes, of remedying the perceived imbalance of the Uruguay Round in which developing countries accepted new obligations in services and intellectual property without gaining much in return. Members of the WTO almost reached an agreement on the modalities for a way forward in 2008, but failed. Negotiations seem permanently stalled. The recent rise of populist, inward-looking movements in several developed countries has contributed towards a general sense of malaise.

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On the other hand, the TFA offers some grounds for optimism. The TFA was adopted and submitted to the Members for acceptance on November 27, 2014.¹ It entered into force on February 22, 2017 after acceptance by 110 Members.² Two years since then, in mid-February 2019, a total of 141 Members have been a party to the Agreement.³ There had been widespread dissatisfaction with the Uruguay Round's approach to special and differential treatment, which merely extended the time limits for adjustment. The new approach in the TFA gives a choice to developing and least-developed countries, flips conditionality, and might work to the general mutual advantage of WTO Members, in accordance with the objectives of both the General Agreement on Tariffs and Trade, 1994 (GATT) and the WTO.⁴

This comment, in the second part, summarizes the negotiating history and substantive obligations under the TFA. Then, the third part describes the innovative mechanisms for implementation and technical assistance, which provide special and differential treatment for developing and least-developed countries. The fourth part examines these mechanisms in the context of previous GATT and WTO approaches. The final part considers the suitability of the TFA as a model for other negotiations in the WTO, concluding on a somewhat positive note, along with its limitations.

II. NEGOTIATION AND OBLIGATIONS

Trade facilitation was one of the areas proposed for negotiation in 1996, at the time of the Singapore Ministerial Conference, which was the first Ministerial Conference after the formation of the WTO. On four proposed issues, there was no agreement to undertake negotiations. For the first two, which were investment and competition, working groups were set up to study their relationships with trade, but any negotiations were to take place only after an explicit consensus was reached to that effect at a later date.⁵ Another working group was set up to study national

¹ Marrakesh Agreement Establishing the World Trade Organization, Agreement on Trade Facilitation, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 154 (entered into force Jan. 1, 1995) [hereinafter Marrakesh Agreement]; The Trade Facilitation Agreement was added to the Marrakesh Agreement by General Council Decision of November 27, 2014, WTO Doc. WT/L/940, Annex [hereinafter Trade Facilitation Agreement].

²Trade Facilitation, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last visited Mar. 3, 2019).

³*Id.*

⁴ General Agreement on Tariffs and Trade 1994, Preamble, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153; Marrakesh Agreement, *supra* note 1, Preamble (“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements”).

⁵ World Trade Organization, Ministerial Declaration of 18 December 1996, ¶ 20, WTO Doc. WT/MIN(96)/DEC (1996).

policies on the third issue, which was transparency in government procurement practices.⁶ On the fourth issue, trade facilitation, the Council for Trade in Goods was instructed to undertake exploratory work.⁷ The Secretariat was directed to provide assistance to developing and least-developed countrymembers to participate in the work on government procurement and trade facilitation.⁸

The Doha Development Round was launched at the Ministerial Conference in 2001.⁹ For all four Singapore issues, it was decided that negotiations could go forward if modalities were agreed upon, by explicit consensus, at the next Ministerial Conference.¹⁰ In 2003, the Cancun Ministerial Conference failed to reach a consensus declaration, in part due to disagreement over the Singapore issues.¹¹ In the Framework Agreement of August 1, 2004, investment, competition and transparency in government procurement were all rejected as areas for negotiations.¹² There was explicit consensus that negotiations would go ahead on trade facilitation, on the basis of modalities contained in Annex D of that document.¹³ According to that Annex, the negotiations would aim to improve aspects of certain GATT provisions, to enhance technical assistance and capacity building, and to support cooperation among customs authorities.¹⁴ It was explicitly recognized that special and differential treatment for developing and least-developed countries would not be limited solely to extensions of transition periods, and that any commitments made would depend on the countries' capabilities.¹⁵ Technical assistance would be provided to developing and least-developed countries for conducting the negotiations.¹⁶ Assistance and capacity building were emphasized for the implementation of any commitment. If a Member lacked the necessary capacity, particularly for infrastructure, implementation would not be required.¹⁷

⁶*Id.* ¶ 21.

⁷*Id.*

⁸*Id.* ¶ 22.

⁹ World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

¹⁰*Id.* ¶¶ 20, 23, 26, 27.

¹¹ World Trade Organization, Ministerial Statement of 14 September 2003, WTO Doc. WT/MIN(03)/20 (2003). The trade facilitation negotiations nearly ended at this point, due to lack of a mandate. Establishing a link between capacity and commitment was key to resolving the impasse; Nora Neufeld, *The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement*, 6, WTO Staff Working Paper ERSD-2014-06.

¹² Decision Adopted by the General Council on 1 August 2004, ¶ 1(g), WT/L/579 (Aug. 1, 2004).

¹³*Id.*

¹⁴*Id.* at Annex D, ¶ 1.

¹⁵*Id.* at Annex D, ¶¶ 2, 3.

¹⁶*Id.* at Annex D, ¶ 5.

¹⁷*Id.* at Annex D, ¶ 6.

The TFA, as finalized, reflects the mandate established in 2004. It clarifies and expands on the obligations under GATT Article V (freedom of transit), GATT Article VIII (fees and formalities connected with importation and exportation) and GATT Article X (publication and administration of trade regulations). The Agreement contains innovative provisions on technical assistance and capacity building that conform to the requirements of the mandate. Additionally, it also supports cooperation among border authorities.

The Agreement addresses the specific topics identified for the negotiations during the Hong Kong Ministerial Conference in 2005.¹⁸ Article 1 requires prompt publication of requirements for import, export and transit of goods, using internet updates to the extent possible and with contact information for enquiry points. Article 2 provides that the private sector must have the opportunity to know and comment on any proposed amendments, to the extent practicable. Under Article 3, states must establish a system of advance rulings that will remain valid for a reasonable period of time after issuance. Article 4 sets out the procedures for appeal and review, including the giving of reasons for administrative decisions. Article 5 deals with border inspections and the testing of food, beverages and feedstuffs. Article 6 contains rules for the imposition of fees and charges connected with importing and exporting, as well as penalties for breach of customs laws and regulations. Article 7 sets out the requirements for modern release and clearance of imports, covering pre-arrival submission of information, electronic payment if practicable, release on guaranty or surety, risk management, post-clearance audits, publication of release times, advantageous treatment of authorized economic operators, expedited shipments and perishable goods. Articles 8 and 9 deal with official cooperation at shared borders and movement of goods through the territory under customs control. Article 10 contains the obligations concerning border formalities, covering simplification of documentary requirements, acceptance of paper or electronic copies, use of international standards, single window systems for processing of information, ban on preshipment inspections for tariff classification and customs valuation purposes,¹⁹ ban on new rules requiring the use of customs brokers, encouragement of the use of common procedures and uniform

¹⁸ World Trade Organization, Ministerial Declaration of 18 December 2005, ¶ 33, Annex E, WTO Doc. WT/MIN(05)/DEC (2005) (These were: publication and availability of information, time periods, consultation, advance rulings, appeal procedures, impartiality, fees, formalities, prohibition of consular requirements, border agency cooperation, release, tariff classification and transit of goods).

¹⁹ A footnote to Article 10.5.2 clarifies that this does not preclude inspections for sanitary and phytosanitary purposes. As well, it should not prevent advance screening for security purposes. See Maureen Irish, *Trade, Border Security, and Development*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 81 (Yong-Shik Lee et al. eds., 2011).

documentation, treatment of rejected goods, temporary admission of goods and inward or outward processing. Article 11 contains the rules on goods in transit.

Cooperation among border authorities is governed by Article 12. Where there are reasonable grounds to doubt the accuracy of a declaration, Members can request the assistance of the authorities of another Member to verify information, including information in documents filed with the requested Member such as invoices, packing lists, certificates of origin and bills of lading. The request must be written and detailed, and must contain an explanation of its purpose. All information received is subject to confidentiality obligations set out in Article 12.5.1 and Article 12.5.11. The requested Member should not be subject to an unmanageable administrative burden, given the practical limits on its resources. If there is no agreement on the prioritization among requests, the requested Member may use its own discretion regarding execution. If the requesting Member would itself have difficulty complying with a similar request, or if the requesting Member has not yet implemented Article 12, then the execution of a request is at the discretion of the requested Member.

III. SPECIAL AND DIFFERENTIAL TREATMENT

Section II of the TFA contains the innovative provisions on special and differential treatment for developing countries and least-developed countries. Implementation of provisions of the Agreement depends on the capacity of a developing or least-developed Member. If the necessary capacity is lacking, implementation is not required.²⁰

Developing and least-developed country Members can decide to implement their TFA obligations in accordance with three categories, and the commitments under each category would be notified by the concerned country itself.²¹ Category A covers obligations that became binding on February 22, 2017, when the TFA came into force, or, in the case of a least-developed country Member, up to one year later, - on February 22, 2018.²² Category B is for commitments that become binding after a transition period. By February 22, 2018, developing countries had to give notice of these commitments and the corresponding transition periods.²³ Least-developed countries are also required to give notice of category B commitments and corresponding transition periods on the same date, and will have to confirm those designations and dates generally within two years after their notification, by February

²⁰ Trade Facilitation Agreement, *supra* note 1, art.13.2.

²¹ *Id.* art. 14.2.

²² *Id.* art. 15.

²³ *Id.* arts. 16.1(a)-(b) (A developing country could request an extension of the notification deadline).

22, 2020.²⁴ Category B adopts the usual mechanism of transition periods, but each developing or least-developed Member chooses its own transition period. That change in itself is a major breakthrough. Further, the process of self-selection for commitments applies to all the obligations in Articles 1 to 12 of the TFA.²⁵ This approach represents a significant reform of special and differential treatments. Individual countries choose their commitments on substantive matters, and not solely their tariff cutting commitments. Note that these commitments do not operate on the basis of direct reciprocity, except for border agency cooperation in Article 12. Developing and least-developed Members are fully Members, whatever the level of their commitments are, and are entitled to the benefits of all TFA obligations of other Members.

Category C is even more innovative. It covers the commitments that become binding after a transition period, if the developing or least developed country has acquired capacity to fulfil them as a result of assistance and support for capacity building. By February 22, 2017, developing countries had to give notice of their Category C commitments, corresponding indicative dates for implementation and the assistance and support required.²⁶ For least-developed countries, the date for notification of Category C commitments was one year later, on February 22, 2018, and the indication of assistance and support required was due one year after that, on February 22, 2019.²⁷ Notifications are made to the Committee on Trade Facilitation (the Committee) established pursuant to Article 23.1 of the TFA, which is open to participation by all Members. The Committee can set up subsidiary bodies to handle its responsibilities for the administration of the Agreement,²⁸ including the Category C mechanism.

Donor Members assisting developing and least-developed country Members for capacity building report annually to the Committee on the status and amount of the assistance and support provided, the procedures for disbursement, the beneficiary Member or region, and the responsible agency within the donor governments.²⁹ Donor Members and beneficiary Members provide the Committee with contact points for information and coordination.³⁰ The Committee may also receive information from relevant international and regional organizations such as the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and

²⁴*Id.* arts. 16.2(a)-(b) (A least-developed country may request an extension for the notification of its definitive dates for implementation).

²⁵*Id.* art. 13.1.

²⁶*Id.* art. 16(1)(c).

²⁷*Id.* art. 16(2)(c),(d).

²⁸*Id.* art. 23.1.3.

²⁹*Id.* art. 22.1.

³⁰*Id.* arts. 22.2, 22.3.

Development (UNCTAD), the World Customs Organisation (WCO), United Nations Regional Commission (UNRC), the World Bank or its subsidiary bodies, regional development banks, and other agencies of cooperation.³¹ Donor Member countries provide the assistance and support to developing and least-developed countries on mutually agreed terms, either bilaterally or through appropriate international organizations.³² The Committee holds at least one dedicated session per year to review the provision of assistance for capacity building, including the situation of any developing or least-developed country Members not receiving adequate assistance and support.³³

On February 22, 2018, one year after entry into force of the TFA, developing country Members and donor Members had to provide the Committee with information on arrangements made for the assistance and support to enable the developing country to implement its Category C obligations.³⁴ Within eighteen months of the provision of this information, on August 22, 2019, a progress report is due and the developing country shall list its definitive dates for implementation.³⁵ Least-developed country Members and relevant donor countries have until February 22, 2021, that is, four years after the entry into force, to give the Committee the information on arrangements made for assistance and support.³⁶ Further, on August 22, 2022, that is, eighteen months after the provision of this information, a progress report is due and the least-developed country shall give notice of its definitive dates for implementation.³⁷

The TFA has rigorous deadlines for setting the time for implementation of Category B and Category C commitments, but does not restrict the length of transition time that a country can choose,³⁸ with one exception. The Secretariat is to give developing and least-developed countries a three-month reminder of the duty to set definitive dates for implementation of Category B and Category C obligations. If no such dates are set, implementation is to take place within one year from the time of setting of the definitive dates.³⁹ Developing and least-developed countries having difficulty submitting definitive dates due to lack of donor support need to report this to the

³¹*Id.* art. 22.5.

³²*Id.* art. 21.1.

³³*Id.* art. 21.4.

³⁴*Id.* art. 16.1(d).

³⁵*Id.* art. 16.1 (e).

³⁶*Id.* art. 16.2(d).

³⁷*Id.* art. 16.2(e).

³⁸ Bernard Hoekman, *The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage*, 15(Robert Schuman Centre for Advanced Studies Global Governance Programme-132, Working Paper RSCAS 2014/102, 2014), http://cadmus.eui.eu/bitstream/handle/1814/33031/RSCAS_2014_102.pdf?sequence=1.

³⁹ Trade Facilitation Agreement, *supra* note 1, art. 16.4.

Committee as soon as possible, as the Committee has power to extend the deadline for notification.⁴⁰

A developing or a least-developed country that considers it will have difficulty in implementing an obligation in time should give an advanced warning to the Committee. The warning shall include a new date for implementation and an explanation of the reasons for the delay.⁴¹ Developing countries are entitled to an additional time of eighteen months for implementation,⁴² while least-developed countries are entitled to an additional time of three years for implementation.⁴³ Countries can request a longer first extension and the Committee shall give a sympathetic consideration to such a request.⁴⁴ Furthermore, countries have the power to shift their commitments between Category B and Category C and can request an examination by the Committee of a request for extra time.⁴⁵

A developing or least-developed country can notify the Committee that it is unable to meet a Category C obligation, as implementation is not required if the country lacks the required capacity, according to Article 13.2.⁴⁶ An Expert Group will then be established to review the matter and make a recommendation to the Committee.⁴⁷ In the case of a least-developed country, the Committee shall, as appropriate, facilitate the acquisition of capacity.⁴⁸ A developing country Member is immune from proceedings on the issue under the Dispute Settlement Understanding (DSU) until the first meeting of the Committee, after it has received the recommendation of the Expert Group.⁴⁹ A least-developed country Member is immune from the DSU for twenty four months after the first Committee meeting following the Expert Group's recommendation or until the Committee makes a decision, whichever is earlier.⁵⁰ The Committee makes decisions after considering the recommendations from the Expert Group, but it does not have the dispute-resolution powers of the DSU.

These provisions are aimed at implementation rather than a finding of breach of an obligation under the DSU. For Category A commitments, developing countries were

⁴⁰*Id.* art. 16.3.

⁴¹*Id.* art. 17.1.

⁴²*Id.* art. 17.2.

⁴³*Id.* art. 17.2.

⁴⁴*Id.* arts. 17.3, 17.4.

⁴⁵*Id.* art. 19.

⁴⁶*Id.* art. 18.1.

⁴⁷*Id.* art. 18.2.

⁴⁸*Id.* art. 18.4.

⁴⁹*Id.* art. 18.5.

⁵⁰*Id.* art. 18.5.

immune from DSU proceedings for two years after entry into force.⁵¹ For Category A commitments, least-developed countries are immune from the DSU for six years after entry into force.⁵² For Categories B and C, least developed countries are immune from the DSU for a full eight years after implementation of the commitment.⁵³ Even if the grace period has expired, Members are required to exercise due restraint concerning complaints against least-developed country Members.⁵⁴ Moreover, Article 13.2 cannot be amended by the Expert Group, the Committee or the Panel and Appellate Body in DSU proceedings. Article 13.2 emphasizes the fundamental understanding from the modalities in 2004 that if a developing or least-developed country Member continues to lack capacity, then implementation is not required.

IV. DEVELOPMENT, GATT AND THE WTO

The detailed provisions on special and differential treatment were not elaborated in the Hong Kong Ministerial Declaration in 2005. The innovative mechanisms for developing and least-developed country Members in the TFA are the result of lengthy and careful negotiations since that time.

There are two main features that are unique in these provisions. The first is the opt-in, which allows developing and least-developed Members to establish their own deadlines for implementation of obligations. Some deadlines must be notified at the time of entry into force of the Agreement. Others are notified after the entry into force. Each developing or least-developed country Member has the opportunity to match its obligations to its economic situation, within the terms of the TFA. The second unique feature is the link between capacity and commitment. Developing and least-developed country members can choose to make implementation contingent on receiving technical assistance that is effective and that builds the required relevant capacity. Donor Member countries have reporting obligations for the assistance they provide. Both the opt-in and the capacity/commitment link switch control to developing and least-developed countries and give them flexibility to respond to the challenges that each one faces. The overall approach is similar to the positive list technique in the General Agreement on Trade in Services. In that agreement, developing countries determine their own level of commitment and can attach conditions promoting their participation in world trade.⁵⁵ In the TFA,

⁵¹*Id.* art. 20.1.

⁵²*Id.* art. 20.2.

⁵³*Id.* art. 20.3.

⁵⁴*Id.* art. 20.4.

⁵⁵ General Agreement on Trade in Services, arts. IV, XIX.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167; *See* MANUELA TORTORA, UNITED Nations Conference on Trade and

obligations arise after a transition period of the Member's choice and in accordance with its own capacity. Moreover, obligations can be contingent on the receipt of technical assistance that has successfully created the needed capacity for implementation. Is the TFA a new ray of hope for development at the WTO?

There is considerable disappointment over the lack of progress in the Doha Round, which was meant to correct the imbalances resulting from the Uruguay Round.⁵⁶ Frank Garcia argues that the Uruguay Round moved the WTO from the development model of the 1979 Enabling Clause,⁵⁷ to a new paradigm of time-limited adjustment to a free market level playing field. He maintains that while open trade may be necessary, it is not sufficient for successful economic development.⁵⁸ A return to a development model would entail a number of features, including transition periods linked to objective economic and social criteria, so that extensions would be available until capacity is established.⁵⁹

The TFA marks a return to the development model through linkages between capacity and commitment, with technical assistance and capacity assessment geared towards specific provisions in the Agreement. The 1979 Enabling Clause expresses the same link. The graduation principle in Paragraph 7 of the Enabling Clause contains the expectation that developing countries will make greater trade concessions and contributions once their economies improve.⁶⁰ The non-reciprocity principle in Paragraph 5 of the Clause emphasizes that developing countries are not expected to make concessions that are inconsistent with their needs.⁶¹ Moreover, Paragraph 5 also provides that developed countries "shall not seek" such concessions that are beyond a developing country's capacity.⁶² The idea of a link between capacity and commitment is a longstanding part of GATT and WTO thinking on special and differential treatment. The TFA applies it to particular obligations and relies on technical assistance to produce the needed capacity. Furthermore, the TFA involves donor countries in related ongoing reporting obligations.

Development, SPECIAL AND DIFFERENTIAL TREATMENT AND DEVELOPMENT ISSUES IN THE MULTILATERAL TRADE NEGOTIATIONS: THE SKELETON IN THE CLOSET 4 (2003).

⁵⁶Sunjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 *TEX. INT'L L. J.* 573, 575 (2010).

⁵⁷ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Nov. 28, 1979), GATT Doc. L/4903, BISD 26S/203 [hereinafter Enabling Clause].

⁵⁸ Frank J. Garcia, *Beyond Special and Differential Treatment*, 27(1) *B.C. INT'L. & COMP. L. REV.* 291, 299-300 (2004).

⁵⁹*Id.* at 307.

⁶⁰ Enabling Clause, *supra* note 57, ¶ 7.

⁶¹*Id.* ¶ 5.

⁶²*Id.*

The transition periods in the TFA aim for a level playing field of obligations, with a few that are 'best efforts' undertakings, especially for the use of electronic communication technology. The substantive commitments are not distinct to developing and least-developed Members, although the timing is distinct for the circumstances of each developing or least-developed country. It will be important to emphasize that if capacity is lacking, "implementation of the provision(s) concerned will not be required until implementation capacity has been acquired", in the terms of Article 13.2 of the Agreement. This proviso was fundamental to the success of the negotiations. In addition, acquisition of capacity involves the activity of the donor countries, as well as the recipient countries.

There are ways in which the TFA experiment might fail. First, the operation of the Agreement depends on voluntary participation of both sides, the developed countries as well as the developing and least developed countries. Developed country Members accepted that technical assistance 'should' be provided,⁶³ and that they would 'facilitate' such support for capacity-building.⁶⁴ The support can be provided bilaterally or through various international organizations, such as the IMF, the OECD, UNCTAD, the WCO, the UNRC, the World Bank or their subsidiary bodies, regional development banks, and other agencies of cooperation.⁶⁵ There is a long history of voluntary tariff preferences being reduced in effectiveness as they came to reflect donor country interests rather than those of the recipient countries alone.⁶⁶ Perhaps the supervision by the Committee,⁶⁷ and the various institutions of the global public sector will guard against the risk of donor conditionality. A second potential concern is that technical assistance funding requires transparency and accountability to meet the purpose of capacity-building.⁶⁸ The reporting obligations in the TFA should assist with supervision, although it is less clear whether assistance can be coordinated when several agencies with individual mandates are involved,⁶⁹ along with technical assistance from the private sector.⁷⁰ The focus on specific

⁶³ Trade Facilitation Agreement, *supra* note 1, arts. 13.2, 21.2.

⁶⁴*Id.* art. 21.1.

⁶⁵*Id.* arts. 21.1, 22.5.

⁶⁶ Thomas R. Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L. L. 513 (1978); Thomas P. Cutler, *The United States Generalized System of Preferences: The Problem of Substantial Transformation*, 5(3) N.C. J. INT'L. L. & COM. REG. 393 (1980); D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: 'Instant Replay' or a Real Change?*, 6(4) NW. J. INT'L. L. & BUS. 1035 (1984-85); See Hoekman, *supra* note 38, at 16.

⁶⁷ Trade Facilitation Agreement, *supra* note 1, at art. 23.1.

⁶⁸ Marjorie Florestal, *Technical Assistance Post-Doha: Is There Any Hope of Integrating Developing Countries into the Global Trading System?*, 24(1) ARIZ. J. INT'L. & COMP. L. 121 (2007).

⁶⁹ See Hoekman, *supra* note 38, at 25.

⁷⁰ Trade Facilitation Agreement, *supra* note 1, art. 21.3(c).

technical assistance to meet particular provisions of the TFA should make supervision somewhat easier than it is for more general economic development programmes, but management may be challenging.

At the meeting of the Committee on Trade Facilitation in mid-February 2019, the WTO Secretariat reported that the TFA had been ratified by 86% of WTO Members. The overall rate of commitments implementation was 61.3%, seeing a 100% implementation by the developed countries, 60.3% by the developing countries and 22.8% by the least developed countries.⁷¹ The provisions attracting the highest rates of implementation commitments are: Article 9 movement of goods, Article 10.5 pre-shipment inspection, Article 10.6 use of customs brokers, Article 5.2 detention and Article 10.9 temporary admission of goods.⁷² These provisions relate to traditional procedures for movement of goods and customs clearances. It can be expected that many WTO Members are already in compliance or might find compliance relatively easy. The provisions attracting the lowest rates of implementation commitments are: Article 8 border agency cooperation, Article 7.6 average release times, Article 3 advance rulings, Article 5.3 test procedures, Article 7.7 authorized operators and Article 10.4 single window.⁷³ These last provisions are of more recent vintage in customs administration, linked to the use of modern information technology or recent innovations in practice such as the use of trusted trader programmes. For these provisions, compliance could be challenging for developing and least-developed country Members. Technical assistance might help with matters such as legal reform or the training of personnel. If a commitment involves new computer hardware or software, there could be a question of ongoing funding for upgrades and replacement equipment. A country would need to be assured of its long-term capacity before deciding to implement such measures.

V. CONCLUDING REMARKS

The TFA has re-oriented the discussion in the WTO around special and differential treatment for developing and least-developed countries. There are approaches to consider other than a general time-limit for adjustment to a harmonized obligation. The Agreement uses two new features that provide more flexibility. First, developing and least-developed country Members can opt-in to the time for implementation of individual provisions of the Agreement. Second, the Agreement links capacity and

⁷¹*Members discuss progress and assistance on Trade Facilitation Agreement's 2nd year*, WORLD TRADE ORG. (Feb. 12, 2019), https://www.wto.org/english/news_e/news19_e/fac_14feb19_e.htm.

⁷²*Trade Facilitation Agreement Database*, WORLD TRADE ORG., <https://www.tfadatabase.org/implementation/progress-by-measure> (last visited May 17, 2019).

⁷³*Id.*

commitment. Developing and least-developed countries can choose to make specific obligations conditional on acquiring capacity through technical assistance from other Member countries. There is no obligation if there is no capacity. These features may or may not be suitable in other areas of WTO law.

The opt-in feature that allows developing and least-developed countries to choose the implementation date for specific provisions may work best in certain contexts. Trade facilitation is intended to benefit traders in general. Implementation will be easier for some countries than for others and small businesses will face greater challenges than larger firms with more staff. The intent, however, is that the benefit is general and available across a range of commercial sectors. A negotiation on trade facilitation does not depend on the win/loss assumptions of mercantilist bargaining, in which the interests of exporters of one product from one country are balanced against the interests of exporters of another product from another country. If negotiators need to be able to predict defined balances and trade-offs, they would face difficulties if the level of implementation at the time of signing is not known. Of course, there will always be some unpredictability over how many countries will agree to a given deal. Differing obligations and delayed implementation create an additional level of uncertainty. The opt-in feature may work best in areas such as rules' negotiations, where there can be general benefits, and negotiations are not only about win/loss results.⁷⁴

The link between capacity and commitment is a long-established part of GATT and WTO thinking. The unique aspects in the TFA are the recognition of choice by developing and least-developed countries, the link to donor-provided effective technical assistance and the Expert Group that reviews a Member's self-assessment of capacity before a dispute goes to the DSU. The United Nations climate change negotiations acknowledge a similar general link between the receipt of funding and the ability of developing countries to make commitments. The Paris Agreement recognizes that support for developing countries will enhance their capability to combat climate change and its effects.⁷⁵ In consequence, developed countries now agree to provide financial resources to developing countries, at least in principle.⁷⁶ The idea that developed countries must pay for certain reforms by developing countries may be increasingly accepted. The TFA is an example of this principle in a specific context. The idea of payment for reform is only suitable if there is some

⁷⁴ Ben Czapnik, *The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?*, 18(4) J. INT'L ECON. L. 773 (2015).

⁷⁵ Paris Agreement (Dec. 13, 2015), art. 4(5), in UNFCCC, COP Report No. 21, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add.1 [hereinafter Paris Agreement].

⁷⁶ *Id.* at arts. 9(1), 10(6). (Article 11(4) requires all Parties involved in capacity-building to report regularly on progress).

expectation of benefit for all. The world's climate is obviously a shared resource and global warming is a shared concern. In the context of the TFA, border administration that is more efficient, more reliable and more transparent is intended to benefit traders in general. This is not an area for the win/loss assumptions of mercantilist bargaining. Moreover, the emphasis on technical assistance and capacity building in the negotiations may have promoted the identification of practicommon interests. Certain aspects of the TFA, such as choice by developing countries, obligations being conditioned on the receipt of effective technical assistance, and expert capacity assessment prior to full dispute settlement, will not be suitable for all topics in WTO negotiations. Like the opt-in feature, they may have some use in areas where specific obligations and capacities can be linked, and where there is some expectation of overall general benefit.

Flexibility for developing and least-developed countries is a hallmark of the TFA. The Agreement marks the end of the Single Undertaking approach from the Uruguay Round, which required all WTO Members to acceptan entire package of agreements. The TFA entered into effect on acceptance by two-thirds of the Members, and is binding only on those who have accepted it.⁷⁷ As Meredith Kolsky Lewis points out, the views of developed and developing countries have been at odds since the founding of the WTO and divergences are strong as the Doha Development Round appears to be faltering.⁷⁸ The opt-in feature and the capacity/commitment link in the TFA demonstrate that flexibility is possible in at least some areas. The ray of hope is not a strong one, but perhaps the Doha Development Round can produce some successes that respond to the needs of developing and least-developed country Members. Perhaps the TFA will be an example of the 'balanced rules and well-targeted, sustainably financed technical assistance and capacity-building programmes' that were envisaged at Doha.⁷⁹

⁷⁷Marrakesh Agreement, *supra* note 1, art. X (3).

⁷⁸Meredith K. Lewis, *The Embedded Liberalism Compromise in the Making of the GATT and Uruguay Round Agreements*, in *THE FUTURE OF INTERNATIONAL ECONOMIC INTEGRATION: THE EMBEDDED LIBERALISM COMPROMISE REVISITED* 12, 25-27 (Gillian Moon & Lisa Toohy eds., 2018).

⁷⁹ Doha Declaration, *supra* note 9, ¶ 2.