

Will the Trade Facilitation Agreement's Novel Architecture and Flexibilities Have Unforeseen Consequences? An Analysis in the Context of World Trade Organization Accessions

Ben Czapnik*

When finalizing the Trade Facilitation Agreement (TFA), World Trade Organization (WTO) Members introduced a highly novel architecture by allowing developing countries to self-designate their transition periods and to make their implementation conditional on the provision of technical assistance. The WTO contains certain rules and conventions of horizontal application and it is unclear how this will interact with the TFA's novel architecture, especially for special and differential treatment (S&DT). For example, in the context of accessions, the WTO takes a strict approach to S&DT. Acceding countries are often pressed to implement WTO commitments during accession negotiations. There is a general presumption against transition periods and, where acceding countries insist on access to transition periods, these have to be negotiated on a case-by-case basis. This convention in accession negotiations runs contrary to the highly-permissive approach to transition periods in the TFA. It thus raises the question of how the WTO should deal with S&DT and transition periods for TFA commitments in developing country accessions. This article will explore several options and conclude that WTO accessions should replicate the TFA's permissive approach (with some minor amendments).

I INTRODUCTION

When finalizing the Trade Facilitation Agreement (TFA), World Trade Organization (WTO) Members introduced highly innovative approaches, especially with respect to special and differential treatment (S&DT). For the first time in WTO history, developing countries were given the right to self-designate their transition periods to full compliance and to make the implementation of certain TFA commitments contingent on the provision of trade-related technical assistance (TRTA).

While the TFA is a self-contained agreement in many respects, it will also become part of WTO law when it enters into force. This means that the TFA will interact with other legal commitments contained in the WTO Agreement and Multilateral Agreements on Trade in Goods.

Negotiators provided no specific guidance on how TFA-style S&DT will interact with other Agreements,¹ perhaps because they did not consider that the TFA approach to

S&DT would have any implications outside of that Agreement. However, the WTO does contain certain rules and conventions on S&DT which have horizontal application.

A clear example is the approach Members take to S&DT and transition periods in the context of WTO accession. This approach is mostly governed by convention rather than strict disciplines, however it is now well established in the Protocols of recently-acceded Members and technical notes by the WTO Secretariat.

WTO accessions take a strict approach to S&DT. Acceding countries are often pressed to implement specific WTO commitments *during* the accession process. There is a general presumption against granting transition periods and acceding countries negotiate for them on a case-by-case basis. This convention runs contrary to the highly-permissive approach embedded in the TFA. How then should the WTO deal with S&DT and transition periods for TFA commitments in accessions?

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* Economic Affairs Officer at the United Nations Economic Commission for Europe, email: ben.czapnik@unece.org. The views in this article were informed by the author's experience providing technical assistance to developing countries on trade facilitation and WTO accessions. Nevertheless, the views expressed herein are those of the author and do not necessarily reflect the views of the United Nations. The author is grateful to Pierre Sauv , Nora Neufeld, Jesse Kreier and Valerie Hughes for helpful discussions and drafting suggestions.

¹ Though the final provisions do provide guidance on how the TFA as a whole will interact with the Marrakesh Agreement, GATT, DSU and TBT and SPS Agreements (TFA Arts 24.6–24.8). There is also important guidance from the fact that the TFA is integrated as a 'covered agreement'.

This article starts off in section 2 with an analysis of WTO rules and conventions on accessions. Section 3 highlights why the TFA does not fit neatly into the usual WTO approach. Section 4 offers reasons why the WTO should take a more lenient approach to TFA issues in accessions. Section 5 explains several approaches and advances recommendations. Section 6 looks at the special case of least developed countries (LDCs) and section 7 concludes.

2 THE WTO APPROACH TO ACCESSIONS

The WTO has a body of rules and conventions which provide guidance on what acceding countries must do to join the multilateral trade body. Article XII of the WTO Agreement² establishes the main rule governing accession. It provides that:

Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, *on terms to be agreed* between it and the WTO.³

This rule is non-prescriptive and provides no guidance on what the 'terms' should be.⁴ Interested parties need to dig a little deeper for an understanding of what a WTO accession package should look like.

Further information on how Article XII should be applied comes from subsequent WTO documents. A General Council Decision from 1995 addresses the procedure for agreeing accession packages, stating that this should be based on consensus, with recourse to the two-thirds majority rule only where consensus is not possible.⁵

More significantly for the substance of accessions, LDC guidelines were established in a series of General Council Decisions and Ministerial Declarations (these will be discussed in section 7).⁶ These guidelines do not apply to non-LDC

developing countries and no other WTO documents contain substantive rules on S&DT in accessions.⁷

Since the official documents provide scant guidance, it is useful to look at what terms were actually agreed between the WTO and countries which acceded after 1995. As of September 2016, the WTO had 164 Members, including 128 original Members and a further 36 Members who acceded under Article XII of the Marrakesh Agreement.⁸ There are two main aspects to accession negotiations – WTO 'rules' and 'market access' schedules for goods and services.⁹ Over the years, rules and market access have been dealt with differently in terms of negotiating procedures and documentation.

2.1 Rules

The aim of rules negotiations is to ensure compliance of the acceding country's trade regime with all obligations in the Multilateral Trade Agreements. Acceding countries may also be asked to take on so-called 'WTO-plus' commitments¹⁰ or they may lobby for access to S&DT and transition periods.

Rules issues are generally negotiated in a multilateral configuration, although some aspects of the negotiations may also occur plurilaterally,¹¹ or even bilaterally where incumbent Members have particular concerns.¹² The documentation for rules negotiations starts with the drafting of the Memorandum of Foreign Trade Regime (MFTR) by the acceding country, followed by an exchange of questions and answers with incumbent Members.

This fact-finding stage establishes what changes the acceding country must make to conform with WTO obligations. The crux of negotiations is on what the acceding country must do domestically to comply, rather than the substantive treaty obligations. It has become customary for the acceding country to submit a legislative action plan identifying its intended legislative changes (and relevant timeframes) and for draft legislation to be submitted to the Working Party for comment.¹³

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² The Marrakesh Agreement Establishing the World Trade Organization (also known as the WTO Agreement).

³ Art. XII of the WTO Agreement (emphasis added).

⁴ See e.g. Simon Evenett & Carlos Primo Braga, *WTO Accession: Lessons from Experience*, World Bank Trade Note 22, 2 (6 June 2005).

⁵ Statement by the Chairman of the General Council (WT/L/93 dated 24 Nov. 1995).

⁶ General Council Decision of 10 Dec. 2002 (WT/L/508), Ministerial Conference Decision of 17 Dec. 2011 (WT/L/846) and General Council Decision of 25 July 2012 (WT/L/508/Add.1).

⁷ With the exception of the dedicated LDC analysis in s. 7, or where LDCs are otherwise referred to explicitly, the analysis in the following sections focuses primarily on non-LDC developing countries.

⁸ Afghanistan and Liberia became the 163rd and 164th Members in July 2016.

⁹ Plurilateral agreements have their own accession mechanism and are therefore dealt with in a separate process following WTO accessions. Art. XXII of the Government Procurement Agreement establishes the relevant process for accession (and is complemented by certain provisions in Art. V about GPA accession for developing countries). WTO Accession Protocols may contain a commitment that the acceding country will enter into GPA negotiations.

¹⁰ WTO-plus commitments may include, for example, rules which are stricter than the Multilateral Trade Agreements, denial of substantive S&DT to developing countries or reduced (or non-existent) transition periods.

¹¹ Williams refers to SPS, TBT and TRIPS issues sometimes being taken up in a plurilateral context. See Peter John Williams, *A Handbook on Accession to the WTO* 33 (Cambridge University Press 2008).

¹² *Ibid.*, at 39.

¹³ *Ibid.*, at 39–40.

The acceding country may be asked to accept WTO-plus commitments.¹⁴ For example, even though Saudi Arabia considered that 'Article XI of the GATT 1994 expressly permitted the imposition of export duties', its representative ultimately 'confirmed that Saudi Arabia would not impose export duties on iron and steel scrap'.¹⁵ This rule, which applies only to Saudi Arabia, is more onerous than the universally-applicable General Agreement on Tariffs and Trade (GATT) provision and is therefore 'WTO-plus'.

In the case of the TFA, WTO-plus could arise in two key ways. Acceding countries could be denied full access to the S&DT flexibilities in section II (self-designation of transition periods and TRTA conditionality) or incumbent Members could negotiate for a higher level of substantive obligation with respect to section I measures.

WTO-plus provisions are not explicitly identified or labelled in Protocols. A paragraph from a Working Party Report may be intended to alter the substance of a WTO rule (including to make it WTO-plus) or it may merely elucidate what is required for the acceding country to implement the standard WTO obligation.¹⁶

In the first 25 accessions, there was an average of 35 commitments on rules per Protocol.¹⁷ This ranged from 82 commitments for China to 17 commitments for Mongolia.¹⁸ The number of rules paragraphs in accession Protocols has been increasing over time, which may indicate that the number of WTO-plus rules commitments is also increasing.¹⁹

WTO rules allow for some differentiation between Members based on objective criteria (such as S&DT for developing countries and LDCs). However, the notion

of WTO-plus commitments and Member-specific rules has been highly controversial. There has been extensive academic debate about whether it is appropriate to impose WTO-plus obligations on acceding countries.²⁰ Despite such debate, it appears that WTO-plus commitments are now an accepted convention in accessions.²¹

Accession packages may also allow flexibility through S&DT and transition periods for developing countries. For transition periods, the standard Protocol states:

Except as otherwise provided for in this Protocol, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by [the acceding country] as if it had accepted that Agreement on the date of its entry into force.²²

When this language was used in Ecuador's Protocol in 1996, it provided meaningful transition periods.²³ By the time it was used in Kazakhstan's Protocol, 20 years later, the transition periods under the Uruguay Round Agreements had expired.²⁴ Therefore Kazakhstan and other recently acceded Members had no access to transition periods under the Standard Protocol text unless they negotiated case-by-case flexibilities and included them in the relevant Protocol paragraph.²⁵ For all other commitments, Members had to implement prior to entry into force.²⁶

In summary, for rules issues, acceding countries have a good sense of what the final package will look like

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¹⁴ For an extensive analysis of what WTO-plus and WTO-minus mean in the context of accessions and for a list of these types of commitments, see Steve Charnovitz, *Mapping the Law of WTO Accession*, in Merit Janow, Victoria Donaldson and Alan Janovich (eds), *The WTO: Governance, Dispute Settlement and Developing Countries (Juris Publishing) 2008*. Charnovitz also considers WTO-plus and minus commitments for incumbent Members, however that distinction does not appear particularly relevant for trade facilitation commitments.

¹⁵ WT/ACC/SAU/61 at para. 184.

¹⁶ See e.g. Charnovitz, *supra* n. 14, at 70. A WTO technical note further highlights six different types of commitment paragraphs (WT/ACC/10/Rev.1, 16) and these do not necessarily introduce a WTO-plus commitment.

¹⁷ Kent Jones, *The Political-Economy of WTO Accession: The Unfinished Business of Universal Membership*, 8(9) *World Trade Rev.* 285 (2009).

¹⁸ *Ibid.*, at 285.

¹⁹ Though, as discussed, not all Protocol commitments are necessarily WTO-plus.

²⁰ Evenett and Primo-Braga refer to a 'multi-tier' system; Cattaneo and Primo Braga describe it as 'discriminatory' while Charnovitz suggests that it 'undermines the rule of law'. See Evenett & Primo Braga, *supra* n. 4, at 4; Olivier Cattaneo & Carlos Primo Braga, *Everything You Always Wanted to Know About WTO Accession (But Were Afraid to Ask)*, World Bank Policy Research Working Paper 5116, 27 (Nov. 2009); Charnovitz, *supra* n. 14, at 80.

²¹ For a summary of WTO accession jurisprudence, see Valerie Hughes, *WTO Rule-Making: WTO Accession Protocols and Jurisprudence* in *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Uri Dadush & Chiedu Osakwe eds) Cambridge University Press, 2015, 309-347. Hughes summarizes the case law on accessions and concludes that 'commitments under working party reports incorporated into Accession Protocols, which are in turn integral parts of the WTO Agreement, are enforceable under WTO dispute settlement proceedings' (334).

²² This example is taken from WT/L/432 (China). Similar language is used in other Accession Protocols.

²³ Ecuador acceded a year after the WTO Agreement entered into force, so it was *a priori* entitled to benefit from transition periods, even though those transition periods were backdated to 1 Jan. 1995.

²⁴ There have been some rare examples where transition periods were extended for original Members and ultimately lasted for over twenty years. An example will be discussed in s. 4. It is worth noting that those extensions were Member-specific and therefore did not create rights for acceding Members.

²⁵ For an example of a negotiated transition period, see para. 71 of WT/MIN(01)/4 where Chinese Taipei agreed to 'eliminate the import ban on passenger cars equipped with diesel engines two years after accession to the WTO'.

²⁶ According to a WTO Technical Note, 'transition periods have been granted in some accessions, in a limited number of areas and for specific periods of time, following submissions by Applicants of action plans' WT/ACC/10/Rev.4, 2.

when they start negotiations.²⁷ They will have to fully comply with all obligations in the WTO Agreement. They may be pressed to assume some WTO-plus undertakings. They may be able to negotiate transition periods for some commitments, though not for substantive obligations.²⁸

2.2 Market Access

Unlike rules, market access negotiations are undertaken bilaterally through the exchange of offers (by the acceding country) and requests (from interested Members). The acceding country's commitments are consolidated in market access schedules for goods and services which document the acceding country's obligations towards the rest of the WTO Membership.

Market access negotiations are very different to rules. There are no benchmarks for liberalization and acceding countries will each have varying levels of commitment.²⁹ The substantive obligations of acceding countries are determined through negotiations. Each acceding country's schedule will have different product coverage and will reflect a variety of factors such as its current applied regime, its sensitive sectors and the commercial interests of incumbent Members seeking access to its market. Recently acceded Members tend to have much higher levels of liberalization than original Members (at the same level of development) and the level of liberalization appears to be going up over time.³⁰

Claims are often heard that the trend towards increasingly higher levels of liberalization is unjust.³¹ Some commentators question the legitimacy of this practice and compare it to the imposition of WTO-plus rules.³² Others suggest that liberalization and domestic reform are the main sources of benefit for the acceding country (even greater than increased market access).³³

In regard to market access, all acceding Members (and indeed all original Members) have different commitments based on a Member-specific schedule. The notion of varying concessions has existed since the earliest days of the GATT. Original Members at the same level of development (and following the same negotiating procedures) ended up with varying levels of liberalization and, for some reason, this has always been accepted as appropriate in multilateral negotiations.

The trend for acceding Members to have increasingly higher average levels of liberalization is certainly open to the perception that it is leverage-induced arm-twisting and that the result is 'unjust'. However, incumbent Members may legitimately respond that there is no universal benchmark for the level and type of liberalization in schedules and that this will vary for each Member based on negotiations. In the absence of a universal benchmark, accusations that market access commitments are 'WTO-plus' may confuse the issue³⁴ and the debate should instead focus on whether the trend towards higher liberalization is 'just'.

The situation is very different for rules issues as a universal benchmark does exist. Under the current WTO approach, all Members (at the same level of development) are bound by the same rules³⁵ and the use of WTO-plus commitments for new Members is therefore a deviation from the norm. Considering the universal character of WTO rules, this deviation from the universal benchmark is widely perceived as an abuse by powerful incumbent Members who hold all the cards in negotiations. There are legitimate questions about whether this undermines the rules-based system.

As noted above, market access commitments are captured in Member-specific schedules for goods and services. While many reforms may be carried out during the accession process, there may also be obligations which require implementation post-accession. For these obligations,

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²⁷ Milthorpe argues that 'trends in the final terms and conditions are now well known' and that 'strong and very consistent indications have been seen about what members expect to see in a finalised accession'. Peter Milthorpe, *WTO Accessions: The Story So Far*, 4 Hague J. Dipl. 104 and 109 (2009). A WTO technical note highlights that 'accessions are similar enough for patterns to emerge'. *Technical Note on the Accession Process*, WTO Document WT/ACC/10/Rev.4, 1 (11 Jan. 2010). On the other hand, Evenett and Primo Braga suggest that many aspects of accessions are non-transparent (such as bilateral negotiations) and that there is more 'folklore' than clear indications about what accession entails. Evenett & Primo Braga, *supra* n. 4, at 2.

²⁸ In theory, there is no reason why acceding countries cannot negotiate for some WTO-minus commitments on their substantive obligations, however this does not occur in practice. See e.g. Charnovitz, *supra* n. 14, at 36 where his survey of WTO-minus provisions for acceding countries only includes transition periods (rather than substantive obligations).

²⁹ With the exception of LDCs which are subject to market access benchmarks. This will be discussed in s. 7.

³⁰ See e.g. Cattaneo & Primo Braga, *supra* n. 20; Evenett & Primo Braga, *supra* n. 4.

³¹ For a review of the academic literature on WTO accession, see Alexei Kireyev & Mustapha Sekkate, *WTO Accessions: What Does the Academic Literature Say*, in *WTO Accessions and Trade Multilateralism: Case Studies and Lessons from the WTO at Twenty* (Uri Dadush & Chiedu Osakwe eds), Cambridge University Press, 2015, 198-216.

³² See e.g. Eric Neumayer, *Strategic Delaying and Concessions Extraction in Accession Negotiations to the WTO*, 12(4) *World Trade Rev.* 669 (2013); Zdenek Drabek & Marc Bacchetta, *Tracing the Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries*, 27(7) *World Economy* 1083 (2004).

³³ See e.g. Cattaneo & Primo Braga, *supra* n. 20; Evenett & Primo Braga, *supra* n. 4; Dirk Bienen & Mamo Mihretu, *The Principle of Fairness and WTO Accession – Appraisal and Assessment of Consequences*, Society of International Economic Law Working Paper 2010/29; and Julia Ya Qin, *WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System*, 37(3) *J. World Trade* (2003).

³⁴ Charnovitz, who is highly-critical of WTO-plus rules, nevertheless rejects the notion of WTO-plus or WTO-minus for market access commitments and highlights the 'inherent subjectivity in judging equivalence' with respect to market access concessions. Charnovitz, *supra* n. 14, at 5.

³⁵ With rare exceptions, such as waivers.

Member-specific transition periods are captured in the acceding country's schedule.³⁶

3 HOW WILL ACCESSION WORKING PARTIES DEAL WITH TFA COMMITMENTS?

When the TFA enters into force, it will become part of the full range of WTO obligations which acceding countries must implement.³⁷ This will raise some new and interesting questions for the WTO membership. Some issues will be specific to the TFA because of its unique character, such as how to deal with TFA-style S&DT or the fact that TFA commitments seem to have both 'rules' and 'market access' characteristics.³⁸ Other issues would potentially apply to any new multilateral agreements, such as how to deal with transition periods.

3.1 TFA-Style S&DT

The TFA takes a novel approach to S&DT, one that is widely viewed by developing countries as more generous and just than the usual WTO approach.³⁹ This, however, is somewhat counter-intuitive as, unlike many WTO Agreements, the TFA does not provide developing countries with less onerous substantive obligations or the right to deviate from standard rules. Rather, the TFA requires full implementation of all commitments by all Members.

What makes the TFA unique is the process by which developing countries will implement the Agreement. Under the TFA, developing countries are entitled to self-designate their transition periods,⁴⁰ compared to the usual approach where transition periods are determined during negotiations (and captured in legal texts or Members' schedules). Further, for those commitments where developing countries lack implementation capacity, their legal obligation will be conditional on obtaining this capacity through TRTA.⁴¹ Essentially, developing coun-

tries can divide their commitments into three categories: immediate implementation (Category A), implementation subject to a transition period (Category B) and implementation subject to both a transition period and the provision of TRTA (Category C).⁴²

Therefore, any debate about S&DT for trade facilitation (in an accessions context) should focus on whether acceding countries have access to the two key elements: self-designation of transition periods and linking implementation to the provision of TRTA. If this is allowed, it will be a significant departure from the normal convention that commitments are clearly specified and implemented *during* accession negotiations.

3.2 Rules vs Market Access Distinction

Under the unique approach to self-designating and categorizing commitments, developing countries are taking a Member-specific approach to TFA implementation which blurs the line between market access and rules commitments. Working Parties will have to decide whether they wish to negotiate trade facilitation obligations under the rules or market access convention with respect to documentation and even certain substantive issues.⁴³

On documentation, should transition periods for TFA measures be captured in paragraphs of the Working Party Report (like rules commitments) or should there be a separate document which captures these commitments (as is the case under the TFA and for market access)? While TFA commitments are generally regulatory in nature, there could be advantages (in terms of clarity and transparency) if they were documented in a separate notification.⁴⁴

Further, there is at least one TFA measure which could arguably be negotiated under the goods market access schedule. The TFA requires that customs charges should be based on 'the approximate cost of the services rendered'.⁴⁵ Nevertheless, there are incumbent Members who scheduled an *ad valorem* customs service charge under

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³⁶ E.g. Samoa acceded to the WTO on 10 May 2012 and was given until either 2017 or 2022 to implement a handful of its tariff reductions (See Samoa's goods schedule WT/ACC/SAM/30/Add.1).

³⁷ According to the Protocol of Amendment (WT/L/940), it will be one of the Multilateral Goods Agreements.

³⁸ For a detailed discussion of the hybrid nature of TFA commitments, see 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. Intl. Econ. L. 773 (2015).

³⁹ For a detailed discussion of TFA-style S&DT, see Czapnik, *supra* n. 38.

⁴⁰ TFA Art. 14.1(b).

⁴¹ TFA Art. 14.1(c).

⁴² TFA Art 14.1.

⁴³ A further issue is whether TFA commitments should be negotiated bilaterally (like goods and services schedules) or be subject to a multilateral negotiation (like standard rules commitments).

⁴⁴ While negotiators deliberately avoided the term 'schedule', TFA notifications have important characteristics in common with a schedule, especially since they define Member-specific commitments.

⁴⁵ Art. 6.2.

'other duties and charges' (ODCs) in their goods schedule.⁴⁶ If an acceding developing country lobbied to retain an *ad valorem* customs service charge, this could be dealt with in either the goods schedule or the Working Party Report.⁴⁷

3.3 Transition Periods for Any New Multilateral Agreements

Transition periods in accessions are calculated 'as if [the acceding country] had accepted [the WTO] Agreement on the date of its entry into force'. Since Uruguay Round transition periods generally expired within a decade, new Members who acceded in the last ten years have had no automatic entitlement to transition periods.

The current Protocol language is potentially ambiguous with respect to transition periods for new multilateral agreements like the TFA. For WTO original Members, those transition periods will commence when the TFA enters into force.⁴⁸ Presumably, the same principle will apply to acceding countries, but this should be made explicit through amended Protocol language.⁴⁹

3.4 What Do the Texts Say?

There is nothing in the WTO Agreement or its rules and conventions which address the issue of TFA-style S&DT and transition periods. It is probably safe to assume that the drafters of the Marrakesh Agreement establishing the WTO did not envisage future legally-enforceable WTO Agreements where developing countries would self-designate their transition periods after entry into force. The Marrakesh Agreement, therefore, provides no guidance on how TFA-style S&DT should be addressed in the context of WTO accession.

In the TFA negotiations, the mandate clearly stated that S&DT should 'go beyond the traditional approach of transition periods' and the final Agreement reflects this. Did TFA negotiators provide any guidance on how this new S&DT would interact with WTO rules from the Uruguay Round or how it should apply to acceding Members?

In the scramble to reach a deal in Bali, the above issues may have been overlooked. The TFA contains no language on how the flexibilities in section II are intended to apply to acceding countries. The TFA contains one potentially relevant paragraph in the Final Provisions:

A Member which accepts this Agreement after its entry into force shall implement its Category B and C commitments counting the relevant periods from the date this Agreement enters into force.⁵⁰

This provision appears to be intended for incumbent developing country Members which ratify and accept the TFA once it has already entered into force (following acceptance by two-thirds of Members).⁵¹ This would resemble the approach taken for the implementation of the WTO Agreement by those Members who signed on in Marrakesh but did not deposit their instrument of acceptance until after entry into force.⁵² It is unlikely that this provision is intended to apply to acceding countries (for example the language refers to a 'Member which accepts this Agreement').

This lack of guidance leaves future Working Parties with much discretion. In principle, they could treat TFA obligations like any other rules and require full implementation upon accession. However, if they wish to preserve the spirit and architecture of the TFA, they could provide full flexibility to acceding developing countries under section II. They could also seek a nuanced outcome somewhere in between.

3.5 Option 1: Full Implementation on Entry into Force

In the unlikely event the WTO treats the TFA like a 'rules' agreement, this would require developing countries to implement all TFA measures upon accession to the WTO. This approach would deny the flexibilities enjoyed by the original Members under section II of the TFA (particularly regarding the self-designation of measures)⁵³ and would therefore be significantly more onerous for acceding countries. Transition periods would have to be negotiated on a case-by-case basis for certain measures, and captured in the Working Party Report.

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⁴⁶ Under Art. II:1(b) of the GATT. For example, according to the OECS Trade Policy Review from June 2014 (WT/TPR/S/299), St Kitts and Nevis recorded its customs service charge in its WTO tariff schedule, para. 17 on page 7.

⁴⁷ It is doubtful incumbent Members would allow this; however, it highlights some of the complications of fitting TFA obligations into the usual WTO mould.

⁴⁸ As of Sept. 2016, the TFA has been ratified by ninety-two Members and a further eighteen ratifications are required before it can enter into force. This is likely to happen later in 2016 or in 2017.

⁴⁹ E.g. by noting that acceding countries should implement the TFA as if they accepted that agreement on the date it entered into force.

⁵⁰ Art. 24.4.

⁵¹ Since the TFA enters into force once two-thirds of Members deposit their instrument of acceptance, some Members will only accede to the TFA after the clock starts ticking.

⁵² Art. XIV:2 of the Marrakesh Agreement.

⁵³ TFA Art. 14.

It is worth noting that incumbent Members could seek to clarify in the Protocol precisely how the acceding country would implement Section I measures or, in the most extreme case, insist on WTO-plus outcomes. The TFA contains many 'best endeavours' provisions which could become hard legal obligations if incumbent Members insisted on a WTO-plus approach.⁵⁴

Some WTO Protocols and Working Party reports already contain WTO-plus obligations on matters which would now be considered TFA issues.⁵⁵ For example, Armenia accepted a commitment that 'all laws, regulations, rulings, decrees or other measures related to trade in goods or services would be published in its official publication for public review at least two weeks prior to implementation'.⁵⁶ Regarding goods trade, this rule appears more onerous than GATT Article X:2. It applies to a broader range of measures and specifies that two weeks is the minimum period for advance publication 'before' enforcement.⁵⁷

Even under the expanded approach in the TFA, Armenia's commitment would likely still be considered WTO-plus.⁵⁸ The TFA requires publication 'as early as possible before ... entry into force'.⁵⁹ The TFA text does not refer explicitly to a minimum period of two weeks and it is conceivable that, for certain measures, the earliest possible publication date would be less than two weeks. Furthermore, the TFA qualifies the commitment in Article 2.1.2 and only requires implementation 'to the extent practicable' and 'in a manner consistent with [the Member's] domestic law and legal system'. Armenia's accession does not include these qualifications, which arguably soften the commitment. Armenia's commitment appears to be TFA-plus.

The TFA has multilateralized certain provisions which were previously considered WTO-plus in accession Protocols. For example, China's obligation to create gen-

eral enquiry points⁶⁰ and to offer an opportunity to comment (including to private sector actors)⁶¹ were considered WTO-plus in 2001,⁶² but are now multilateral obligations embedded in the TFA.⁶³

Some transparency aspects of China's accession would still be considered WTO-plus, even under the TFA. For example, China must publish certain laws in at least one WTO official language.⁶⁴ This is more onerous than the TFA, which does not require publication in a WTO official language,⁶⁵ except for the description of import, export and transit procedures.⁶⁶

In summary, under a strict approach to S&DT, acceding developing countries would be required to fully implement TFA obligations during negotiations. They could potentially negotiate for transition periods (on a case-by-case basis). However, they could also receive demands for TFA-plus commitments with respect to sections I and II.

This approach seems highly unlikely because it would be blatantly unjust to expect full implementation by new Members while 'original Members of the TFA'⁶⁷ still enjoy access to generous TFA-style S&DT. However, it is worth noting that accessions have an unusual negotiating dynamic where any outcome is possible provided all parties agree to it.

Acceding countries have a very weak bargaining position and, with the exception of the LDC guidelines (which took decades to finalize), the WTO has no track record of finding systemic solutions to issues which are common to all acceding countries. Rather, each applicant country is left to 'fend for itself' and negotiate an outcome with the entire WTO Membership. In the absence of guidance on how trade facilitation will be treated in accessions, it would be premature to assume that section II flexibilities would be fully granted merely because this seems fair.

Notes

⁵⁴ E.g. under TFA Art. 1.2.3, Members 'are encouraged' to make certain trade-related information available through the internet. Under a WTO-plus approach, Members could require that this information 'shall' be published on the internet.

⁵⁵ In fact, Charnovitz highlights that certain TFA issues (such as transparency and administrative/judicial review) are among the most common WTO-plus topics in accessions. See Charnovitz, *supra* n. 14, at 33.

⁵⁶ Working Party report of Armenia, WT/ACC/ARM/23, para. 215.

⁵⁷ See e.g. GATT Art. X:2: 'No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments there for, shall be enforced before such measure has been officially published.'

⁵⁸ An interesting legal issue, which is beyond the scope of this essay is how the TFA will interact with WTO-plus accession commitments. For example, if the TFA obligation is less onerous, would this prevail over the (earlier) accession obligation or would they be considered concurrent obligations.

⁵⁹ TFA Art. 2.1.2.

⁶⁰ China's Protocol of Accession, 3 (under s. C dealing with transparency).

⁶¹ *Ibid.*

⁶² For a detailed explanation of China's WTO-plus obligations, including with respect to transparency, See Ya Qin, *supra* n. 33, at 483.

⁶³ TFA Arts 1.3 and 2.1.

⁶⁴ China's Working Party Report, para. 334.

⁶⁵ Art. 1.2.

⁶⁶ Art. 1.2.2.

⁶⁷ This essay defines 'original Member of the TFA' as Members of the WTO when the TFA enters into force (even if they have not yet deposited their instrument of acceptance). This includes WTO original Members and Members who acceded prior to entry into force of the TFA.

3.6 Option 2: Acceding Developing Countries to Self-Designate Commitments Following Accession

An alternative approach would allow acceding developing countries to access all S&DT flexibilities and transition periods which are currently available under the TFA. In other words, these developing countries would accede first and then unilaterally notify the extent and timing of their implementation. Their obligations would be conditional on the provision of TRTA, as is the case for original Members of the TFA. If the WTO wishes to preserve the 'spirit' of the TFA in accession negotiations, this would be the logical approach. Section 4 offers several reasons why the WTO should follow this latter approach.

4 SHOULD TFA COMMITMENTS BE TREATED DIFFERENTLY IN ACCESSIONS?

Article XII of the Marrakesh Agreement grants much discretion to accession negotiators regarding the 'terms' they agree to. The trend has been for accession packages to grow increasingly demanding in regard to both rules and market access. For TFA commitments, incumbent Members certainly have the right (and the power) to insist on immediate implementation by acceding countries. This part will assess whether it is in the interests of incumbent Members and acceding countries to follow such a seemingly ambitious approach.⁶⁸

The architecture of the TFA is very different to that of other WTO Agreements, especially for S&DT and transition periods. Arguably this is because of the development dimension of the Doha Round in which the TFA was negotiated. However, other (unadopted) Doha Round negotiating texts do not share the TFA's novel features and a more likely explanation is that trade facilitation reform is substantively different from many other types of trade policy reform.

In addition to its highly-novel structure, this part considers four other elements which justify a special approach for TFA measures in accessions: (1) the domestic political

economy of trade facilitation reforms; (2) the cost and timeframe for implementation; (3) TRTA and (4) the scope for TFA-plus approaches to reform.⁶⁹

4.1 Dynamics of Domestic Reform

The implementation of WTO commitments by acceding governments (or any government entering into a trade commitment) is often difficult. However, not every commitment raises the same types of implementation difficulties. At times, the main problem derives from domestic politics while, at other times, the key obstacle appears to be the resources required to implement.

Often, the biggest obstacle to reform is the presence of forces resisting change. For example, consider the prohibition on export subsidies under the WTO Agreement on Subsidies and Countervailing Measures (SCM). Eliminating subsidies is not a technically-difficult reform – it can be achieved with the stroke of a pen.⁷⁰ Eliminating subsidies is also not a resource-intensive reform for governments; it does not cost a cent and, if anything, it actually frees up government resources. Yet the removal of export subsidies is difficult for one major reason: domestic political resistance by the recipients of the subsidy.

If a government opposes the removal of such a subsidy during negotiations or requests an extended transition period to remove it, this must be understood in the context of domestic politics. While the government has the technical capacity to remove the subsidy, it may be under political pressure to continue providing support through a redesigned program or to manage the adjustment as beneficiary producers get weaned off it.

This is a very real scenario which arose in the context of Uruguay Round negotiations. Export subsidies were recognized as a thorny issue and developing countries were granted at least eight years⁷¹ to eliminate them under the SCM Agreement.⁷² Due to the difficulty of removing these subsidies, certain developing countries applied for extensions which ultimately lasted until 2015.⁷³ In November 2015, one Member sought a waiver to extend its program by a further three years.⁷⁴ So while subsidies can in theory be eliminated with 'the stroke of a

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⁶⁸ The analysis in this essay focuses on Members' interests, rather than what is 'moral' or 'fair'.

⁶⁹ In many respects, these ideas are inter-linked however they will be analysed separately.

⁷⁰ Finger and Schuler refer to 'the stroke of a minister's or a legislature's pen', while Hoekman says 'by decree'. See J Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, World Bank Policy Research Working Paper 3 (Oct. 1999); Bernard Hoekman, *Strengthening the Global Trade Architecture for Development*, CEPR Paper 18 (Jan. 2002).

⁷¹ Art. 27.2 of SCM Agreement. Eight years is a very generous transition period by Uruguay Round standards.

⁷² LDCs were exempted from the prohibition on export subsidies and a group of other developing countries were placed under a regime which provided more flexibility than the eight-year phase-out period (see Art. 27.2(a) and Annex VII).

⁷³ See e.g. Ministerial Conference Decision of 14 Nov. 2001, WT/MIN(01)/17, WTO Document G/SCM/39 dated 20 Nov. 2001 and General Council Decision of 27 July 2007 (WT/L/691).

⁷⁴ G/C/W/705/Rev.2.

pen', political obstacles can prevent implementation for over two decades.⁷⁵

Trade negotiators understand that domestic resistance to change can be a major barrier to trade policy reform and they use certain tools to overcome it, such as the exchange of reciprocal concessions. This mobilizes domestic stakeholders with export interests and re-frames the political debate about the value of undertaking reforms.

A further tool is the adoption of clearly-defined, legally-enforceable, commitments. In this case, a government which wavers (or backtracks) on implementation can be brought before a dispute panel and obliged to respect its trade commitments (even in the face of fierce political resistance back home). The WTO dispute settlement mechanism is widely considered to have had (to date) an excellent track record of getting governments to implement politically-difficult commitments, including through the threat of retaliation.

For accessions, the mechanisms to overcome domestic political resistance are even stronger. Not only are acceding countries required to take on meaningful legal obligations, it is common to wait for the actual implementation of obligations before letting the acceding country into the WTO. After all, the carrot of membership can facilitate and speed up the reform process in the acceding country during negotiations.

This option is not available in multilateral trade rounds. The final outcome of a multilateral negotiation is always highly-contested until the last minute and governments are not certain what their final commitments will be. A Member would have trouble managing the domestic politics of reform during negotiations (as it would not have received reciprocal concessions). Even if it managed to reform during negotiations, these concessions would lose value and be pocketed by negotiating partners.⁷⁶ Multilateral negotiations must rely on implementation after entry into force and therefore give a more prominent role to dispute settlement to ensure compliance.

How should trade facilitation reforms be dealt with in accessions? If they are likely to face significant domestic resistance, then requiring full implementation during accession negotiations may be the best way to ensure ambitious and prompt reform efforts. Alternatively, if domestic political resistance is not the main obstacle to

reform, it may be more efficient to let acceding developing countries into the WTO quickly and work alongside them as they implement their commitments.

The treatment of S&DT in the TFA text suggests that domestic political resistance is not a prominent obstacle to trade facilitation reforms. While some measures may be politically difficult,⁷⁷ it appears that the major barrier to implementation concerns the adequacy of resources. Therefore, the usual lever which incumbent Members employ in accessions (down payment on implementation) may not be necessary for trade facilitation reforms. Rather, the TFA's flexible approach to S&DT and the granting of transition periods should be replicated in accession negotiations.

4.2 Cost and Timeframe for Implementation

The WTO strives to achieve universal membership. One of the factors which prevents (or at least delays) the expansion of WTO Membership is the time it takes to complete accession negotiations. Accession negotiations are becoming increasingly complex and time-consuming,⁷⁸ a trend which the addition of trade facilitation commitments will likely exacerbate.

WTO Membership can be a shock to new Members. There are many reforms to implement and some acceding countries may require an ideological shift on economic policy to join the multilateral trade body. There may be domestic stakeholders who strongly oppose WTO Membership and it can take time to build needed domestic political support and buy-in.

While the previous section provided a 'political' reason to treat TFA reforms differently, this section offers a 'practical' reason: trade facilitation reforms are time-consuming and costly and could significantly delay accessions. If long accession negotiations are necessary to ensure consistency with WTO rules, this may be justifiable. However, since protracted negotiations delay the benefit of accession to incumbent Members and the acceding country, these should be minimized wherever possible.

Following the Uruguay Round, where a wide range of new commitments became part of the WTO rule-book,⁷⁹ much analysis was undertaken on implementation time and costs. Finger and Schuler distinguished between two

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⁷⁵ Some Members chose to implement this measure by re-designing their subsidy programs in a WTO-consistent manner (by removing the export contingency). The waiver request in G/C/W/705/Rev.2 asks for 'the necessary time to design and implement an entirely new, WTO-consistent subsidy program'. This is not necessarily an easy task and may require extensive consultations, economic modelling and legal analysis. Nevertheless, the decision to re-design the program was driven by domestic political concerns. These governments could have elected to eliminate the subsidy altogether (at least in a technical sense).

⁷⁶ A reform which has not yet been implemented always has more value in negotiations than the mere binding of a unilateral reform.

⁷⁷ E.g. certain Members negotiated hard to 'grandfather' their current approach to the mandatory use of customs brokers. This position may have been driven by a well-organized lobby group (customs brokers) seeking to protect the current system in their country.

⁷⁸ See e.g. Cattaneo & Primo Braga, *supra* n. 4, at 3. See also Sauvé, *Assessing the WTO Accession of Nepal and Cambodia: Economic Impacts and Social Adjustment Costs*, 1(1) Asia-Pac. Trade & Inv. Rev. 27-49 (Apr. 2005).

⁷⁹ Or existing commitments were extended to Members not covered by the Tokyo Round Codes.

types of commitments. Traditionally, GATT had dealt with reducing trade barriers (such as tariffs and quotas) and getting rid of 'bad policies'.⁸⁰ While these reforms were politically difficult (in terms of resistance by affected stakeholders), they were not resource-intensive.⁸¹

The TFA contains few obligations of this type. Non-mandatory use of customs brokers⁸² is an example of a reform that requires few resources, but may lead to political resistance in some countries. The prohibition of consular transactions would have fallen into this category, but it did not survive endgame negotiations (presumably due to political pressure in certain capitals) and it was removed from the final TFA text.⁸³

The second type of WTO commitment, already evident at the time of the Uruguay Round, concerns obligations requiring positive actions by government to change the way they operate (such as customs valuation, sanitary and phytosanitary (SPS) measures and protection of trade-related aspects of intellectual property rights (TRIPS)).⁸⁴ Most measures under the TFA fit clearly within this category, such as the requirement to undertake post-clearance audits or establish a single window.

To put this in perspective, it is possible to compare TFA commitments to different types of Uruguay Round commitments. Hoekman analysed twenty-two different types of Uruguay Round disciplines to see whether they involved significant direct implementation costs or required corollary investments. He found that half of the commitments were not resource intensive for governments (such as transparency, tariff bindings and the removal of export subsidies).⁸⁵

Some resource-intensive commitments in Hoekman's framework were not obligatory. For example, though expensive to operationalize, trade remedies remain optional and many developing countries did not invest resources in establishing an investigating authority.⁸⁶

This further reduced the number of resource-intensive commitments arising from WTO membership.

The TFA potentially creates new implementation challenges. For many Uruguay Round Agreements, even where implementation costs were high, the responsibility for implementation fell clearly on a lead agency (such as for customs valuation, SPS and rules of origin). While these commitments were no doubt burdensome, the TFA introduces the notion of whole-of-government coordination as a new issue (e.g. to implement a single window). Further, like certain Uruguay Round commitments, the TFA requires the creation of new units and staff positions⁸⁷ and the purchase of hardware and software.⁸⁸

The WTO has identified eight different types of implementation costs relating to the TFA.⁸⁹ These costs have not been systematically mapped to the different types of TFA measures.⁹⁰ However, there are compelling reasons to suggest that some TFA obligations, especially the single window, will be resource-intensive to implement.⁹¹

The nature of implementation costs has evolved over time. Following the Uruguay Round, transparency was considered a relatively cheap commitment to implement.⁹² Under the TFA, certain transparency commitments may turn out to be significantly more resource-intensive, such as for internet publication and the establishment of enquiry points.⁹³

UNCTAD's 'New Frontier of Competitiveness' provides details on the time to implement the TFA. According to UNCTAD, certain developing and LDCs estimate their total TFA implementation time to last 10 years.⁹⁴ Provisions such as freedom of transit and the creation of single windows are consistently seen as involving high estimated implementation times across all sampled countries.⁹⁵

Trade facilitation reform requires changes to procedures and bureaucratic cultures. It requires all trade-related agencies to consult, cooperate, coordinate and agree on whole-of-government approaches. It is not just about changing

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⁸⁰ Finger & Schuler, *supra* n. 70, at 3.

⁸¹ The example of removing export subsidies illustrates this point.

⁸² Art. 10.6.

⁸³ In the final negotiating text before Bali, dated 23 Oct. 2013 (TN/TF/W/165/Rev.18), there was a square bracket prohibiting consular transaction requirements.

⁸⁴ Finger and Schuler subdivide these reforms into two categories (trade procedures and business environment reform).

⁸⁵ Hoekman, *supra* n. 70, at 9.

⁸⁶ In this context, optional signifies that Members may use trade remedies, but have no obligation to do so. If they elect to use trade remedies, there are highly-prescriptive and costly obligations which apply.

⁸⁷ E.g. enquiry points (Art. 1.3).

⁸⁸ E.g. internet publication (Art. 1.2) or electronic single windows (Art. 10.4).

⁸⁹ These included diagnostic, regulatory, institutional, training, equipment/infrastructure, awareness-raising, political and operational. World Trade Report 2015, 116–117.

⁹⁰ It would be interesting to see further analysis in this area to understand whether TFA obligations are substantively different to the most resource-intensive Uruguay Round commitments (such as customs valuation and TRIPS).

⁹¹ The World Trade Report 2015 found that some measures would be relatively cheap to implement (for example, publishing legislation is 'already part of longstanding practices in many developing countries'), while others could be very expensive, such as electronic single windows (up to USD 27 million). See World Trade Report, 119–121.

⁹² Hoekman, *supra* n.70, at 9.

⁹³ However, it is important to note that some of the more resource-intensive aspects are merely 'best endeavours' obligations.

⁹⁴ UNCTAD, *The New Frontier of Competitiveness in Developing Countries: Implementing Trade Facilitation*, 28.

⁹⁵ *Ibid.*, at 32.

laws and procedures, but also instilling a culture of transparency, cooperation, honesty and impartiality. This will require efforts to stamp out corruption and encourage border officials to see themselves as service providers to facilitate trade, and not just as an enforcement officers.

There is no doubt that TFA implementation will take time and require significant financial resources and unwavering political will. WTO Members should strongly consider whether this can be carried out, at least partially, following accession (provided that transition periods are clearly defined and TRTA is made available).

4.3 WTO Regime for TFA-Related TRTA

There may be significant benefits, in terms of TRTA, if developing country accessions are expedited and implementation is carried out post-accession. While acceding countries will undoubtedly have access to TRTA, even pre-accession,⁹⁶ a highly beneficial (and novel) dimension of the TFA is the structure, rigour and transparency of its approach to TRTA.

The TFA creates principles for how TRTA should be provided,⁹⁷ mandates a dedicated session of the WTO's Trade Facilitation Committee to look at TRTA⁹⁸ and requires donors to notify details of their programs and disbursements.⁹⁹ If an acceding developing country requires TRTA for trade facilitation purposes – which appears likely considering the average time and costs involved – this should be brought within the TFA framework rather than being provided on an ad hoc basis.

4.4 TFA-Plus Approach to Negotiations

Finally, it is worth noting that many developing countries are using TFA implementation to pursue TFA-plus reforms,¹⁰⁰ often with the support of development partners. This should provide significant benefits to the implementing countries and to the multilateral trading system.

TFA-plus approaches may be desirable where governments seek to integrate trade facilitation within an existing reform agenda aimed at improving their trade and doing business environments. Governments may wish to implement certain trade facilitation measures alongside government policies related to customs automation and modernization, regional integration, investment climate reform as well as infrastructure development plans.¹⁰¹

For example, the TFA requires the establishment of a single window, 'enabling traders to submit documentation ... through a single entry point'.¹⁰² However, the Agreement is non-prescriptive as to how this should be done. It does not require that the single window must be electronic; Members could choose to set up a physical office instead. Furthermore, the TFA focusses on the submission of documents and remains silent on whether or how border agencies should integrate their operations. While an integrated electronic single window would be more costly and time-consuming, many developing countries are pursuing this TFA-plus approach as it is seen as producing desirable efficiencies and cost reductions.

If incumbent Members insist on TFA implementation during accession negotiations, this may create a perverse incentive for acceding countries to comply with the minimum legal standard required by the Agreement, rather than pursuing a beneficial TFA-plus agenda. This would be an unfortunate and self-defeating outcome.

4.5 Summary

In the context of WTO accession, Members will have to address an important question: do they wish to delay accessions while they wait for TFA reforms or are they prepared to welcome new Members and allow them a transition period to implement their TFA obligations?

There are highly-compelling reasons to choose the latter. Trade facilitation reforms do not attract fierce political resistance by domestic stakeholders and therefore it may not prove necessary to use the accession process as leverage to push through reforms. Trade facilitation reforms can be very time-consuming and costly and implementation could significantly delay accessions. TRTA will be more rigorous and transparent under the WTO framework. Finally, linking TFA reforms to accession may discourage TFA-plus reforms.

5 ANALYSIS OF THE DIFFERENT OPTIONS

5.1 Full Implementation Before Entry into Force

At first glance, full TFA implementation prior to accession could be seen as the highest-ambition approach

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⁹⁶ There is no evidence to suggest that donors are limiting their TRTA on trade facilitation to WTO Members only. In fact, even the WTO's TFA Facility appears to be available for acceding countries.

⁹⁷ Art. 21.3 of TFA.

⁹⁸ Art. 21.4 of TFA.

⁹⁹ Art. 22 and Annex 1 of TFA.

¹⁰⁰ TFA-plus refers to situations where Members choose to implement trade facilitation reforms which go beyond the minimum requirement in the TFA.

¹⁰¹ See e.g. World Trade Report 2015, 116–118.

¹⁰² Art. 10.4.

available to the WTO. It would push for prompt and comprehensive reforms and might appeal to some incumbent WTO Members seeking the highest level of ambition from acceding developing countries. They could press for ambitious packages which would reinforce the (controversial but seemingly entrenched) notion that incumbent Members can demand WTO-plus and early implementation in the context of WTO accession.

However, this approach has significant weaknesses. It could be perceived as unjust and overly-onerous for acceding developing countries. This is not an uncommon refrain generally in accessions, however it would have even more weight for the TFA where S&DT is embedded into the Agreement's architecture.¹⁰³

Further, a strict approach to TFA implementation could significantly delay accessions. For the reasons discussed in section 4, Members should be pragmatic and consider extending TFA-style S&DT to acceding countries.

5.2 Full Access to S&DT Flexibilities

An alternative approach would allow developing countries to use the full flexibility contained in the TFA (including unilateral and *post facto* self-designation). This would grant acceding developing countries the same level of flexibility afforded to original Members of the TFA. It would lead to a consistent approach to TFA implementation for all developing countries and ensure that TFA issues do not delay accessions.

Some incumbent Members may view this approach as low in ambition, especially those with trade interests in the acceding country. Incumbent Members may face pressure from their exporters to press for clarity about when the acceding country will implement or they may call for WTO-plus commitments or early implementation of high priority measures.

The decision to allow self-designation after entry into force was a compromise in the context of multilateral negotiations. This compromise was strongly opposed by certain Members who may see accession negotiations (where they have a stronger bargaining position) as an opportunity to take a stricter approach to S&DT and transition periods.

Even if the core principle of self-designation is respected, some may view notification following entry into force as a sub-optimal outcome. WTO Members are likely to demand clarifications during the negotiating process (either formally or informally) about how TFA measures will be implemented.

A further issue is how any flexibility should be captured in the accession documents. Ordinarily, transition

periods for rules are captured case-by-case in the Working Party Report. However, if Members decide to allow self-designation, it would be excessively cumbersome to dedicate a Working Party Report paragraph to each of the measures where acceding countries seek flexibility.

A simpler method would be for each acceding developing country to provide a notification of its Category A, B and C commitments in a single annex as part of the accession package. A template for this type of notification was developed by the Trade Facilitation Preparatory Committee in January 2016.¹⁰⁴ This notification was not designed for WTO accessions but could be effectively used in this context.

5.3 A Compromise Approach

Working Parties could recognize the special situation for TFA obligations and seek a systemic solution. This would save a handful of acceding countries (at the head of the accession queue) from serving as guinea pigs on how TFA commitments should be dealt with. It would also prevent an ad hoc outcome in the first post-TFA accession from inadvertently becoming a precedent.

This article suggests that acceding developing countries should be entitled to a starting assumption of full access to the TFA's S&DT flexibilities. This would allow acceding developing countries the right to self-designate their transition periods.

In order to improve transparency and clarity of obligations, acceding countries could be required to undertake self-designation during negotiations (rather than *post facto*) and to capture all measures in a single document. The key difference with this approach is that acceding developing countries would be required to put their cards on the table during negotiations. This would make it easier for the acceding country and other WTO Members to view the package as a whole when finalizing the terms of accession.

5.4 Miscellaneous Issues

There are two further issues that deserve attention under the approach described above. How would the WTO deal with certain information (such as definitive dates and TRTA arrangements) which only becomes available after entry into force? And how should Working Parties treat acceding countries which have made significant progress on their accession packages before the WTO introduced new trade facilitation commitments?

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¹⁰³ In fact, since the TFA-style S&DT focusses on transition periods and TRTA (rather than different substantive obligations), this would be tantamount to having developed country commitments.

¹⁰⁴ The WT/PCTF/N/ series. Zambia has already provided such a notification in WT/PCTF/N/ZMB/1.

5.4.1 How Would Definitive Dates for Categories B and C Operate?

The TFA requires certain information to be notified upon entry into force, such as 'indicative dates' for implementation.¹⁰⁵ However, other information only needs to be provided later, such as definitive implementation dates for Category B measures which are to be notified 'no later than one year after entry into force'.¹⁰⁶ In the context of accessions, incumbent Members could insist that this information be provided during negotiations (especially if a comprehensive needs assessment was undertaken and acceding countries had a clear understanding of their implementation requirements).

However, the situation is more complicated for Category C measures where certain details relating to TRTA and definitive implementation dates are only due to be notified following entry into force. Information on TRTA arrangements (between developing countries and donors) is to be notified one year after entry into force¹⁰⁷ while progress reports on TRTA and definitive dates for implementation are to be notified a further eighteen months on.¹⁰⁸

This information would be hard to capture during accession negotiations. Developing countries would be hesitant to lock in definitive dates for implementation until they had confirmed TRTA arrangements and started seeing disbursements. Donors are under no legal obligation to provide TRTA and may be concerned if their arrangements were somehow captured in official accession documentation.¹⁰⁹

Accession negotiators could follow the TFA approach of only requiring these details to be notified subsequently, however this would represent a significant philosophical shift. Accession negotiators generally leave nothing to chance and have no history of leaving key details to be ironed out only once the new Member has already acceded.¹¹⁰ Rather, they tend to use their significant leverage to press for clarity and ambition in the final deal.

Working Parties must also decide if acceding countries will access other S&DT mechanisms available under the TFA. For example, the early warning mechanism allows developing countries to unilaterally extend their implementation dates in certain cases.¹¹¹ Further, developing countries

may shift measures between Categories B and C following their original notification, provided they comply with certain conditions.¹¹² In principle, these mechanisms should be made available to acceding developing countries.

In summary, accession negotiators could take some categorization information which is currently provided *post facto* and make it part of the accession package. They could also adopt a uniform format for the self-designation of commitments in order to promote greater transparency. There may be limits to how far this can be achieved and certain elements may still need to be determined following accession, especially with respect to TRTA.

5.4.2 How to Deal with Developing Countries That Have Already Advanced in Accession Negotiations

In April 2016, the WTO amended certain accession documents (such as the MFTR and the Draft Working Party Report) to reflect the fact that trade facilitation will soon become a core element of accession packages.¹¹³ The Secretariat's Technical Note on accession negotiations was also amended to reflect the fact that trade facilitation will now be included as a topic under Policies Affecting Trade in Goods (section 4).¹¹⁴

The TFA marks the first time that acceding countries witness the multilateral goalposts moving on them during negotiations. For those acceding developing countries which are well advanced in the process, demands to amend their MFTR or engage in further questions and answers could be highly disruptive.

In such a long and complex negotiation, requiring candidates to renegotiate issues which had appeared settled would certainly undermine trust in the negotiating process. It may also empower those voices in acceding country capitals that actively oppose accession.

Countries which are well advanced in their accession process should be offered a mechanism to integrate trade facilitation rules and commitments with a minimum of complexity. Rather than using the MFTR, the fact-finding for an acceding country's trade facilitation regime

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¹⁰⁵ Art. 16.1(c).

¹⁰⁶ Art. 16.1(b).

¹⁰⁷ Art. 16.1(d).

¹⁰⁸ Art. 16.1(e).

¹⁰⁹ Even if no legally-binding obligation was created, this may lead to diplomatic pressure on the donor Member with respect to the assistance it provides.

¹¹⁰ E.g. China's Accession Protocol ran to 11 pages, plus 9 annexes (including goods and services schedules) and 143 paragraphs from the Working Party Report which were incorporated by reference (see WT/L/432 and WT/ACC/CHN/49).

¹¹¹ Art. 17.

¹¹² Art. 19.

¹¹³ WTO Accessions Newsletter, Version 62 (Apr. 2016), can be found at https://www.wto.org/english/thewto_e/acc_e/nl_e/2016_04_acc_newsletter_e.pdf (consulted on 3 May 2016).

¹¹⁴ WT/ACC/22/rev.1.

should be based on the WTO's Self-Assessment guide (also known as a trade facilitation needs assessment).¹¹⁵ Needs assessments could be conducted by the WTO Secretariat or other development partners to identify the appropriate categorization, implementation timetables and TRTA needs for each measure.

In fact, the WTO should strongly consider using its needs assessment methodology to deal with TFA commitments in all future accessions (even for those countries which have not yet applied for membership), rather than using the MFTR.

6 SPECIAL APPROACH FOR LDCs

Unlike other developing countries, LDCs seeking accession appear to have an automatic *legal* right to full TFA S&DT. The General Council has produced guidelines on the substance of LDC accession packages and an *addendum* 'to further strengthen, streamline and operationalize' their implementation.¹¹⁶ The 2012 *Addendum* introduced benchmarks with respect to market access commitments which is markedly different to the arrangement for other developing countries, where the level of ambition is determined purely by negotiations.

The General Council Decision from December 2002¹¹⁷ established that 'special and differential treatment ... shall be applicable to all acceding LDCs, from the date of entry into force of their respective Protocols of Accession' and that 'transitional periods/transitional arrangements foreseen under specific WTO Agreements, to enable acceding LDCs to effectively implement commitments and obligations, shall be granted in accession negotiations'. These principles were reaffirmed and reiterated in Decisions of the Ministerial Conference (December 2011)¹¹⁸ and General Council (July 2012).¹¹⁹

When these Guidelines were originally decided, the innovative approach to S&DT under the TFA had not yet been mandated nor developed. Even when the principles in the guidelines were reaffirmed, TFA-style S&DT was merely a square bracket in a negotiating text. While the TFA approach to S&DT may not have been considered or foreseen, a strict interpretation of the guidelines would suggest that LDCs are entitled to the full range of TFA-style S&DT and transition periods.¹²⁰ After all, TFA negotiators were fully aware of these guidelines when they negotiated section II.

The TFA also contains language which suggests that LDCs should be given leeway with respect to implementation. The General Principles in section II note:

Least developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.¹²¹

Certain section II obligations also use qualifying language such as 'taking into account maximum flexibilities for LDCs'.¹²²

Regardless of how WTO Members elect to treat TFA-style S&DT for developing countries, they will have to take a flexible approach to LDC accessions. The LDC guidelines suggest that full S&DT must be extended. The application of the LDC guidelines to TFA commitments in accessions is a matter which should be clarified explicitly by the WTO.

7 CONCLUSION

The unique approach to S&DT in the TFA will have consequences which go beyond that Agreement. This will likely become apparent in the context of developing country accessions. Rather than dealing with these issues on an ad hoc basis as accessions arise, the WTO should proactively discuss these issues and make decisions about how TFA-style S&DT will be treated.

This article's contention is that the WTO should adopt an original approach to TFA commitments in accession packages. Most importantly, it should break from the past practice of seeking implementation *during* negotiations and pressing for minimal S&DT or transition periods. The WTO should consider addressing TFA commitments through a needs assessment (rather than the MFTR) and capturing S&DT flexibilities in a separate notification or schedule.

If incumbent Members take a heavy-handed approach with trade facilitation commitments in accessions, it could potentially disrupt developing countries on the cusp of accession, as well as those which remain years away from finalizing their entry packages. Now is the time for the WTO to start considering the systemic implications of TFA-style S&DT and to clarify how it will co-exist with other rules and conventions of the multilateral trading system.

Notes

¹¹⁵ WTO document TN/TF/W/143/Rev.8 dated 17 Nov. 2014.

¹¹⁶ General Council Decision of 25 July 2012 (WT/L/508/Add.1).

¹¹⁷ WT/L/508, 2.

¹¹⁸ WT/L/846.

¹¹⁹ General Council Decision of 25 July 2012 (WT/L/508/Add.1), paras 18 and 19.

¹²⁰ Hughes has highlighted that although these Decisions are called 'guidelines', the legal language chosen appears to be of an obligatory nature and the mandatory term 'shall' is often used. See Valerie Hughes, 319.

¹²¹ TFA Art. 13.3. This language is consistent with the mandate from the July Package (Annex D, para. 3).

¹²² See e.g. TFA Art. 16.2(a).