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Working Paper

World Trade Organization Agreement on Trade Facilitation: Assessing the Level of Ambition and Likely Impacts

ADB Working Paper Series on Regional Economic Integration, No. 138

Provided in Cooperation with:

Asian Development Bank (ADB), Manila

Suggested Citation: Hamanaka, Shintaro (2014) : World Trade Organization Agreement on Trade Facilitation: Assessing the Level of Ambition and Likely Impacts, ADB Working Paper Series on Regional Economic Integration, No. 138, Asian Development Bank (ADB), Manila, <https://hdl.handle.net/11540/1284>

This Version is available at:

<https://hdl.handle.net/10419/109630>

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WORLD TRADE ORGANIZATION AGREEMENT ON TRADE FACILITATION: ASSESSING THE LEVEL OF AMBITION AND LIKELY IMPACTS

Shintaro Hamanaka

NO. 138

September 2014

**ADB WORKING PAPER SERIES ON
REGIONAL ECONOMIC INTEGRATION**

ADB Working Paper Series on Regional Economic Integration

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No. 138 | September 2014

The views expressed in this paper are those of the author.
The author would like to thank Aiken Tafgar for her
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September 2014
ISSN 2313-5999 (Print), 2313-6006 (e-ISSN)
Publication Stock No. WPS146857-2

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Abstract

At the Ninth Ministerial Conference of the World Trade Organization (WTO) held in Bali on 3–6 December 2013, the ministers agreed upon the WTO Agreement on Trade Facilitation (ATF). This paper assesses the level of ambition of the ATF from two angles. First, the use of softening language in each provision is examined. Second, the final agreement is compared against the draft text prepared before the Bali conference. Then, the paper considers the likely legal, economic, capacity-building, and reform-inducing impacts of the ATF.

Keywords: Agreement on Trade Facilitation (ATF); Capacity building; assistance; obligation; best endeavor

JEL Classification: F13, F53, F55

1. Introduction

The Ninth Ministerial Conference of the World Trade Organization (WTO) was held in Bali, Indonesia, on 3–6 December 2013. Since the overall progress of the Doha Development Agenda (DDA) negotiations has been slow, this conference concentrated on three items: (i) trade facilitation, (ii) least developed countries (LDCs), and (iii) agriculture. Among them, negotiations over trade facilitation made significant progress and a Ministerial Decision was adopted on 7 December, which included the Agreement on Trade Facilitation (ATF) in its annex. While the treatment of trade facilitation at the WTO has experienced some ups and downs,¹ the ATF became the first substantial output of the DDA. The Protocol to insert the ATF into Annex 1A of the WTO Agreement shall be adopted at the General Council to be held before 31 July 2014 and is open for acceptance until 31 July 2015. The Protocol shall enter into force in accordance with Article X:3 of the WTO Agreement.

It is important to note that the scope of trade facilitation under the WTO is very narrow. While trade facilitation sometimes covers any policy related to reducing trade costs, WTO trade facilitation negotiations only aim to clarify and improve relevant aspects of Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations) as stipulated in the July Package in 2004. This means that certain measures to facilitate trade such as Sanitary and Phytosanitary Measures (SPS), which is a popular item of trade facilitation at the project level, are not included in the ATF (SPS is already covered by the WTO SPS Agreement).

This short paper conducts a preliminary assessment of the new WTO ATF and considers its likely impacts. The next section briefly reviews the commitment methodology of the ATF. Understanding the commitment methodology is very important in assessing the impacts of the ATF because the level of obligation of each Member depends on its commitments. Then, the paper assesses the actual obligations set out in Section I of the ATF. The question is: if a WTO Member makes a “full” commitment, how ambitious is the ATF? The primary goal is to assess the level of ambition of obligations in terms of the use of softening language and the difference between the final agreement and draft text, rather than to interpret every obligation in each

¹ At the First Ministerial Conference of the WTO in Singapore in 1996 ministers agreed to initiate exploratory work into the four so-called Singapore issues—investment, competition policy, transparency in government procurement, and trade facilitation—without prejudging the scope of future negotiations. At the Fourth Ministerial Conference in Doha in 2001, which declared the launch of new round of negotiations (DDA), it was agreed that trade facilitation negotiations would take place after the Fifth Ministerial Conference on the basis of a decision to be taken. However, at the Fifth Ministerial Conference in Cancun in 2003, it turned out that the positions of major WTO Members regarding the Singapore issues were diverse and it was decided that all of them be excluded from the negotiation items of DDA. Meanwhile, proponents of trade facilitation continued to advocate the significance of the issue and, finally, at the General Council in July 2004 it was agreed that separate treatment for trade facilitation be rendered (the July package). Formal trade facilitation negotiations were subsequently launched. While DDA adhered to the idea of the single undertaking, at the Eighth Ministerial Conference in Geneva ministers admitted the limitations of such an approach and recognized the necessity of different negotiating approaches, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking, which paved the way for the Bali package.

provision. The fourth section assesses the likely impacts of the ATF from several angles: legal, economic, capacity building, and domestic reform. The final section concludes.

2. Commitment Methodology under the ATF (Section II)

Section II of the ATF is entitled Special and Differentiated Treatment Provisions for Developing Country Members and Least Developed Members. It elaborates on how developing and LDC Members implement obligations set in Section I.² While developed Members should implement all obligations upon entry into force of the ATF, developing and LDC Members have the freedom to decide when to implement each provision by submitting notification of three categories described below (Paragraph 2):

- Category A contains provisions that a developing Member or an LDC Member designates for implementation upon entry into force of this Agreement, or in the case of an LDC Member within 1 year after entry into force.
- Category B contains provisions that a developing Member or an LDC Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement.
- Category C contains provisions that a developing Member or an LDC Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.

Developing countries need to classify all provisions under one of the three categories. This has two important implications: (i) all WTO Members agree on the importance of implementing the ATF, though implementation may be sometimes difficult due to the lack of capacity; and (ii) items over which disagreements exist in terms of the necessity of implementation are excluded from Section I.

Paragraphs 3, 4.1, and 4.2 prescribe when the various types of notification should be submitted (Table 1). The deadline for submitting notifications regarding Categories B and C can be extended, following appropriate procedures (Paragraph 4.3).

² The term developing countries refers here to developing countries other than LDC Members. They should be distinguished from LDCs because stronger special and differential treatment is rendered to LDC Members than other developing Members.

Table 1: Notification Requirements (Paragraph 4)

	Type of Notification	Developing Members	LDC Members
Category A	Notification of provisions classified under A and implementation	Upon entry into force of ATF	Within 1 year after entry into force of ATF
Category B	Notification of provisions classified under B	Upon entry into force of ATF	No later than 1 year after entry into force of ATF
	Notification of indicative date of implementation	Same as above	Same as above (optional)
	Notification of definitive date of implementation	No later than 1 year after entry into force of ATF (extension may be allowed)	No later than 2 years after the submission of notification of items classified under B (extension may be allowed)
Category C	Notification of provisions classified under C	Upon entry into force of ATF	1 year after entry into force of ATF
	Notification of necessary assistance	Same as above	1 year after the submission of notification of items classified under C
	Notification of indicative date of implementation	Same as above	Within 2 years after the submission of notification of necessary assistance
	Notification of details of assistance arrangement	Within 1 year after entry into force of ATF	Same as above
	Notification of definitive date of implementation	Within 18 months from the notification of details of assistance	Within 18 months from the notification of details of assistance

AfT = Aid for Trade, LDC = least developed country.

Source: Author's compilation.

Implementation dates for provisions classified under Categories B and C can be also extended, following appropriate procedures (Paragraph 5.1). When the additional time for implementation is less than 18 months for developing Members and less than 3 years for LDC Members, such shall be allowed without further action (Paragraph 5.2). When the additional time required for the first extension is longer and/or a second or subsequent extension is

requested in accordance with appropriate procedures (Paragraph 5.3), the Committee shall give sympathetic considerations (Paragraph 5.4).

Paragraph 6, which was not included in the draft text, was added in the final text. This implies that Members admit the possibility of non-implementation due to lack of capacity despite the mechanisms elaborated in the ATF. When a developing or LDC Member cannot implement provisions, it shall notify the Committee of its inability to implement the relevant provisions (Paragraph 6.1). In this case, an Expert Group shall be immediately established to make a recommendation to the Committee (Paragraphs 6.2, 6.3, and 6.4). Developing Members shall not be subject to Dispute Settlement Understanding (DSU) proceedings after the notification of inability to implement relevant provisions until the first Committee meeting after it receives the recommendation of the Expert Group (Paragraph 6.5).³

Shifting between Categories B and C is allowed (in both directions), following appropriate procedures. The shift from B to C requires the submission of information on assistance (Paragraph 7.1).

There is a grace period for the application of the DSU. The grace period depends on Categories as well as on the developmental status of the Member (Paragraphs 8.1, 8.2, and 8.3—see Table 2). There is no grace period for provisions committed by developing Members under Categories B and C. However, as aforementioned, the Member shall not be subject to DSU proceedings after the notification of inability to implement relevant provisions until the first Committee meeting (Paragraph 6.5). Notwithstanding the grace period, the Member shall exercise due restraint in raising matters under DSU against LDCs (Paragraph 8.4).

Table 2: Grace Period

	Developing Members	LDC Members
Category A	2 years after entry into force	6 years after entry into force
Category B	Not applicable	8 years after implementation of provisions
Category C	Not applicable	8 years after implementation of provisions

Source: Author's compilation.

Donor Members agree to facilitate the provision of assistance and capacity building (Paragraph 9.1). Note that the term “assistance and support for capacity building” is used instead of “technical assistance” because assistance includes “financial assistance” as defined in footnote 16 of the ATF. Another interesting point is the use of the term “donor Members” rather than “developed Members,” which implies that non-developed Members are not exempt from providing assistance to others. Principles for providing assistance that Members shall endeavor to apply are listed in Paragraph 9.3.

³ LDC Members shall not be subject to DSU proceedings until either of the following: (i) the Committee makes a decision, or (ii) within 24 months after the first Committee meeting after it receives the recommendation of the Expert Group.

Paragraph 10 concerns the information on assistance to be submitted to the Committee. Donor Members shall submit information to the Committee.

It is useful to summarize the above analysis in light of the question as to when dispute settlement may occur. Since Members shall exercise due restraint in raising matters against LDCs under the DSU, the analysis here focuses on developing Members. First, when developing Members classify provisions under Category A, and if other Members consider that their implementation of Category A is insufficient, dispute settlement may occur after the grace period (2 years). However, this scenario is unlikely because developing Members classify provisions in which implementation is not difficult under Category A. Second, when developing Members classify provisions under Category B or C, dispute settlement may occur when implementation is due but other Members consider that implementation is insufficient. Thus, the essential question is when the ultimate deadline of implementation really is. (A change in classification does not automatically mean the extension of the deadline.) Developing Members are entitled to extend the implementation deadline up to 18 months. An extension longer than 18 months and the second and subsequent extensions are possible because the Committee shall give sympathetic consideration when the required time is longer. However, if developing Members fail to implement a commitment within the (extended) period and/or a (further) extension is not granted, they shall notify the Committee of an inability to implement, leading to dispute settlement after the first Committee meeting after the Committee receives the recommendation of the Expert Group. Therefore, when any Member “blocks” the second or subsequent extensions, or an initial extension exceeding 18 months, dispute settlement may occur.

3. Obligations Set by the ATF (Section I)

This section will assess the level of ambition of obligations set out in Section I of the ATF from two angles. The first is whether the obligations are mandatory obligations or best endeavor obligations. A mandatory obligation is usually stipulated as a “shall plus verb” without accompanying softening language (except “shall endeavor,” which is regarded as best endeavor). The use of “should” is regarded as best endeavor. The following terms are regarded as softening language that make an obligation a best endeavor obligation: “to the extent possible,” “as appropriate,” “as may be required,” “whenever” or “wherever practicable,” and “where possible.”⁴ Finally, some obligations fall under the necessity test category,⁵ which is situated in between the two.

The second angle concerns the difference between the final agreement and the draft text prepared before the Bali conference (17th draft dated 29 July 2013 [TN/TF/W/165/Rev.17]).

⁴ In addition, the use of “as rapidly as possible” or “within the shortest possible time” (used in Article 7-8) is regarded as best endeavor because the time frames involved are vague.

⁵ Necessity tests attempt to strike a balance between (i) preserving the freedom of Members to set and achieve regulatory objectives through measures of their own choosing and (ii) discouraging Members from adopting or maintaining measures that unduly restrict trade (WTO 2003, p. 1).

Items dropped from the final agreement and the selection of language in brackets in the draft text are the main items to be reviewed.

Publication and Availability of Information (Article 1)

Publication per se (Article 1-1.1) does not seem to be a controversial issue, partly because Article X of the General Agreement on Tariffs and Trade (GATT) already includes it. The draft did not have any bracketed language and the final text and draft for Article 1 are identical.

However, although making information available through the internet is a mandatory obligation, updating the information on the internet is a best endeavor obligation (Article 1-2.1). Thus, there is no guarantee that information that traders obtain online is updated. Moreover, making information available online in WTO official languages became a best endeavor obligation in the final text. Information that shall be published online is limited to importation, exportation and transit procedures, while making available online forms and documents, enquiry points, and other trade-related information became a best endeavor obligation (Article 1-2.3).

The establishment of enquiry points became best endeavor as well, although this was in brackets in the draft (Article 1-3.1), and the prohibition of charging fees for answering basic enquires also became a best endeavor obligation (Article 1-3.3).

There were no brackets in terms of the notification in the draft and the final text is identical to the draft (Article 1-4.1).

Opportunity to Comment, Information before Entry into Force and Consultation (Article 2)

Language concerning the “interval between publication and entry into force,” which means that new or amended laws or regulations should not be suddenly applied, was dropped in the final text after being included in the draft with softening language.

Giving traders and interested parties an opportunity to comment became a best endeavor obligation (Article 2-1.1) in the final text, as did consultation between border agencies and traders and other stakeholders (Article 2-2).

Advance Rulings (Article 3)

The ATF sets some obligations regarding advance rulings. Each Member shall issue an advance ruling in a reasonable, time-bound manner. A Member may decline to issue an advance ruling only when the issue is pending or has been decided by an appellate tribunal etc (Article 3-2). Once issued, an advance ruling shall be binding (Article 3-5) and valid for a reasonable time (Article 3-3). A Member may revoke, modify, or invalidate an advance ruling through written notice (Article 3-4). While Members shall publish, at a minimum, (i) a requirement for the application for advance ruling, (ii) the time period for issuance of an advance ruling, and (iii)

the length of validity of an advance ruling (Article 3-6), the publication of other information relating to an advance ruling is a best endeavor obligation (Article 3-8).

It is important to note the definition and scope of advance rulings (Article 3-9). An advance ruling covers only tariff classification and origin. An advance ruling regarding other matters (e.g., method or criteria for customs value determination and tariff quota) became a best endeavor obligation in the final text. Another important point is that the final text includes the provision that a Member may require that an applicant has legal representation or registration in its territory (Article 3-9d). (There is a possibility that an advance ruling will be declined based on this provision.)

Appeal or Review Procedures (Article 4)

Each Member shall provide the right to appeal or review the decision. However, this right is limited to customs-related issues, and administrative decisions made by other border agencies were dropped from the final text (Article 4-1.1). Each Member is encouraged only to make provisions under Article 4 applicable to administrative decisions made by border agencies other than customs (Article 4-1.6). Thus, substantial provisions regarding appeal and review are included in the ATF, but they are applicable to customs only.

Furthermore, provisions regarding appeal mechanisms within a customs union among WTO Members were dropped from the final text. These would have been business-friendly provisions since the administrative decisions of each member of a customs union may not be identical, which can lead to trade deflection.

Other Measures to Enhance Impartiality, Non-Discrimination, and Transparency (Article 5)

While all provisions under Article 5 were in brackets in the draft, these provisions were included in the final text.

Regarding notification for enhanced controls or inspection, the provision says that each Member “may” issue notifications (Article 5-1a, b). The mandatory obligations are the following: (i) each Member shall terminate or suspend notification when the circumstances giving rise to it no longer exist, and (ii) the termination or suspension of notification shall be promptly announced (Article 5-1c, d).

Regarding detention, a Member shall inform the carrier or importer promptly (Article 5-2).

Regarding test procedures, the obligation is not ambitious. Members may grant an opportunity for a second test (Article 5-3.1) and a Member shall consider the result of a second test and may accept the result of such a test (Article 5-3.3).

Fees and Charges Imposed on or in Connection with Importation and Exportation (Article 6)

Regarding general disciplines, the only mandatory obligation is that information on fees and charges shall be published in accordance with Article 1 (Article 6-1.2). Adequate time between publication of new or amended fees or charges and their application is necessary, but such is not required in urgent circumstances (Article 6-1.3). Periodical reviews to streamline the number and diversity of fees and charges are also a best endeavor obligation (Article 6-1.4).

Specific disciplines are applicable to fees and charges for customs processing. Fees and charges for customs processing shall be limited in amount to the approximate cost of services rendered on or in connection with specific import or export operations. However, such fees and charges are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods (Article 6-2.1).

Penalty disciplines are substantial. A penalty shall be imposed only on the person(s) responsible for the breach (Article 6-3.2). The penalty imposed shall depend on the facts and circumstances of the case, and shall be commensurate with the degree and severity of the breach (Article 6-3.3). Each Member shall ensure to avoid conflict of interest and creation of incentives (Article 6-3.4). Each Member shall ensure that an explanation in writing that specifies the nature of the breach and applicable laws and regulations is provided to the person(s) upon whom the penalty is imposed (Article 6-3.5).

Release and Clearance of Goods (Article 7)

Article 7 includes both mandatory and best endeavor obligations (Table 3). Mandatory obligations include pre-arrival processing, separation of release from final determination of duties, post-clearance audit, authorized economic operators, and minimization of documentation requirements for expedited shipment. Stipulations regarding the release of expedited shipments and perishable goods are essentially best endeavor obligations because the terms “as rapidly as possible” and “within the shortest possible time” are used.

Table 3: Obligations under Article 7

Items	Article	Mandatory Obligation	Best Endeavor
Adoption or maintenance of procedures allowing for the submission of import documentation prior to arrival	7-1.1	X	
Advance lodging of documents in electronic format	7-1.1		X
Electronic payment	7-2		X
Adoption or maintenance of procedures allowing the release of goods prior to the final determination of duties etc	7-3.1	X	
Adoption or maintenance of risk management system	7-4.1		X
Adoption or maintenance of post-clearance audit	7-5.1	X	
Publication of average release time of goods	7-6.1		X
Provision of additional trade facilitation measures for authorized operators	7-7.1	X	
Minimization of documentation requirement for expedited shipments	7-8.2a	X	
Release of expedited shipment as rapidly as possible	7-8.2b		X
Release of perishable goods within the shortest possible time	7-9.1a		X

Source: Author's compilation.

Consularization

While the prohibition of consular transaction requirements is potentially a very powerful tool to facilitate trade, this was dropped from the final agreement.

Border Agency Cooperation (Article 8)

There are two types of border agency cooperation: cooperation among agencies in a Member's jurisdiction and international cooperation across borders. Regarding domestic cooperation, a Member shall ensure that its authorities and agencies cooperate with each other and coordinate their activities (Article 8-1). With regard to international cooperation, cooperation and coordination are best endeavor obligations (Article 8-2).

Movement of Goods under Customs Control Intended for Import (Article 9)

The movement of goods under customs control intended for import became a best endeavor obligation in the final agreement even though softening language was not included in the draft.

Formalities Connected with Importation and Exportation, and Transit (Article 10)

Article 9 also includes both mandatory and best endeavor obligations (Table 4). While the review of formality and documentation requirements is a mandatory obligation, reforms based on the review are best endeavor obligations with the inclusion of the term “as appropriate.” There are mandatory obligations to prohibit certain trade practices: pre-shipment inspection requirement and mandatory use of customs brokers. The application of common border procedures within a customs territory is a mandatory obligation, but the scope is limited to customs procedures. (Other border procedures included in the bracket in the draft text were dropped from the final agreement.)

While the issue of rejected goods was one of the issues wherein developed and developing Members had different negotiating positions, it was eventually agreed that Members shall allow importers to re-consign or return the rejected goods, but this is subject to and must be consistent with domestic laws and regulations. Likewise, temporary admission of goods and inward and outward processing shall be allowed “as provided for in its laws and regulations,” and, hence, became a best endeavor obligation.

Table 4: Obligations under Article 10

Items	Article	Mandatory Obligation	Best Endeavor
Review of formality and documentation requirement	10-1.1	X	
Reform of formality and documentation requirement based on the result of review	10-1.1 a-d		X
Acceptance of copies	10-2		X
Use of international standards	10-3		X
Single window	10-4		X
Prohibition of pre-shipment inspection requirement	10-5	X	
Prohibition of mandatory use of customs brokers	10-6	X	
Common border procedures and uniform documentation requirements within a Member's territory	10-7	X	
Re-consignment or return of rejected goods	10-8		X
Temporary admission of goods and inward and outward processing	10-9		X

Source: Author's compilation.

Freedom of Transit (Article 11)

While Article V of GATT includes some substantial obligations, Article 11 of the ATF contains operational guidelines to secure freedom of transit, which comprise both mandatory and best endeavor obligations (Table 5).

Table 5: Obligations under Article 11

Items	Article	Mandatory Obligation	Necessity Test	Best Endeavor
Less restrictive regulations or formalities	11-1		X	
Avoidance of disguised restrictions	11-1	X		
Prohibition of traffic in transit to be conditioned upon the collection of fees except transportation costs, administrative expenses, or cost of services	11-2	X		
Prohibition of voluntary restraints or similar measures	11-3	X		
No less favorable treatment than goods directly transported from origin to destination for goods in transit	11-4	X		
Physically separate infrastructure for traffic in transit	11-5			X
Formalities, documentation requirements, and customs control not more burdensome than necessary	11-6		X	
Prohibition of customs charges and unnecessary delays or restrictions until transit is concluded at exit point	11-7	X		
Prohibition of the application of technical regulations and conformity assessment procedures	11-8	X		
Provision of advance filing and processing of transit documentation and data prior to the arrival of goods	11-9	X		
Prompt termination of transit operations	11-10	X		
Guarantees				
<ul style="list-style-type: none"> Shall be limited to ensuring that transit requirements are fulfilled 	11-11.1	X		
<ul style="list-style-type: none"> Shall be discharged without delay once transit requirements have been satisfied 	11-11.2	X		

Table 5: Continued

Items	Article	Mandatory Obligation	Necessity Test	Best Endeavor
<ul style="list-style-type: none"> Can be comprehensive in a manner consistent with the Member's laws and regulations 	11-11.3			X
Publication of relevant information used to set the guarantee	11-11.4	X		
Prohibition of customs convoy or escorts when circumstances are not high-risk or guarantees ensure compliance	11-11.5	X		
International cooperation and coordination for transit	11-12			X
Appointing a national transit coordinator	11-13			X

Source: Author's compilation.

Three best endeavor clauses seem to be very effective if implemented. These include (i) physically separate infrastructure, such as lanes and berths, for traffic in transit (Article 11-5); (ii) international cooperation and coordination with a view to enhance freedom of transit (Article 11-12); and (iii) appointment of a national transit coordinator (Article 11-13).

Customs Cooperation (Article 12)

Customs cooperation, especially information exchanges, could be the basis of other trade facilitation measures, but the obligation under Article 12 is thin. When a requesting Member submits a written request following the procedures set in Article 12-4, the requested Member shall provide information, but this becomes a best endeavor obligation with the use of "to the extent information is available" (Article 12-6 b, c, and e). Moreover, the requested Member may postpone or refuse the provision of information for public interest purposes as stipulated in domestic laws and other regulations (Article 12-7.1). It is interesting to note that domestic law can be a justification to postpone or refuse the provision of information (Article 12-7.1.b).⁶

In summary, it can be said that the obligations in Section I were diluted in three ways. First, very controversial issues included in the draft were dropped from the final agreement (e.g., consularization). Second, softening language was included for controversial issues. Third, the scope is limited to customs only; other border agencies are outside the scope (e.g.,

⁶ Requesting Members have a strong obligation to protect the confidentiality of information provided; the use of information is limited only to the customs authority dealing with the matter at issue (Article 12-5), and when unauthorized use or disclosure is committed by a requesting Member, the requested Member may suspend its obligation to the requesting Member (Article 12-11). When a requested Member receives an unmanageable number of requests for information and, in the absence of a mutually agreed approach of prioritization between requesting and requested Members, the requested Member has the discretion of prioritization (Article 12-9.2).

common customs procedures). Accordingly, the mandatory obligations under Section I are limited to the items listed below, while substantial mandatory obligations apply only to (i) the release and clearance of goods and (ii) freedom of transit:

- Internet publication (excluding the update of online information)
- Advance ruling
- Appeal (limited to customs-related matters)
- Information on detention
- Publication of fees and charges
- Penalty disciplines
- Release and clearance of goods (various aspects are covered)
- Domestic agency coordination (excluding international coordination)
- Formalities (review of formalities, not reform; prohibition of pre-shipment inspection requirement and mandatory use of customs brokers; uniformed customs procedures, excluding non-customs procedures)
- Freedom of transit (various aspects are covered)

4. Likely Impacts

4.1 Legal Impacts

The ATF will likely not have a major legal impact on Members, which means that the rise of dispute settlement can be avoided. This is good news given the nature of trade facilitation. In addition to the fact that the ATF strongly discourages disputes against LDC Members, two points should be mentioned. First, developing and LDC Members can decide when to implement obligations and their implementation can be conditional on the provision of assistance. Second, the majority of obligations set by the ATF are best endeavor obligations and the scope of mandatory obligations is very limited. Thus, even if Members fully commit and later unfulfill their obligations, this does not automatically mean a breach of the agreement, especially for provisions wherein the term “to the extent possible” is used. Thus, the proliferation of disputes against developing countries is likely to be avoided.

It is interesting to find that developing and LDC Members can decide when to implement best endeavor clauses. If a developing Member decides to implement a best endeavor clause on a certain date, what does it mean? Does its implementation imply that the obligation becomes something beyond mere best endeavor? We still need some time to have a clear idea about the difference between before and after the implementation date of best endeavor clauses in terms of non-fulfilment of commitments.⁷

⁷ Best endeavor clauses do not seem to have a substantial impact when the agreement is applicable to all countries across the board. However, because the ATF employs a commitment method, “committed” best endeavor clauses seem to be more than that.

The majority of WTO Agreements do not set a clear obligation on assistance (Hamanaka 2011). The usual case is that developing countries undertook to implement bound commitments in exchange for unbound commitments for assistance (Finger and Winters 2002). The ATF attempts to link the implementation of commitments of developing Members with the assistance commitments of developed and donor Members. However, the linkage between the implementation of commitments and assistance may have two potential risks. First, there is a possibility that donor Members undertook to implement bound commitments for assistance in exchange for developing Members' unbound commitments for implementation. As we saw, the majority of obligations are best endeavor obligations. Second, when the implementation of linked commitments fails, it is not easy to assess which side's commitment has gone unfulfilled: the donor's commitment for assistance or the developing Members' commitment to implement? While the two can conceptually be distinguished easily, they are tangled in reality. When developed Members consider that the implementation of a commitment is weak, there is also a possibility that developing Members consider that the assistance provided by the donor Member is insufficient.

4.2 Immediate Economic Impacts

It seems myopic to consider that the ATF will bring significant economic impacts even though the economic impact of the ATF that former WTO Director-General Pascal Lamy referred to as a "1 trillion dollar boost" is widely cited (Lamy 2013). It seems that Lamy's figure is based on the study conducted by the Peterson Institute for International Economics (Hufbauer and Schott 2013) that halved the estimate made by the World Bank study (Portugal-Perez and Wilson 2010; Wilson, Mann, and Otsuki 2005). It should be noted that the gain from trade facilitation mainly emanates from investment in physical infrastructure (e.g., level of development and quality of ports, airports, roads, and rail infrastructure), which is outside the scope of the ATF.⁸

The fact that the ATF does not bring immediate economic impacts does not mean it is not economically meaningful. The ATF can be a tool of trade facilitation reform in the long-run and result in significant economic gains, as discussed below.

4.3 Capacity Building through Technical and Financial Assistance

It is very natural to assume that the ATF can contribute to the development of trade facilitation capacities among developing Members because the provision of assistance is emphasized in Section II. However, the linkage of donor Members' assistance and developing Members' implementation of commitments may face obstacles unless such assistance is properly designed. This is especially true for technical assistance because designing and implementing trade facilitation technical assistance that strikes a balance between donor skills and interests on one hand, and recipient's needs and ownership on the other, is not an easy task.

⁸ The only provisions relating to infrastructure are Article 8-1a and Article 11-5, which are best endeavor obligations.

Financial assistance can be a very effective tool for capacity building, though donor Members may be hesitant to provide financial assistance, unlike technical assistance. Developing Members are often reluctant to change their existing policies and practices not because they believe changes are unnecessary but because they seek to avoid impacts that would be detrimental to people. For example, developing Member governments may try to maintain a system of customs brokers just because they do not want customs brokers to lose their jobs. Even if developing Member countries may be willing to abolish fees and charges (though this is a best endeavor clause) to facilitate trade, this could be difficult because the government might lose revenue, and charging a fee to finance the services rendered would become inevitable. In these cases, financial assistance might solve the problem.⁹

4.4 Short-Term and Long-Term Trade Facilitation Reform

Trade facilitation is, fundamentally, a domestic unilateral issue. The majority of literature suggests that political will is essential. But it is also true that trade facilitation is a technical issue. The ATF gives us some idea about which types of trade facilitation reform are important from a commercial perspective. In this regard, the implementation of best endeavor items seems to be necessary. For example, since the ATF includes the implementation of single window (best endeavor), developing Members should focus on its implementation, avoiding a philosophical debate on whether single window is effective or not.

Furthermore, items dropped from the final agreement are indeed important from a commercial perspective. Items dropped from the final agreement due to potential disagreements over the terms of implementation include the following:

- interval between publication of new or amended trade-related laws and regulations, and their implementation;
- comparable disciplines on non-customs agencies to customs (e.g., publication through internet, appeal, common border procedures);
- appeal mechanism for a customs union to secure consistency among union members;
- avoidance of ad valorem fees or charges; and
- prohibition of consular transaction requirement.

5. Conclusion

The ATF has become one of the first substantial deliverables of the DDA. It is expected not only to improve the trade facilitation policies of Member countries, but also to provide some impetus to stagnant DDA negotiations.

It is important to note two points in assessing the likely impacts of the ATF. First, developing and LDC Members can decide when to implement obligations and implementation can be

⁹ The situation is similar to countries that want to cut tariffs to increase trade but cannot do so because customs revenue is critical to government overall revenue (Cirera et al. 2011).

subject to the provision of assistance from donors. Second, the obligations themselves are not ambitious. Above all, very controversial issues were dropped from the final agreement (e.g., consularization). Obligations tend to be best endeavor in nature as softening language (e.g., “to the extent possible”) is usually included. This means that what is required is not ambitious even in cases where developing Members have made full commitments.

The ATF is not expected to have a major legal impact on Members. It seems that the proliferation of dispute settlement can be avoided, which is indeed good news. The ATF’s immediate economic impact also seems to be narrow because it covers only limited trade facilitation items. While technical assistance may be helpful in building the trade facilitation capacities of developing Members, financial assistance can be an important catalyst for promoting trade facilitation reform among developing Members. Furthermore, the ATF promotes trade facilitation reform, which is fundamentally a unilateral action. The implementation of best endeavor items, including single window, seems to be very helpful for traders. Moreover, the voluntary implementation of trade facilitation measures that were eventually dropped from the final agreement seems to be important from a commercial perspective. In summary, the ATF can be a useful guide for trade facilitation reform at the domestic level, while the likelihood for success of such unilateral reforms is enhanced with assistance—especially financial—from donors.

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World Trade Organization Agreement on Trade Facilitation

Assessing the Level of Ambition and Likely Impacts

The Agreement on Trade Facilitation (ATF) was agreed at the Ninth Ministerial Conference of the World Trade Organization (WTO) held in Bali in December 2013. This paper assesses the level of ambition and likely impacts of ATF.

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ASIAN DEVELOPMENT BANK

6 ADB Avenue, Mandaluyong City

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Publication Stock No. WPS146857-2

Printed in the Philippines