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The agreement on trade facilitation and its Implications: An interpretative perspective

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THE AGREEMENT ON TRADE FACILITATION AND ITS IMPLICATIONS: AN INTERPRETATIVE PERSPECTIVE

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ABSTRACT

As a highly compromising and flexible agreement, the Agreement on Trade Facilitation (hereinafter "TFA" or "the agreement") may shed light on the future direction of the world trade regime. Going beyond the tariffs and border, the agreement is featured with good governance requirements. Its delicate relationship with free trade agreements (hereinafter "FTAs"), the domestic law, and existing World Trade Organization (hereinafter "WTO") agreements deserves attention and carries important implications. What is the relationship between of the TFA and non-WTO rules? How do existing WTO agreements apply to the TFA explicitly or implicitly? What is the interpretative challenge? In addressing these issues, the holistic approach is needed. It remains to be seen how the TFA fits to the world trade regime in the future.

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The TFA may be deemed as a milestone in the WTO rule making as it is first time the members agree on a new multilateral trade agreement. The TFA is binding on all WTO members.[1] Although the TFA missed the deadline of July 31, 2014, it remains relevant for trade law. As Professor Howse explains:

> *The fact that July 31 is only specified as a deadline by which a meeting is to occur with a view to certain actions rather than when the actions themselves must have been completed, is consistent with the fact that nothing in the TFA specifies any legal consequences in the event that the actions in question remain incomplete by July 31…. Further, the deadline is not contained within the TFA itself (and that includes the 2015 deadline for acceptances). Extending the acceptances deadline would simply require a new ministerial decision, and does not require opening up the heavily negotiated text of the TFA…. In sum, the legal basis for declaring the TFA dead and the WTO in crisis is completely illusory . . . .*[2]

The TFA may become a plurilateral agreement under the WTO,[3] or becomes a basis for relevant provisions of FTAs that are based on WTO rules. The interpretation of the TFA may be of significance to the WTO or even to FTAs. To expedite the movement of goods, the agreement addresses the lack of WTO specific provisions in some areas, particularly on customs procedures and on transparency. The agreement results in mutual gains that are positive sum. Meanwhile, there has been uproar over the TFA for various reasons, including some members possibly being affected in the short run in changing their rules to global regulations, and high potential costs of implementation such as electronic submission of signatures.[4]

Not isolated from the world trade regime, the TFA needs to be read together with other rules and its interpretative challenge deserves attention.

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[1] Preparatory Committee on Trade Facilitation, *Agreement on Trade Facilitation* [hereinafter "TFA"], art. 24.2, WT/L/931 (July 15, 2014).

[2] Rob Howse, *The Fallacy of the Jul 31 Deadline in the WTO TFA: Inventing A Crisis and Demonizing India's Democracy*, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Aug. 1, 2014, 12:50 PM), http://worldtradelaw.typepad.com/ielpblog/2014/08/the-fallacy-of-the-jul-31-deadline-in-the-wto-tf ainventing-a-crisis-and-demonizing-indias-democracy.html.

[3] Carlos A. Primo Braga, *A Crisis is a Terrible Thing to Waste: IMD Professor Carlos A. Primo Braga on the WTO Trade Facilitation Agreement Imbroglio*, IMD (Aug. 7, 2014), http://www.imd.org/news/WTO-Trade-Facilitation-Agreement-imbroglio.cfm.

[4] Deborah Elms, After Bali: What Happens Next with Asian Trade Facilitation?, at 11-12, *presented at* the Asian WTO Research Network 2014 Taipei Conference ([June 14, 2014]) [on file with the author].

Part I reviews the structure of the agreement and the possibilities of TFA disputes. Part II highlights the features of the TFA. Part III and IV then analyze the TFA's relationship with non-WTO rules and existing WTO agreements respectively. Part V concludes. Due to the space limit, the paper focuses on the substantive provisions in Sections I and III of the TFA. Section II of the TFA will be discussed when necessary.

I. INTRODUCTION

A. The Structure of the TFA: A Dichotomy?

Addressing customs and other formalities, the TFA mainly consists of Section I, Section II, Section III, and members' commitments that are to be made under Section II accordingly.[5]

Section I is composed of 12 articles. Articles 1-5 of the TFA, to various degrees, are related to General Agreement on Tariffs and Trade (hereinafter "GATT") Article X and the issue of transparency. Similar to GATT Article X:2, the policy underlying these TFA provisions pertains to transparency and due process.[6] Both the title of TFA Article 5 and the text of GATT Article X:3(a) impose the requirement of impartiality. Like GATT Article X:3(a), TFA Article 3.1 imposes the requirement of reasonable manner for the issuance of advance rulings. The requirement of uniformity in GATT Article X:3(a) is also echoed in TFA provision of notifications for enhanced controls.[7]

TFA Articles 6-10 are generally related to GATT Article VIII that deals with fees and formalities connected with importation and exportation. Substantial development has been made in enhanced inspection, disciplines on fees and charges, release and clearance of goods, border agency cooperation, goods intended for import, formalities connected with importation and exportation. Detailed rules are provided to expedite the movement of goods. To prevent exploitation of rules, penalty disciplines, for instance, impose requirements on the commensurateness of penalties with severity of the breach,[8] avoidance of conflicts of interests,[9] written explanation of breach nature and applicable rules,[10] and consideration of a person's voluntary breach disclosure as a potential mitigating factor.[11] The

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[5] TFA art. 24, ¶¶ 10 &11.
[6] Appellate Body Report, *United States–Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, 21, WT/DS24/AB/R (Feb. 10, 1997).
[7] TFA art. 5.1(b).
[8] TFA art. 6.3.3.
[9] TFA art. 6.3.4(a).
[10] TFA art. 6.3.5.
[11] TFA art. 6.3.6.

separation of release from final determination of duties and fees is required.[12] Among them, the use of a single window is encouraged, which enables traders to submit documentation and/or data requirements for importation, exportation or transit of goods through a single entry point to the participating authorities or agencies. TFA Article 11 clarifies and improves GATT Article V on freedom of transit. The remaining Article 12 deals with customs cooperation to ensure the implementation of the agreement. Some articles, such as Articles 7 (release and clearance of goods) and 10 (formalities concerning importation and exportation and transit), provide for obligations that are of crucial importance to businesses.

The TFA is adapted to provide special and differential treatment (hereinafter "S&D treatment") for developing country members and least-developed country (hereinafter "LDC") members,[13] which is provided in Section II. These members could divide their commitments to Categories A, B, and C. Category A is to be implemented upon the entry into force of the TFA. Category B will be implemented after a transitional period, and the implementation of Category C depends on the transitional period and the implementation capacity assistance. Accordingly Section II provides for, inter alia, assistance and support for capacity building to help these members implement the TFA.[14] If the assistance for capacity building provided by donor members is insufficient, it may affect implementation of the TFA.

Moreover, buffers and flexibilities are provided for developing country members and LDC members in terms of the provision implementation. The extent and the timing of implementing TFA provisions are related to these members' implementation capacities. If the necessary capacity continues to be lacking in these members, the implementation of the provisions concerned will not be required until implementation capacity has been acquired.[15] There is also an early warning mechanism to extend the implementation of provisions in categories B and C,[16] including the opportunity of automatic extension without the action of the Committee on Trade Facilitation (hereinafter "the Committee").[17] The shift between Categories B and C is allowed through notification to the Committee.[18]

The TFA implementation issues may be examined by the Expert Group, which is composed under the Committee.[19] The Understanding on Rules

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[12] TFA art. 7.3.1.
[13] Simon J. Evenett & Alejandro Jara, *Executive Summary*, *in* BUILDING ON BALI: A WORK PROGRAMME FOR THE WTO 1, 6 (Simon J. Evenett & Alejandro Jara eds., 2013).
[14] For instance, TFA arts. 13.2, 21.
[15] TFA art. 13.2.
[16] TFA art. 17.
[17] TFA art. 17.2.
[18] TFA art. 19.
[19] TFA art. 18.2.

and Procedures Governing the Settlement of Disputes (hereinafter "DSU") may be applied with the limited "non-application" period or the grace period. When a developing country member notifies its inability to implement relevant provisions, it is not subject to the DSU between the notification time and the first meeting of the Committee after receiving the recommendation of the Expert Group.[20] Similarly, a longer period is available to LDC members too. The DSU may not be applied for a grace period ranging from 2 to 8 years, depending on the member and provision category types.[21] For instance, for 2 years after entry into force of the TFA, the DSU will not apply to the dispute settlement against a developing country member concerning provisions designated in Category A by the member.[22] The dispute concerning developing country members may start to arise when 2 years elapses after the entry of force of the TFA. If the disputes cannot be solved, they may be submitted to the WTO dispute settlement mechanism (hereinafter "DSM"). Due restraint shall be exercised in raising matters under the DSU involving LDC members.[23]

Institutional arrangement is provided in Section III. Moreover, the final provisions in Section III deal with the relationship between the TFA and other rules, the relationship between Categories A, B, C commitments and the TFA, among others. Members are obliged to implement the TFA from the date of its entry into force. Developing country members and LDC members choosing to use Section II provisions shall implement the TFA in accordance with Section II. In practice, these members probably would use the provisions of Section II, otherwise they could not benefit from the S&D treatment. Unless otherwise provided in the TFA, GATT Articles XXII and XXIII as elaborated and applied by the DSU apply to consultations and disputes settlement under the TFA. Despite of two provisions in Section III, one may argue that there exists a dichotomy between Section I and Section II, which represents the general rules and S&D treatment respectively.

B. The TFA disputes: Illusion or not?

Although the implementation of the TFA may mean no substantial change in procedures for some members, the extent of changes could be significant for others.[24] There are doubts about whether the TFA could be effectively implemented given the implementation and coordination costs, and other constraints. Some obligations, such as single window, may fall within Category C and if so, may not lead to disputes in the near future

[20] TFA art. 18.5.
[21] TFA art. 20.
[22] TFA art. 20.1.
[23] TFA art. 20.4.
[24] Elms, *supra* note 4, at 6.

given the flexibilities and lenient starting date requirements. However, the requirement of single window may lead to potential questions as to which governmental agencies should receive the information and the extent of the relevant obligations. Having said that, the disputes relating to TFA may arise for a few reasons, and more burdens may be cast on the interpreter in addressing potential disputes.

First, the TFA may lead to controversies, since historically three GATT provisions that the TFA desires to clarify have been the subjects of a large number of WTO disputes. The TFA desires to "clarify and improve relevant aspects" of GATT Articles V, VIII and X.[25] Therefore, the TFA will develop GATT provisions concerning transit, fees and formalities relating to importation and exportation, trade rule publication and administration, among others. In the past, GATT Article V has been interpreted in disputes such as *Colombia — Ports of Entry*.[26] Article VIII, such as the term "cost of services rendered" in GATT Article VIII:1(a), has been addressed by the panel and Appellate Body.[27] Some new members have also made commitments regarding conformity with Article VIII:1(a) in respect of the right to trade.[28] The same term "cost of services rendered" could be found in TFA Article 6.2(i), and may be subject to different interpretations. GATT Article X, such as the terms "of general application" and "impartial",[29] has been invoked and interpreted in previous WTO disputes. Likewise the TFA terms, including "of general application" and "impartiality", may become one of the issues in potential disputes.

Second, the TFA not only provides for "soft" requirements that could impose serious requirements, but also contains "hard" requirements. For the former, an example is the soft requirements of "shall endeavour to", which is obligatory in spite of a qualifier contained. The effect of these requirements should not be underestimated. For the latter, the TFA, for instance, has imposed "hard" requirements without qualifier in terms of

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[25] *See* TFA Preamble.

[26] Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, ¶¶ 7.394-7.396, WT/DS366/R (Apr. 27, 2009). [hereinafter "Colombia – Indicative Prices and Restrictions on Ports of Entry case"]

[27] Panel Report, *United States – Customs User Fee*, ¶86, L/6264 - 35S/245 (Feb. 2, 1988); Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, ¶¶6.74-6.75, WT/DS56/R (Nov. 25, 1997); Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 7.839, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011).

[28] Working Party on the Accession of the Kyrgyz Republic, *Report of the Working Party on the Accession of the Kyrgyz Republic*, ¶30, WT/ACC/KGZ/26 (July 31, 1998).

[29] *See, e.g.*, Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, ¶¶7.903-7.905, 7.907-7.910, WT/DS371/R (Nov. 15, 2010); Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶¶11.99-11.101, WT/DS155/R (Dec. 19, 2000). [hereinafter " Argentina – Bovine Hides and Finished Leather case"]

some requirements on publication,[30] advance ruling,[31] appeal rights,[32] among others. Here an advance ruling refers to a decision in writing given by a member to an applicant before the importation of a good that indicates the treatment available to the goods at the time of importation regarding tariff classification and origin determination.[33] TFA disputes such as those concerning advance ruling may arise.

Despite of S&D treatment, members bear serious obligations such as those under category A that are to be implemented upon the entry into force of the TFA. It is very unlikely that members take no Category A provision obligations. The likelihood of disputes may also increase when the grace period for the application of DSU elapses.

Third, as the TFA involves the balance of trade facilitation with other competing interests such as public health and data protection, the disputes may arise and the general exceptions in existing WTO agreements may be invoked too. The TFA may be invoked either independently or in combination with existing WTO agreements in trade disputes.

Last but not least, TFA provisions concern not only governments but also businesses, consumers and other interested parties. The TFA may substantially reduce "red tape", improve the transparency of documentation requirements, and strengthen the cooperation both among agencies and between agencies and traders, all of which could reduce clearance process time and simplify form requirements, and so forth. They help to drive down the costs for businesses. In comparison with issues such as reduction of nominal tariff rates where the applicable tariff rates are generally rather low, businesses and other actors have more incentives to ensure the implementation of the TFA, including the government's possible recourse to WTO DSM.

II. THE CHARACTERISTICS OF THE TFA

The TFA negotiation is conducted in an inclusive and bottom-up way, which may set new standards in trade negotiation and impact the WTO and the world trade governance.[34] The TFA is deemed to fall within the approach of "bespoke multilateralism", which is in parallel with plurilateral

[30] TFA art. 1.1
[31] TFA art. 3.1.
[32] TFA art. 4.1(a) & (b).
[33] WTO, *Background Note: The Relationship Between the Trade Facilitation Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)*, ¶3.9 (Mar. 21, 2014), http://www.wto.org/english/tratop_e/sps_e/tf_sps_e.pdf.
[34] Nora Neufeld, *The Long and Winding Road: How WTO Members Finally Reached A Trade Facilitation Agreement* 12 (WORLD TRADE ORGANIZATION, Staff Working Paper ERSD-2014-06, 2014).

and critical mass approaches. [35] As new-generation trade rules, the TFA possesses a number of characteristics.

A. Good Governance

Going beyond border and mere customs duties, the TFA is featured with numerous good governance clauses and concerns procedures and formalities.[36] Broadly speaking, TFA good governance clauses can be divided into two categories, those on transparency and those on impartiality.[37] Adding more specificity and imposing more obligations on existing WTO transparency requirements, the transparency requirements include the publication of importation procedures, duty rates and other trade information, [38] the opportunity to comment, [39] consultation with border agencies and traders or other stakeholders, [40] the provision of information for fees and charges[41] or for delay in releasing perishable goods when practicable,[42] and written explanation of breach nature and applicable rule,[43] the publication of reasons for fees and charges,[44] the publication of criteria,[45] and the publication of information concerning the guarantee.[46]

Other good governance requirements focus on impartiality and objectiveness, such as the commensurateness of penalties with degree and severity of the breach,[47] the avoidance of conflicts of interests,[48] the issuance of advance rulings in a reasonable, time bound manner where

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[35] Evenett & Jara, *supra* note 13.

[36] A number of detailed requirements, for instance, are specified in terms of formalities concerning expedited shipments in Article 7.8.

[37] As it is difficult to find a commonly accepted definition of good governance, this article does not intend to define good governance. Having said that, transparency and neutrality are usually deemed as elements of good governance. *See, e.g.*, Friedl Weiss & Silke Steiner, *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*, 30(5) FORDHAM INT'L L. J. 1545, 1551-52 & 1571-72 (2007); Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10(3) J. INT'L ECON. L. 509, 519 & 524 (2007); Thomas G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, 21(5) THIRD WORLD Q. 795, 797 & 801 (2000).

[38] TFA art. 1.1 & art. 11.5 (publication of customs convoys or customs escorts under art. 1). (Please kindly clarify the cited material since we cannot find art. 164259 in TFA)

[39] TFA art. 2.1.

[40] TFA art. 2.2.

[41] TFA art. 6.1.2.

[42] TFA art. 7.9.4.

[43] TFA art. 6.3.5.

[44] TFA art. 6.1.2.

[45] *E.g.*, TFA art. 7.7.2 & art.7.8.1.

[46] TFA art. 11.14

[47] TFA art. 6.3.3.

[48] TFA art. 6.3.4(a).

requested,[49] the right to appeal or review of customs rulings,[50] the "adequate" time period between the publication of fees and charges and their entry into force,[51] the notification of application in a timely manner through the single window,[52] formalities and documentation requirements not being "more burdensome than necessary to" identify goods and ensure fulfillment of transit requirements,[53] and the protection and confidentiality of information and documents.[54] In-built good governance requirements also include a national transit coordinator addressing enquiries and proposals relating to the "good functioning" of transit operations.[55]

The two categories of good governance requirements are sometimes intertwined with each other. For the licensing of customs brokers under some circumstances, both the requirement of transparency and the requirement of objectiveness are imposed.[56] TFA Article 5 provides for other measures to "enhance impartiality, non-discrimination and transparency". These requirements should be applied together in many circumstances.

The provisions on good governance may bring new challenges to the interpreter as they involve new obligations and cover a broader and deeper scope than that of traditional rules. These good governance clauses requirements could also be regarded as WTO-plus obligations that go beyond existing WTO agreements. The typical example concerns the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement"). They are SPS-plus provisions in TFA Section I that go beyond the SPS Agreement,[57] such as the publication of information related to importation and exportation requirements and procedures,[58] the limit of formalities and documentation requirements,[59] advance filing and processing of documentation and data,[60] advance ruling,[61] the regular consultations between border agencies and traders or other stakeholders,[62] and border agency cooperation.[63] The good governance clauses would enhance the predictability in customs regulations through, *inter alia*, advance rulings on applicable tariffs, streamlined

[49] TFA art. 3.1.
[50] TFA art. 4.1.1.
[51] TFA art. 6.1.3.
[52] TFA art. 10.4.1.
[53] TFA art. 11.6.
[54] TFA art. 12.5.
[55] TFA art. 11.17.
[56] TFA art. 10.6.3.
[57] For a detailed analysis of SPS-plus provisions in the TFA, *see* WTO, *supra* note 33.
[58] TFA art. 1.1.
[59] TFA art. 11.6.
[60] TFA art. 11.9.
[61] TFA art. 3.
[62] TFA art. 2.2.
[63] TFA art. 8.

procedures, and availability of trade-related information.

Relevant jurisprudence of other WTO agreements for trade in goods and even that of the General Agreement on Trade in Services (hereinafter "GATS") may be applied. The former obviously includes the jurisprudence of GATT 1994. For the latter, for instance, the term "not more burdensome than necessary to" in the TFA has not appeared in GATT 1944 but can be found in the GATS rule on domestic regulation.[64] It could be a possible exportation of GATS rules to the TFA, and the same wordings under these two circumstances could have similar meaning.

In addition, the repeated use of similar expressions in different contexts could lead to different interpretations. The transparency requirements are also scattered in various articles, such as the published criteria for expedited release.[65] As a concrete example, the term "reasonable" has been frequently adopted in the TFA. It appears as reasonable inquiry of governments, traders and other interested parties,[66] reasonable ground to doubt the truth of importation or exportation declaration[67], issuance of advance ruling in a reasonable manner,[68] reasonable time period for answering enquiries and providing forms,[69] the validity of advance ruling for a reasonable period,[70] importer's failure to exercise the option of rejected goods in a reasonable time period,[71] and inability to respond to information request in a reasonable time.[72] Other recurrently used terms include "as appropriate",[73] "appropriate",[74] "where appropriate and available",[75] "where appropriate",[76] and "in appropriate circumstances".[77] There also exist subtle differences between terms such as "to the extent possible and practicable"[78] "to the extent practicable",[79] and "to the extent possible",[80] or between "within its available resources",[81] and "within the limits of their resources".[82]

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[64] General Agreement on Trade in Services, art. VI:4(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter "GATS"].
[65] TFA art. 7.8.1.
[66] TFA art. 1.3.1.
[67] TFA art. 12.2.1.
[68] TFA art. 3.1.
[69] TFA art. 1.3.4.
[70] TFA art. 3.3.
[71] TFA art. 10.8.2.
[72] TFA art. 12.9.2.
[73] *E.g.*, TFA art. 7.1.2, art. 7.7.3(a), art. 7.7.3(b).
[74] TFA art. 7.4.4.
[75] TFA art.12.4.1(a).
[76] TFA art. 10.2.1 & art.12.4.1(c).
[77] TFA art. 12.1.1.
[78] TFA art. 8.2 & 10.4.4.
[79] TFA art. 9.
[80] TFA art. 3.9(d).

These terms may be subject to members' different understanding and be given distinct meanings in different occasions. Combining with the context and object, the interpreter may need to consider the existence or omission of words such as "possible", or slightly different expressions in different clauses to analyze whether it leads to different degrees of constraints on members. As the context and object may not give concrete guidance, the recurring use of similar terms may potentially lead to more reliance on textual interpretation when the adjudicator interprets other TFA clauses without such words.

Looking at the WTO law in its entirety, some TFA good governance terms, such as "reasonable", are also used in related WTO agreements. For instance, GATT Article V:4 requires the charges and regulations to be "reasonable". The similar but not the same context of a term in the TFA and other WTO rules may lead to disagreement in terms of their meanings. However, if the meanings of "reasonable" do not conflict with each other, their meanings shall all be recognized. The rule predictability may be limited in the sense that these interpretations have to be conducted on a case-by-case basis. It is unclear whether these terms impose exactly the same requirements.

B. Collaboration with Other Organizations

The TFA seems to show an increasing but cautious collaboration with other organizations. The TFA interacts with international and regional organizations in the negotiation, the work on international standards, best available advice on the TFA implementation, and capacity building. International Monetary Fund (hereinafter "IMF"), the Organization for Economic Cooperation and Development (hereinafter "OECD"), United Nations Conference on Trade and Development (hereinafter "UNCTAD"), the World Customs Organization (hereinafter "WCO") and the World Bank made contributions to the TFA negotiations in various forms including *ad hoc* attendance of the negotiation group and written contribution to the negotiations.[83]

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[81] TFA art. 1.3.1.

[82] TFA art. 10.3.2.

[83] *Briefing note: Trade facilitation — Cutting "red tape" at the border*, WTO (Feb. 12, 2014), http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm. The Negotiating Group, at its first meeting, agreed to invite the International Monetary Fund, the Organisation for Economic Cooperation and Development, UNCTAD, the World Customs Organization [hereinafter "WCO"] and the World Bank to attend on an ad hoc basis. The WCO and the World Bank made written contributions to the negotiations, and identified areas of assistance provided to developing country members.

It is not surprising that the TFA involves other international organizations engaging in work related to trade facilitation.[84] Relevant international organizations could be invited to discuss their work on international standards.[85] Through international organizations, donor members may also facilitate the assistance provision and capacity building support to developing country members and LDC members.[86] For OECD members, the information submitted on capacity building assistance can be based on relevant information from the OECD Creditor Reporting System.[87] Non-member donors may be encouraged by the Committee to provide information on capacity building arrangements.[88] The Committee will invite relevant international and regional organizations and other agencies of cooperation to provide information on assistance.[89] As illustrated by the TFA, these organizations include the IMF, OECD, UNCTAD, WCO, UN Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks.

As part of the institutional arrangements, the Committee is required to maintain close contact with other international organizations in the field of trade facilitation for securing the best available advice on the implementation of the TFA, while regional organizations have not been mentioned here probably due to reasons such as the immense number and diversity of FTAs.[90] This arrangement aims to avoid unnecessary duplication of effort. It seems that the institutional link between the WTO and FTAs in the area of trade facilitation could be further improved. The connection with other international organizations may have some effects on the interpretation of TFA in particular in terms of use of international standards and capacity building. However, such effect is very limited as the link with other organizations is loose and the rules of these organizations have not been explicitly recognized.

C. Balance Between Trade and Non-Trade Concerns

The TFA involves the balance between trade facilitation on the one hand, and non-trade concerns at multilateral and domestic level on the other hand. As indicated in the TFA provisions analyzed below, there are limited

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[84] An overview of and link to instruments (*e.g.* conventions, standards, recommendations and guidelines) that can support the implementation of TFA provisions is available at http://tfig.itcilo.org/pdf_files/wto-map/map.html. Trade facilitation information and activities provided by other international organizations are available at http://www.wto.org/english/tratop_e/tradfa_e/ta_capac_build_negoti_e.htm#3.

[85] TFA art. 10.3.3.

[86] TFA art.16.1(d), n 19 & art. 16.2(e), n 21.

[87] TFA art. 22.1.

[88] TFA art. 16.1(d) & art. 16.2(e).

[89] TFA art. 22.5.

[90] TFA art. 23.1.5.

kinds of non-trade concerns. Having said that, as GATT general exceptions apply to the TFA, these non-trade concerns are GATT-plus ones and their scope could be broader than the old-generation counterpart of GATT 1994. These concerns have been emphasized and applied in not only importation or exportation formalities but also customs cooperation.

In formalities connected with importation and exportation, legitimate policy objectives and other factors such as changed circumstances, relevant new information and business practices need to be considered.[91] Policy objectives shall also be fulfilled here.[92] For the use of customs brokers, the TFA would recognize the "important policy concerns" of some members that currently maintain a special role for customs brokers.[93] Meanwhile, it prohibits the introduction of mandatory use of customs brokers.[94] It looks like a "grandfather clause", and the policy concerns are limited to important ones rather than general policy concerns in other clauses. Such qualification may restrict the scope of non-trade concerns.

Regarding customs cooperation, a requested member may postpone or refuse an information request and inform the reasons, if it is contrary to the "public interest" in its domestic law and legal system.[95] The public health concerns are referred to in enhanced control and could also arise here.[96] The special provisions for importation of controlled or regulated goods may potentially reflect the recognition of non-trade concerns.[97]

Accordingly, a careful balance between trade and non-trade concerns is needed in the interpretation. First, phrased in different ways and sharing similar concerns, these non-trade concerns could be read differently in different disputes. On the one hand, these objectives or concerns could be read broadly. For instance, as probably one of most challenging TFA clauses for interpretation, it is unclear what "changed circumstances", "relevant new information" and "business practices" exactly mean. They are likely to be decided on a case-by-case basis, and the evolutionary interpretation approach will be adopted since the provision emphasize the terms "changed" and "new". On the other hand, these words have not been used in other clauses. From the perspective of textual interpretation, the silence or implied terms may lead to different accommodation of non-trade concerns. The provisions are open to two interpretations: one of which does, and the other does not enable other policy concerns. The adjudicator may defer to legitimate policy concerns to a lower degree if they are not explicitly mentioned.

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[91] TFA art. 10.1.1.
[92] TFA art. 10.1(c).
[93] TFA art. 10.6.1.
[94] *Id*.
[95] TFA art. 12.7(a).
[96] TFA art. 5.1.
[97] TFA, n 11.

Second, an inherent and potential conflict among difference considerations may exist. For instance, a member may require the applicant of advance rulings to have legal representation or registration in its territory. The TFA also ensures that "to the extent possible", such requirements do not restrict the categories of eligible persons, with "particular consideration" for specific needs of small and medium sized enterprises (hereinafter "SMEs").[98] However, inherent tension may exist between the practicality of the member and the needs of SMEs.

Third, TFA wording resembling general exceptions clauses may entail the transplantation of jurisprudence of general exceptions. Similar with other WTO agreements, the nature of non-trade concerns under the TFA is more of an exception to general rules. The wording and jurisprudence of clauses on general exceptions in other WTO rules seem to have affected the TFA wording. Besides the using of "a reasonably available less trade restrictive" manner, the TFA on several occasions provides that members' requirements shall not constitute or create arbitrary or unjustifiable discrimination, or shall avoid disguised restrictions to international trade.[99] Same wordings have been used in the chapeaux of GATT Article XX and GATS Article XIV, but in contexts different from those under the TFA. The TFA also prohibits a disguised restriction on traffic in transit.[100] Although no general exception clause is found in the TFA, all GATT exceptions, exemptions, and waivers apply to the TFA.[101] It remains to be seen how the jurisprudence of GATT/GATS general exceptions may affect the same terms in the different context of the TFA, and what is the relationship among these provisions of different agreements. Perhaps jurisprudential transplantation may occur but subject to substantial modification given the different context. Moreover, new members acceding the WTO before the TFA's entry into force should be in the position to invoke GATT general exceptions clause in the application of the TFA.[102]

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[98] TFA art. 3.9(d).

[99] *Id.* (The requirements of advance ruling applicant shall be clear and transparent and not "constitute a means of arbitrary or unjustifiable discrimination"), TFA art. 7.4.2 (Every member is obliged to design and apply risk management in a manner as to "avoid arbitrary or unjustifiable discrimination, or disguised restrictions to international trade") and TFA art. 7.7.2(b)(i) (The criteria to qualify as an operator shall not be designed or applied to "afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail").

[100] TFA art. 11.1(b).

[101] TFA art. 24.7.

[102] The application of general exceptions has been a key issue in recent disputes such as Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009); Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (July 5, 2011); Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (Aug. 7, 2014).

III. THE TFA AND NON-WTO LAW

The TFA is not isolated with rules within or outside the WTO. The links among the TFA, international organizations other than the WTO, and regional arrangements are rather limited. Instead, the TFA has a closer and more substantial relationship with domestic law and existing WTO agreements. Such relationship is either explicitly provided by, or could be inferred from TFA provisions. The interpretation of these relationships may have far reaching implications not only for the TFA but also for the WTO as a whole in the world trade regime.

A. The TFA and FTAs

The TFA makes reference to its relationship with bilateral, plurilateral or regional agreements that usually are FTAs. It seems that the TFA endeavors to establish a mutual supportive relationship with regional agreements and bodies as seen from TFA clauses below on implementation assistance, publication, customs cooperation, provision of assistance for capacity building, information on assistance. Notably a general clause could be found in the final provisions regarding the relationship between the TFA and regional trade rules. Members of a customs union or a regional economic arrangement may adopt regional approaches to "assist in" the implementation of their TFA obligations including through the establishment and use of "regional bodies".[103] It reflects the position for the co-existence and mutual support between the multilateral and regional arrangements. On a related issue, the TFA recognizes not only regional arrangements but also regional bodies here. Similarly, regional organizations established under the FTAs may be invited by the Committee to provide information on assistance.[104] The coordination between regional economic communities and members are highlighted to maximize the assistance results.[105] These regional bodies probably should be considered together with regional agreements.

Regarding requirements in Section I, the members of FTAs may establish or maintain common enquiry points at the regional level to satisfy the publication requirement for common procedures.[106] In a provision titled "bilateral and regional agreement", the TFA neither prevents the existence of a bilateral, plurilateral, or regional agreement for customs

[103] TFA art. 24.5.
[104] TFA art. 22.5. The article uses the term "regional organizations" and gives an example of regional development banks. Organizations established under the free trade agreement may also be deemed as regional organizations here.
[105] TFA art. 21.3(d).
[106] TFA art. 1.3.2.

information exchange.[107] In the same vein, it will not be interpreted to affect members' rights or obligations under these agreements or to govern the exchange of customs information made thereunder.[108] The TFA clearly indicates its intention of keep these other arrangements unaffected.

Coming to S&D treatment in Section II, members will attempt to provide assistance for capacity building regarding the TFA implementation, including activities to "address regional and sub-regional challenges and promote regional and sub-regional integration."[109] The coordination between members and regional economic communities are highlighted to maximize the effectiveness of the capacity building assistance.[110] Moreover, the use of regional coordination structures is encouraged to coordinate and monitor FTA implementation activities.[111]

The encouragement of regional coordination and repeated usage of terms such as "regional" arrangements, among others, indicate a pragmatic approach of the drafters towards regionalism and a response to accommodating regional rule development. These TFA provisions would ensure the implementation of requirements under the multilateral approach while providing flexibility for FTA members. In other words, the TFA seems to recognize and tries to mobilize FTAs to enhance trade facilitation. For instance, the TFA may have taken into account the practices of FTAs, such as the proposed Association of Southeast Asian Nations (hereinafter "ASEAN") Single Window.[112] Interacting with the TFA, recent FTAs have also incorporate more trade facilitation clauses after the TFA negotiation started.[113]

Although some provisions touch upon the relationship between the TFA and FTAs, this relationship between FTAs and the TFA needs to be further elaborated. Since FTAs and domestic law may not be necessarily consistent with TFA requirements, the TFA provision on freedom of transit also provides that it is "without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport consistent with WTO rules."[114] It strikes a balance among the TFA, WTO rules, national regulations, and bilateral and multilateral arrangements, while keeping the supremacy of WTO rules. This provision may be regarded as the context of other provisions, and could have broader

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[107] TFA art. 12.12.1.
[108] TFA art. 12.12.2.
[109] TFA art. 21.3(b).
[110] TFA art. 21.3(d).
[111] TFA art. 21.3(e).
[112] *See, e.g.*, Negotiating Group on Trade Facilitation, *Communication from ASEAN: Experience on the Development of the ASEAN Single Window*, TN/TF/W/105 (May 26, 2006).
[113] Nora Neufeld, *Trade Facilitation Provisions in Regional Trade Agreements — Traits and Trends* 36, (WORLD TRADE ORGANIZATION, Staff Working Paper ERSD-2014-01, 2014).
[114] TFA art. 11.3.

implications even for the interpreting the existing WTO rules. In this sense, perhaps the TFA could also play a role in "updating" the multilateral disciplines on regional trade rules. If FTA rules are inconsistent with the TFA, the WTO adjudicators would probably take a piecemeal approach targeting at concrete measures,[115] rather than declaring a FTA as a whole insistent with the TFA.

As a related technical issue, it remains unclear whether the regional arrangements should be covered in this clause. Unlike other TFA clauses using "bilateral and regional agreements"[116] or "regional economic arrangements",[117] it uses the wording "bilateral or multilateral arrangements". It could be argued that it does not cover the regional arrangements, since the latter is not expressly mentioned here. Others may argue that the multilateral arrangements could be broadly interpreted to cover regional ones as they involve more than two parties. The principle of effective interpretation may be relevant here.

B. The TFA and Domestic Law

Carefully drafted, but sometimes potentially controversial terms have been used in terms of the relationship between the TFA and domestic law, and the relationship among different domestic laws. Generally the TFA indicates a respect for domestic law, including the wordings "in a manner consistent with its domestic law and legal system",[118] "consistent with domestic legislation",[119] "subject to and consistent with its laws and regulations",[120] "in a manner consistent with its laws and regulations",[121] and "as provided for in its laws and regulations".[122]

It is important to note that certain exceptions to the TFA requirements may depend on the domestic law and legal system. Concerning customs cooperation, a requesting member may be unable under its domestic law and legal system to comply with the protection and confidentiality requirement, and if so it shall specify this in the request.[123]

Regarding the relationship among different domestic laws, a member may impose its requirements under its domestic law but other members may not necessarily comply with these domestic requirements. This arises

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[115] Heng Wang, *The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold?*, 46(2) J. WORLD TRADE 397, 399 (2012).
[116] TFA art. 12.12.
[117] TFA art. 24.5.
[118] TFA art. 2.1.1.
[119] *E.g.*, TFA art. 7.9.3 (perishable goods).
[120] TFA art. 10.8.1.
[121] TFA art. 11.13.
[122] TFA art. 10.9.2(a) & 10.9.1.
[123] TFA art. 12.5.2.

in terms of customs cooperation. The member requested information from may require, under its domestic law, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations or in non-customs proceedings without its permission. If the requesting member is not in a position to comply with such requirement, it should specify this to the requested member.[124] Similarly, a requested member may postpone or refuse an information request and inform the reasons, if it is contrary to the public interest in its domestic law and legal system,[125] or its domestic law and legal system prevents the release of the information.[126]

These provisions help to accommodate the special needs of domestic law. The frequent expression of respect for domestic law is probably due to the possible reliance of the WTO adjudicator on the treaty text and the recognition of domestic circumstances. Domestic law is respected under the TFA in particular when relevant clauses are available. For instance, regarding movement of goods under customs control intended for import, TFA Article 9 stresses the precondition of meeting all regulatory requirements. It could be read to respect members' regulatory rights, as such movement may incur SPS issues relating to the spread and prevention of pests or diseases.[127]

However, a serious challenge could arise if the domestic law itself is inconsistent with TFA requirements. For instance, a member must "in a manner consistent with its laws and regulations", allow comprehensive guarantees including multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.[128] Domestic laws and regulations may not be necessarily consistent with, and could even conflict with the substantive TFA requirements. In such case, the domestic law is unlikely to take precedence over TFA requirements unless otherwise provided, since the TFA would have used explicit wording if the domestic law could prevail, or an exception to the TFA obligation is available. Generally the interpretation of TFA needs to reflect the drafters' intentions to balance the need to expedite movement of goods and the members' domestic regulatory needs.

IV. THE TFA AND EXISTING WTO AGREEMENTS

A number of other WTO agreements are related to the TFA in different ways, including GATT 1994, the SPS Agreement, the Agreement on

[124] TFA art. 12.6.2
[125] TFA art. 12.7.1(a).
[126] TFA art. 12.7.1(b).
[127] WTO, *supra* note 33, at ¶¶ 3.24-3.25
[128] TFA art. 11.13.

Technical Barriers to Trade (hereinafter "TBT Agreement"), the Pre-shipment Agreement, the Agreement on Rules of Origin (hereinafter "ROO Agreement"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter "TRIPS"). The application of other WTO agreements may be restricted in exceptional circumstances. For instance, technical regulations and conformity assessment procedures within the meaning of the TBT Agreement could not be applied to goods in transit.[129] Existing WTO rules apply to the TFA at different levels or through different ways.

A. Explicit Application of Existing WTO Agreements

There are three categories of the explicit application of existing WTO agreements. First, three GATT provisions concerns the object of the TFA and their relationship with the TFA is of enormous importance. As indicated in the third paragraph of the preamble, the TFA desires to clarify relevant aspects of GATT Articles V, VIII and X to further expedite the movement, release and clearance of goods. The jurisprudence of these GATT provisions would apply to the TFA interpretation. Going beyond Article I, GATT Article X:3(a) seems to require "uniform administration of Customs laws and procedures between individual shippers and even with respect to the same person at different times and different places", and to focus on the day to day application of customs laws and regulations.[130] The similar understanding may apply to the TFA. In general, GATT Article X is found to apply to the administration of laws, regulations, decisions and rulings, rather than the laws, regulations, decisions and rulings themselves that are to be reviewed under other GATT provisions.[131] The same logic may apply to TFA provisions as they are developed from GATT provisions, but the nature of TFA provisions needs to be taken into account. For instance, TFA Article 5 further develops GATT Article X:3(a) that requires uniform, impartial and reasonable administration of rules. The title of Article 5 indicates its aim to enhance impartiality, non-discrimination and transparency, and Article 5.1, under b requires the uniform applicability of notification for enhancing control level. Article 5.1, under c then develops the GATT rule by requiring the termination or suspension of such notification if the targeted circumstances disappear or less trade restrictive options are available. Following the jurisprudence of GATT Article X:3(a),

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[129] TFA art. 11.8.

[130] *Argentina – Bovine Hides and Finished Leather case*, at ¶¶11.83- 11.84.

[131] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, ¶200, WT/DS27/AB/R (Sept. 9, 1997) [hereinafter "EC–Banana case"]. *See also* Panel Report, *United States – Sunset Review of Anti Dumping Duties on Corrosion Resistant Carbon Steel Flat Products from Japan*, ¶7.289, WT/DS244/R (Aug. 14, 2003).

one may argue that TFA Articles 5.1, under b and 5.1, under c could only address the administration of such notifications rather than the notifications themselves. However, GATT Article X:3(a) calls for a uniform, impartial and reasonable application of domestic laws, and concrete requirements for these municipal laws could be found in Article I and so forth. Differing from GATT Article X:3(a), the TFA Article 5.1 contains concrete requirements on the notification themselves which could hardly be found elsewhere. Therefore, effective interpretation may require the interpreter to give effect to these concrete requirements as to the uniform application, suspension and termination of notifications.[132]

Second, GATT provisions affect the scope of various TFA provisions, and along with the DSU, govern the dispute settlement of the agreement. TFA Article 6.1 applies to fees and charges other than taxes within the scope of GATT Article III. The information on fees and charges will also be published under TFA Article 1.[133] Therefore, the interpretation of GATT Article III would determine the scope of TFA Article 6.1 and possibly Article 1. Similarly, internal taxes applied to imports pursuant to GATT Article III, including value added taxes and excise taxes, are not subject to TFA expedited shipment provisions.[134] The administrative action within GATT Article X is also used in understanding the administrative decision in the right to appeal or review provision of the TFA.[135] Unless otherwise provided in the TFA, GATT Articles XXII and XXIII as elaborated and applied by the DSU apply to consultations and the dispute settlement under the TFA.[136]

Third, other WTO agreements have been explicitly referred to. Members are not precluded from differentiating border procedures and documentation requirements in a manner consistent with the SPS Agreement.[137] In practice, trade facilitation measures and the SPS control could be implemented at border. Moreover, regarding the advance ruling on the origin of a good, it may be an assessment of origin for the purposes of the ROO Agreement if the ruling meets the requirements of the TFA and the ROO Agreement.[138]

The Pre-shipment Inspection Agreement is also expressly referred to and could, along with the SPS Agreement, apply to the TFA. Members are

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[132] For the analysis of effective interpretation, *see* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 248-253 (2003).
[133] TFA art. 6.1.2.
[134] TFA art. 7.8.2(d).
[135] TFA n. 4 (An administrative decision in TFA Article 4.1.1 covers an administrative action within the meaning of GATT Article X).
[136] TFA art. 24.8.
[137] TFA art. 10.7.2(e).
[138] TFA n. 3.

prevented from requiring the use of pre-shipment inspections in relation to tariff classification and customs valuation.[139] While members' rights to use other types of pre-shipment inspection are recognized, members are encouraged not to expand the use of other pre-shipment inspections.[140] These other types of inspections refer to pre-shipment inspections under the Pre-shipment Inspection Agreement, and do not preclude pre-shipment inspections for SPS purposes.[141] In other words, pre-shipment inspections under the Pre-shipment Inspection Agreement are precluded, but those for SPS-purposes are not.[142] This requirement recognizes regulatory rights to use, and discourages using, other types of pre-shipment inspection. It remains to be seen how it may tone down the requirement. It may involve the relationship between the TFA, the Pre-shipment Inspection Agreement, and the SPS Agreement.

B. Implicit Application of Existing WTO Agreements

Existing WTO rules may be applicable to the TFA although they are not explicitly referred to. As one example, TFA Article 5 deals with systems of enhancing controls on imports at the border following detection of violations, also called import/rapid alert systems. The alert system for protecting human, animal, or plant life or health could also fall within the scope of the SPS Agreement, in which the requirements for SPS measures (to base measures on scientific evidence, etc.) are different from TFA Article 5.[143] TFA Article 5.1 has, therefore, set an SPS-plus discipline of alert system, which co-exists with obligations under the SPS Agreement. A member may issue the notification for enhanced control or inspections so that it applies uniformly only to those entry points where "the sanitary and phytosanitary conditions" on which the notification or guidance are based apply. TFA Article 5.2 and 5.3 also set SPS-plus requirements in terms of detention and test procedures. Another example is that the goods presented for import may be rejected for failure to meet SPS regulations or technical regulations.[144] These regulations and conditions are subject to the SPS Agreement and/or TBT Agreement. Both agreements, along with the TFA,

[139] TFA art. 10.5.1.
[140] TFA art. 10.5.2.
[141] TFA n. 12.
[142] WTO, *supra* note 33, at ¶¶ 3.26, 3.28.
[143] *Id*. at ¶ 3.14.
[144] TFA art. 10.8.1.

may be read to fight against unnecessary obstacles to trade[145] and disguised restrictions to trade.[146]

Moreover, TFA Article 7.3.6 provides that it does not affect members' right to examine, detain, seize, confiscate or deal with goods in a manner "not otherwise inconsistent with the member's WTO rights and obligations." Although they do not name the specific existing WTO Agreement, the WTO rights and obligations could lead to the invocation of provisions of existing WTO agreements, such as TRIPS Article 57 that provides for the right to have goods detained by the customs authorities for intellectual property reasons.

Interestingly, TFA Article 7.8.3 indicates that the expedited shipments do not affect the right to examine, detain, seize or confiscate the goods, which is identical with the wordings in TFA Article 7.3.6. It additionally indicates that it would not affect the right to refuse entry to goods, or to carry out post-clearance audits. It does not prevent members from requiring, as a condition for release, the submission of additional information and the fulfillment of non-automatic licensing requirements. Although TFA Article 7.8.3 does not contain the terms "in any manner not otherwise inconsistent with the Member's WTO rights and obligations" that exist in TFA Article 7.3.6, potentially other WTO agreements may be applied. As the context of each other, TFA Articles 7.3.6 and 7.8.3 could be read together due to their substantially identical wordings and their link to the release and clearance of goods.

A TFA provision could be notably related to more than one WTO agreement. The TFA provision on rejected goods is related to both SPS regulations and technical regulations,[147] and could concern both the SPS Agreement and the TBT Agreement. The TFA clauses concerning other WTO laws may lead to concurrent application of different WTO agreements and also lend more support to harmonious interpretation. A measure may be scrutinized under the TFA, other WTO agreements, and potentially even the Accession Protocol.[148]

C. The Interpretative Challenge

The TFA shows more reliance and deference to other WTO agreements than to domestic law. This detailed wording as to the relationship between TFA and other WTO rules may, to a great extent, avoid potential

[145] The Agreement on Technical Barriers to Trade, Preamble, ¶ 5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, Legal Instruments-Results of the Uruguay Round, 1868 U.N.T.S. 120 (1994).
[146] TFA art. 7.4.2 & art. 11.1(b).
[147] TFA art. 10.8.1.
[148] The concurrent application of different WTO agreements is not rare. For the concurrent application of the GATS and GATT 1994, *see EC–Banana case*, at ¶221.

jurisprudential uncertainty due to the silence of the clauses. However, the interpretative challenge remains.

First, the TFA interpretation would involve the position of the TFA in WTO law, which is not entirely clear. On the one hand, it seems that the TFA may take precedence over GATT to the extent of the conflict. The TFA will be inserted into Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter "Marrakesh Agreement") through a Protocol of Amendment drawn up by the Preparatory Committee on Trade Facilitation under the General Council as per the WTO Ministerial Decision of 7 December 2013. As a part of the multilateral agreements on trade in goods, it looks that the TFA would in principle attain a similar position with existing WTO agreements such as GATT 1994 and the SPS Agreement. Under the General interpretative note to Annex 1A (hereinafter "Interpretative Note"), if a GATT provision conflicts with a provision of another Annex 1A agreement, the latter shall prevail to the extent of the conflict. Accordingly the TFA provision prevails over GATT articles. The relationship between GATT 1994 and other agreements on trade in goods, have arisen in WTO disputes. From the perspective of the Appellate Body, although GATT Article X:3(a) and Article 1.3 of the Licensing Agreement both apply, the Licensing Agreement is to be applied first, since it "deals specifically, and in detail," with the administration of import licensing procedures.[149] In the disputes concerning GATT Article X and relevant provisions of the Anti-Dumping Agreement, the panel also exercised judicial economy with respect to GATT Article X after finding the violation of the Anti-Dumping Agreement.[150] Clarifying GATT Article X and other provisions, the TFA could also be applied first.

On the other hand, other WTO agreements, to some extent, take precedence over the TFA, as the TFA does not diminish the obligations and/or rights under some WTO agreements. It looks that the TFA establishes at least three categories of existing WTO agreements.

Category one is GATT 1994. Members' obligations would not be diminished by the TFA, but their rights may be diminished. In spite of the Interpretative Note, the TFA provides that it will not be interpreted to diminish a member's GATT obligations.[151] Implicitly the rights under GATT 1994 may be diminished. This interpretation is echoed by the Interpretative Note under which the TFA prevails over GATT 1994, and is supported by legal maxim *lex specialis derogat legi generali*. Category two

[149] *Id*. at ¶ 204.
[150] Panel Report, *United States – Anti Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, ¶ 6.92, WT/DS99/R (Jan. 29, 1999); Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, ¶ 6.55, WT/DS179/R (Dec. 22, 2000).
[151] TFA art. 24.6.

is the TBT Agreement and the SPS Agreement. The TFA provides that it would not be construed to diminish members' rights and obligations under these two agreements.[152] The TFA drafters intended to avoid the possible conflict with other WTO agreements as much as possible, but it is not an easy job. For example, the requirement to streamline formalities concerning importation, exportation and transit under the TFA may negatively affect members' right to implement SPS regulation under the SPS Agreement.[153] Category three is the rest of existing WTO agreements, including the ROO Agreement, and the Pre-shipment Inspection Agreement.

Interestingly, the TFA provides that it should not be construed to diminish members' "obligations" under GATT 1994, and to diminish members' "rights and obligations" under the TBT Agreement and SPS Agreement. Such difference of terms regarding the relationship between agreements could be read that the TFA could be construed to diminish the rights under GATT 1994 but not those under the TBT Agreement and SPS Agreement. Arguably the TFA is not precluded from diminishing the rights and obligations under existing WTO rules other than GATT 1994, SPS Agreement and TBT Agreement, since there are no similar clauses in the TFA to the contrary. Theoretically the adage *lex posterior derogat legi priori* tends to support such interpretation. Members are encouraged not to expand the use of pre-shipment inspections under the Pre-shipment Inspection Agreement.[154] It seems to support the argument that the TFA may affect the rights and obligations under the Pre-shipment Inspection Agreement. That being said, the interpreter would try not to diminish the rights and obligations under other WTO rules. For instance, the TFA tries to establish a harmonious relationship with the ROO Agreement by mutual recognition of origin assessment under the ROO Agreement and the TFA and not requiring two separate arrangements of origin determination under these two agreements.[155] It remains unclear as to the relationship between the TFA and the accession protocols of new members, either acceding before or after the entry into force of the TFA.

On a different but related issue, three types of provisions apply to TFA provisions: (i) all GATT exceptions and exemptions, (ii) waivers applicable to GATT 1994, granted according to Article IX:3 and IX:4 of the Marrakesh Agreement, and (iii) GATT Articles XXII and XXIII as elaborated and applied by the DSU, unless otherwise provided in the TFA. It may also imply that other provisions of existing WTO agreements do not automatically apply to the TFA.

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[152] *Id*.
[153] WTO, *supra* note 33, at ¶ 3.28.
[154] TFA n. 12.
[155] TFA n. 3.

To simplify significantly, the TFA rights and obligations may be regarded being cumulative on those of GATT 1994 and other WTO agreements. However, given the difference in TFA terms discussed above, more delicate reasoning may be necessary. In case of a possible conflict between the TFA and GATT 1994, the adjudicators may need to ensure that the TFA "triumphs" but GATT obligations are not diminished. The above TFA provision does not relieve the interpreter's tasks of striking a balance in trade linkage issues in the context of trade facilitation. For instance, the TFA facilitates the movement of goods, but the SPS Agreement and TBT Agreement may slow down the movement of goods for public health and other considerations. In practice, the single window requirement may potentially be at variance with data protection. There is a need to balance different values and objects embodied in different WTO rules. In addressing these competing interests, GATT general exceptions could be applied.

Second, previous WTO jurisprudence could possibly play a more important role in the interpretation of the TFA. The TFA contains WTO-plus provisions and perhaps also borrows the wording from the WTO jurisprudence. The SPS Agreement and its jurisprudence could be a benchmark for the interpretation of the TFA SPS-plus obligations.

Some terms used in the WTO jurisprudence have been absorbed in the TFA in different ways. One example is "a reasonably available less trade restrictive manner", which has been used regarding notification of enhanced controls and freedom of transit,[156] and which is not found in GATT text. "Reasonably available alternative" has been used by the Appellate Body as part of the necessity requirement of general exceptions in disputes including *EC-Asbestos, Korea-Beef, and US-Gambling* and "less trade restrictive" has been used in the interpreting the chapeau of general exception clause.[157] It is noteworthy that GATT exceptions apply to the TFA. The similar wording in a different context indicates the borrowing of WTO jurisprudence in the TFA. Therefore, the WTO adjudicators are likely to interpret the TFA and other WTO agreements in a harmonious way. Similar with the interpretation of GATT Article X:3(a),[158] the context of a paragraph within an article, and a reading of other paragraphs of the same article could be helpful in the interpretation. Moreover, other agreements that could be helpful to understand the TFA in the context of WTO law include the TFA, GATT 1994, the SPS Agreement, the TBT Agreement, the ROO Agreement, and the Pre-shipment Inspection Agreement, among others.

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[156] TFA art. 5.1(c) & art. 11.1(a).

[157] *See, e.g.*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 25-29, WT/DS2/AB/R (Apr. 29, 1996).

[158] *See EC – Banana case*, at ¶200.

Third, the relationship among the TFA clauses needs to be clarified to coordinate its relationship better with other WTO rules. The relationship among TFA articles is clarified in some occasions. For instance, TFA Article 3.7 on the review or revocation of advance ruling does not impose the requirement of the right to appeal or review under TFA Article 4.1.[159] In the WTO jurisprudence, there exist issues that the standard in one article of a WTO agreement could be applicable to another article of the same agreement. For instance, in *US-Carbon Steel*, the issue is the applicability of *de minimis* standard in Article 11.9 of the SCM Agreement to Article 21.3 of the SCM Agreement.[160] The relationship between GATT stipulations has arisen in the past disputes. For instance, GATT Articles I:1 and V:6, in the view of the panel, deal with the general MFN treatment of like products and MFN treatment based on transit trajectory respectively.[161] Nearly the same requirement of the first sentence of GATT Article V:6 can be found in TFA Article 11.4. Some of the GATT provisions have been developed in the TFA. Certain uncertainty remains in terms of the relationship among other TFA provisions and among different sections of the TFA. The existence of the TFA may complicate the job of explaining the relationship among different articles within or across agreement(s).

As another example, TFA Article 7.5.2 requires members to select a person or a consignment for post-clearance audit in a "risk-based" manner. It has a close relationship with risk management for customs control provided for in TFA Article 7.4, under which the risk management shall be applied in a manner to avoid arbitrary or unjustifiable discrimination, or disguised restrictions to trade. These provisions could constitute the context for each other. Potentially the post-clearance audit in TFA Article 7.5.2 may be subject to the same requirement of TFA Article 7.4 in terms of the application of measures. TFA Article 7.5.2 also obliges members to conduct post clearance audits in a transparent manner. Such requirement may be read together with other context, such as TFA Article 5 that provides for other measures to enhance impartiality, non-discrimination and transparency. Both of them share the same requirement of transparency. Reading TFA Articles 5, 7.4.2 and 7.5.2 together, the requirement of impartiality, non-discrimination and transparency may be extended to TFA Article 7.5.2. Moreover, risk management also arises in TFA Articles 7.8.3 and 10.7.2, under b. The former recognizes that the regulation of the entry of goods could relate to the use of risk management system, while the latter requires the procedures requirements for goods need to be based on risk management. They could also be regarded as the context of TFA Article

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[159] TFA n. 2.

[160] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, ¶ 74, WT/DS213/AB/R (Nov. 28, 2002).

[161] *Colombia – Indicative Prices and Restrictions on Ports of Entry case*, at n. 783.

7.5.2 in a broad sense.

V. CONCLUSION

The interpretation of the TFA deserves serious attention not only for understanding the WTO and but also for understanding the FTAs as they affect each other in terms of negotiations and implementation. Several conclusions may be concluded here.

First, the characteristics of the TFA include good governance, collaboration with other organizations, and the balance between trade and non-trade concerns. Among them, the TFA good governance clauses consist of two categories, those on transparency and those on impartiality.

Second, there is an increasingly close relationship between TFA, FTAs and domestic law. However, caution is needed in addressing the potential tension among them.

Third, the TFA has a more harmonious relationship with existing WTO agreements, although uncertainty remains in certain aspects of their relationship. There are two kinds of application of existing WTO agreements to the TFA, explicit and implicit. Regarding explicit application, there is a trichotomy of WTO agreements as reflected in the TFA, three GATT provisions concerning the object of the TFA, GATT provisions affecting the scope of TFA provisions, and other WTO agreements explicitly referred to by the TFA. These rules will in turn be applied differently.

Last but not least, the WTO jurisprudence and rules may constitute a baseline for the TFA interpretation, and transplantation of other WTO jurisprudence. The TFA includes a variety of WTO-plus obligations going beyond current WTO requirements, which may entail the baseline function of the WTO jurisprudence and law when interpreting the TFA. Meanwhile, the TFA also contains legal languages that are much more flexible than existing WTO rules, and the TFA itself is structured by a dichotomy between general rules and special treatment. Challenges naturally would arise from this commonly found flexibility, and the unclear relationship between the TFA and other WTO agreements. It seems that the TFA establishes at least three categories or even a "hierarchy" of existing WTO agreements, GATT 1994, TBT Agreement and the SPS Agreement, and the rest of existing WTO agreements. The relationship between different rights and obligations need to be clarified and a holistic approach is needed. Regarding the jurisprudential transplantation such as those of general exceptions, it may occur for the TFA interpretation due to, *inter alia*, TFA wording resembling GATT clauses and the application of GATT general exceptions to the TFA. Again the transplantation needs to be carefully conducted given the special nature and context of trade facilitation rules.

To sum up, the flexibility of the TFA not only catalyzes the negotiation, but also brings more challenges to the rule interpretation. Reflected in the text of the TFA, the uniformity and efficiency considerations may play an important role in the interpretation. The subsequent practices of the members at domestic and regional level on the one hand, and the FTA as the new-generation multilateral rules on the other hand, may substantially affect the future of world economic governance by going beyond the border and tariffs.

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