The Trade Facilitation Agreement: Building Faith in International Trade in an Uncertain Time

Ashley Kincaid Lloyd
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I. INTRODUCTION

It is often theorized that multilateral trade can act as a stabilizing conduit for peace despite tumultuous governments, economic crisis, or social unrest.1 Facilitating such trade in a pragmatic multilateral way has been a challenging project, but on February 22, 2017, the groundbreaking Trade Facilitation Agreement (TFA) entered into force.2 The TFA is “the first new multilateral agreement in the nearly twenty-year history” of the World Trade Organization (WTO).3

“Trade facilitation” is defined by the United Nations Economic Commission for Europe (UNECE) with the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) as “the simplification, standardization and harmonization of procedures and associated information flows” required to move goods from seller to buyer and to make payment.4 In the WTO context, trade facilitation primarily refers to reforming “border management processes so as to make import and export transactions more transparent, predictable and efficient.”5 Bernard Hoekman states, “[a]n even broader view of trade facilitation is to include

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1. The WTO Can...Contribute to Peace and Stability, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/l0thi_e/10thi09_e.htm [hereinafter The WTO Can] (“When the world economy is in turmoil, the multilateral trading system can contribute to stability. Some would argue that this can even contribute to international peace. History is littered with examples of trade disputes escalating into armed conflict. It’s a claim that should not be exaggerated, but there is truth in it. If we understand why, we have a clearer picture of what the system actually does.”).
any measure that promotes trade." Trade facilitation, generally, is "now widely considered a necessary complement to broader economic liberalization—essential to reap [trade facilitation’s] full benefits."

One of the most beneficial aspects of trade facilitation is that it creates stability in markets and thus certainty and confidence in traders, importers, and exporters. Extensive empirical data at this time exists to suggest trade facilitation can significantly boost trade, "diversification along the extensive margin of trade, and increase aggregate welfare." Arguably, the TFA has far reaching effects, one is superseding the negative effects of high, as "trade facilitation has a larger effect than removing tariffs." If one is inclined to embrace trade facilitation and accept the theory that trade at least encourages peace between nations, the TFA may be interpreted as a manifestation of the foregoing intuition that trade creates peace. Moreover, because the WTO’s allows states to retaliate against any state that violates WTO agreements, and as the TFA is the first agreement that all WTO members signed, there are binding and legal repercussions that make the TFA indisputably unique.

This Article is comprised of the following sections: (II) background of the TFA’s creation; (III) the ways in which protectionism hinders trade facilitation; (IV) a discussion of the TFA including: (A) its projected benefits, (B) the role of the Global Alliance, (C) implementing the TFA, and (D) regulating and enforcing the TFA despite protectionism in 2017; (V) non-protectionist critiques of the TFA; and (VI) concludes that the TFA will serve a significant purpose.

II. BACKGROUND

The WTO created the TFA as a natural consequence of the WTO’s work. This

6. Id.
10. Enabling Trade: Valuing Growth Opportunities, World Economic Forum, http://reports.weforum.org/global-enabling-trade-2013/a-reducing-supply-chain-barriers-to-trade-could-increase-gdp-up-to-six-times-more-than-removing-tariffs-they-have-been-under-managed-by-both-countries-and-companies/#view/fn-6 ("While the increases in trade from tariff elimination are similar in magnitude to those associated with trade facilitation, the increases in GDP are many times greater. The reason is that the kinds of efficiencies brought about by improved trade facilitation are more powerful than those associated with tariff reduction. Reductions in supply chain barriers improve the efficiency of the movement of goods, in a manner analogous to an increase in transportation productivity, thereby recovering resources that are otherwise wasted. In contrast, tariff reductions primarily represent a reallocation of resources within an economy, while capturing only the more modest inefficiency created by the tax.").
section will summarize the WTO's history from its inception, through the Doha Development Agenda discussions, and finally to the Bali Ministerial Conference that culminated in the TFA's creation and entry into force. The WTO is an intergovernmental organization (IGO)11 created in 1995 in Geneva, Switzerland.12 Its creation arose from the Uruguay Round Agreement,13 but its establishment occurred through Article 1 of the Agreement Establishing the World Trade Organizations' entry into force.14 At the WTO's inaugural Ministerial Conference in 1996, trade facilitation discussions arose as a top priority.15 Trade increased presumably from the certainty that the WTO rules provided for businesses and countries. The rules also had positive effect on equality.16 The WTO held ten Ministerial Conferences to date, with an eleventh scheduled for December 2017 in Buenos Aires, Argentina.17

The Doha Conference was a landmark decision that paved the way for the TFA’s creation. Controversy arising from popular movements against

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11. Intergovernmental Organizations (IGOs), HARVARD LAW SCHOOL, http://hls.harvard.edu/dept/opia/what-is-public-interest-law/public-service-practice-settings/public-international-law/intergovernmental-organizations-igos/ ("The main purposes of IGOs were to create a mechanism for the world’s inhabitants to work more successfully together in the areas of peace and security, and also to deal with economic and social questions. In this current era of increasing globalization and interdependence of nations, IGOs have come to play a very significant role in international political systems and global governance.")


14. Id.

15. The First WTO Ministerial Conference, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm ("Trade, foreign, finance and agriculture Ministers from more than 120 World Trade Organization Member governments and from those in the process of acceding to the WTO participated in a Ministerial Conference in Singapore from 9 to 13 December 1996. The Conference was the first since the WTO entered into force on 1 January 1995."); see also Hoekman, supra note 5, at 4 (stating the WTO’s interest in Trade Facilitation arose from the international business community’s concerns that product sharing and global sourcing suffered as a result of “inefficient border management procedures and controls.”)

16. World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, ¶ 2, https://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (Moreover, the Singapore Ministerial Declaration iterated the WTO’s intent “to make the most of the possibilities that the multilateral system provides to promote sustainable growth and development while contributing to a more stable and secure climate in international relations.”).

“megacorporations” prior to 2001 did not deter the WTO from continuing to strive towards its goals to work on efficient trade facilitation. To this end, the WTO members attending the Doha Round focused on reducing import taxes, or “tariffs”, on a variety of trade goods. The Trade Negotiations Committee had leadership and a mission to begin crafting trade facilitation among WTO members. Following the Cancún Conference, “WTO members formally agreed to launch negotiations on trade facilitation in July 2004,” based upon Annex D: Modalities for Negotiations on Trade Facilitation (Modalities), included in the July Package. The Modalities also directed WTO members to improve and clarify freedom of transit, “fees and formalities connected with importation and exportation[,]” and ways to publish and administer trade regulations.

The United States found India and China’s agricultural policies “unconscionable”, and this breakdown frustrated many WTO members.
However, there was optimism. The tone surrounding the Doha Agenda in 2012 and 2013 drastically changed. Members, through alliances or individually, submitted hundreds of proposals for the Negotiating Group to consider. At the 2013 Bali Ministerial Conference, Members worked collectively to complete the Bali Package, which included the TFA. Finally, after years of disagreement and months of the Negotiating Group’s revisions, the Bali proposals became the TFA’s final text. The momentum that began in Bali continued through to the 2015 Ministerial Conference in Kenya. At the Kenya Round, “WTO members agreed on several significant issues within the Doha Development Agenda and outlined the way forward in WTO negotiations.” Within two short years, the TFA entered into force on February 22, 2017.

III. PROTECTIONISM ADVERSELY AFFECTS TRADE FACILITATION

Historically, any given state was skeptical of trusting its trade partners to have perpetually open markets and instead opted for “protectionism.” Protectionism refers to governmental efforts to restrict international trade. The Great

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2008), https://www.ft.com/content/0638a320-5d8a-11dd-8129-000077b07658 (India and China believed protected its impoverished domestic farmers from external agricultural import surges, but the United States disagreed); see also McClanahan, supra note 18 (Susan Schwab also suggested if the United States had relented to India and China “we could have come out with an outcome that rolled the global trading system back three years, or five years, or 30 years: 30 years of progress.”); Heather Stewart, Tariffs: WTO talks collapse after India and China clash with America over farm products, GUARDIAN (July 20, 2008, 12:01AM), https://www.theguardian.com/world/2008/jul/30/wto.india.
26. Early years – from Singapore to Doha, supra note 22; see also Negotiating An Agreement on Trade Facilitation, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_e.htm.
27. World Trade Organization, supra note 25.
28. Early years – from Singapore to Doha, supra note 22; see also Negotiating An Agreement on Trade Facilitation, supra note 26 (“WTO members had achieved a consensus text with 13 articles and a special section dealing with special and differential treatment provisions. Among the issues addressed in the Agreement are: norms for the publication of laws, regulations and procedures, including Internet publication; provision for advance rulings; disciplines on; fees and charges and on penalties; pre-arrival processing of goods; use of electronic payment; guarantees to allow rapid release of goods; use of “authorized operators” schemes; procedures for; expedite shipments; faster release of perishable goods; reduced documents and formalities with common customs standards; promotion of the use of a single window; uniformity in border procedures; temporary admission of goods; simplified transit procedures; provisions for customs cooperation and coordination.”).
31. The WTO Can, supra note 1.
32. Protectionism, INVESTOPEDIA.COM, http://www.investopedia.com/terms/p/protectionism.asp?ixzz4ZCCURiRx (“Protectionism” refers to “government actions and policies that restrict or restrain international trade, often done with the intent of protecting local businesses and jobs from foreign competition. Typical methods of protectionism are
Depression, that began in 1929, caused competing states “to raise trade barriers and protect domestic production and employment[,]” which contributed to an impoverished international market. The Great Depression was ruinous for trade, jobs, and industries, as the value of world trade—$3 billion USD in 1929—crashed to $1 billion USD by March 1933.

After the WTO’s creation, its goals centered around stabilizing world economies and keeping markets open in the face of economic crisis. The WTO was partially credited with stabilizing the world economy in the wake of the 2007 financial crisis, despite domestic pressure on governments to succumb to protectionist policies. Protectionism in domestic state policies has not disappeared, as evidenced in India’s 2008 government, the United States’ 2017 leadership, and in indigenous communities. India and the United States struggled to agree on trade facilitation mechanisms regarding agriculture. As international criticism of India’s domestic agriculture policies began to surface, the more India’s domestic citizenry began to agree that “the WTO issue is a relic of India’s past with anti-trade bias.” Moreover, the previously-held belief that India was singled out by the WTO was abandoned in popular rhetoric. While the attitude in India’s government changed from protectionist to pragmatic in conformity with the global trend, the United States’ 2017 policies abandoned liberalized trade in favor of protectionism.

On January 23, 2015, the United States, through its then-existing Trade tariffs and quotas on imports and subsidies or tax cuts granted to local businesses. The primary objective of protectionism is to make local businesses or industries more competitive by increasing the price or restricting the quantity of imports entering the country.

33. The WTO Can, supra note 1.
35. The WTO Can, supra note 1; see also Matthieu Bussière et al., Protectionist Responses to the Crisis: Global Trends and Implications (EUROPEAN CENTRAL BANK) https://www.ecb.europa.eu/pub/pdf/scpops/ecbcop110.pdf?29e9e5d9a3d7fab9dc635261bb6deb1de (“[E]vidence from surveys shows that public pressure for more economic protection has been mounting since the mid-2000s, and has possibly intensified since the start of the financial crisis. However, no World Trade Organization (WTO) member has retreated into widespread trade restrictions or protectionism to date.”).
37. Tim Worstall, India Threatens to Derailed WTO Deal Stockholding of Food; A Policy It Should Change Anyway, FORBES (July 26, 2014, 3:10AM), http://www.forbes.com/sites/timworstall/2014/07/26/india-threatens-to-derail-wto-deal-over-public-stockholding-of-food-a-policy-it-should-change-anyway/#580cee304aab (stating India’s food for the poor system was described as “a great steaming dungpile of corruption and inefficiency.”).
39. Id. (“India buying huge amount of wheat and rice from farmers at highly unsustainable prices and then finding it rot in the non-existent godowns (thereby distorting prices for everyone else)” was deemed problematic); Worstall, supra note 37.
Representative Michael Froman, formally accepted the TFA citing its positive aspects for expedient trade.\textsuperscript{40} This formal affirmation was confirmed by the WTO Director-General Roberto Azevedo on January 28, 2015.\textsuperscript{41} The United States’ acceptance was not merely based on global potential gains. The United States also encouraged speedy implementation of the TFA by offering to help developing nations implement TFA’s policies.\textsuperscript{42} In December 2016, United States Ambassador Michael Punke confirmed the United States’ “commitment to open markets and to the rules-based multilateral trading system embodied in the WTO.”\textsuperscript{43}

Despite Ambassador Punke’s declaration that the United States continued to dedicate itself to open borders and multilateral pragmatism at the end of 2016, by January 2017, new leadership proved itself to be wholly protectionist. For example, on January 24, 2017, an executive order ended the United States’ involvement in the Trans-Pacific Partnership (TPP);\textsuperscript{44} an action diametrically opposed to Ambassador Punke’s address to the WTO Trade Policy Review, which heralded the United States’ “vigorous pursuit of bilateral and regional arrangements aimed at reinforcing and complementing the multilateral trading system.”\textsuperscript{45}

Thus far, the United States’ 2017 protectionist policies have both destroyed an opportunity for involvement in the TPP\textsuperscript{46} and directly contravened its officially stated commitment to pragmatic multilateralism\textsuperscript{47} in favor of imposing high tariffs.\textsuperscript{48} It is these protectionist steps, combined with a threat to “pull out” of the

\begin{itemize}
  \item \textsuperscript{41} Protocol Amending the Marrakesh Agreement, Establishing the World Trade Organization, Done at Geneva on November 27, 2014, Agreement on Trade Facilitation, Notification of Acceptance; WT/Lett/1029.
  \item \textsuperscript{42} United States Takes Final Step Toward WTO Trade Facilitation Agreement, supra note 40 (“We are working with developing countries to help support effective implementation of this Agreement,” […] “In fact, we are already considering how to best support countries who are committed to implementation—working with other governments and the private sector.”).
  \item \textsuperscript{45} Ambassador Michael Punke, supra note 43.
  \item \textsuperscript{46} Id. (“According to analysis supported by the Peterson Institute for International Economics, if TPP were implemented, global exports would increase (compared to the baseline) by US $1.1 trillion (2015 dollars) by 2030, and global real income would increase by US $492 billion.”).
  \item \textsuperscript{47} Id. (stating “this multilateral system is so vitally important to” the United States of America).
  \item \textsuperscript{48} Patrick Gillespie, NAFTA: What it is, and Why Trump Hates It, CNN Money (Nov. 15, 2016, 5:17 PM), http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/ (“Top of Trump’s wish list is to renegotiate or ‘terminate’ NAFTA—the North American Free Trade Agreement. He also wants to slap a 35% tax on goods, such as Ford (F) cars, that are made in Mexico and sold in the U.S.”).
\end{itemize}
WTO,\textsuperscript{49} that indicate “Donald Trump is prepared to risk precipitating a trade war” that creates worry.\textsuperscript{50} Considering the current United States trade policies, it is ironic that the United States “became one of the first countries to try to reverse” the 1930’s global protectionist movement.\textsuperscript{51} Trade regimes and peace are interrelated. When trade barriers become insurmountable, war is imminent.

Faith in liberalized multilateral pragmatism may win out over protectionism; for, at the end of the day, TFA is fully entered in force, and creates certain rights and obligations on its signatories.

IV. THE TRADE FACILITATION AGREEMENT

The TFA is comprised of three main sections. Section I of the TFA (Section I) tells us that this agreement is binding and requires a commitment to use “best endeavors”\textsuperscript{52} to enforce the TFA.\textsuperscript{53} Section I covers: publication and availability of information; disciplines and fees about importation and exportation penalties; border agency cooperation, release, and clearance of goods; enhancing non-discrimination and transparency; goods under custom’s control; formalities in importing and exporting; freedom of transit; and customs cooperation.\textsuperscript{54}

Interestingly, the Section I standard is applied to developing and least-developed countries on a sliding scale. This sliding scale, covered in Section II, allows for “special and differential treatment” provisions that may be invoked by nations that qualify as developing or least-developed. Section II of the TFA creates three categories of nations that qualify as developing or least-developed countries and various ways to implement the TFA.\textsuperscript{55} Section II allows such countries to unilaterally determine when to “apply the various provisions laid out in Section I.”\textsuperscript{56} However, Section II also informs applicable states how to notify the Committee of the stage or progress on TFA implementation.\textsuperscript{57} Moreover, Section II discusses the methods available to change categories between A, B, or C, and how to seek support on implementing the TFA at various stages.\textsuperscript{58}


\textsuperscript{50} John Plender, \textit{Trump Trade Blind to Global Cost of Protectionism}, FINANCIAL TIMES (Jan. 31, 2017), https://www.ft.com/content/2bee373a-e786-11e6-893e-082e54a7f539.

\textsuperscript{51} Kyle Bagwell, Robert W. Staiger, & Alan O. Sykes, \textit{Border Instruments, in LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW} 29 (Cambridge University Press 2013).

\textsuperscript{52} Best Endeavors, INVESTOPEDIA, http://www.investopedia.com/terms/b/best-endavors.asp (Best endeavors is “[a] term commonly found in commercial contracts, that places upon the party given such an undertaking, the obligation to use all efforts necessary to fulfill it. “Best endeavors” places a party under a stricter obligation than “reasonable endeavors.”).
Section III covers institutional arrangements for an international and domestic Committee on Trade Facilitation, including its roles, obligations, and how to conduct meetings. This is followed by final provisions including notice that the TFA’s provisions are binding on all members, and that members are bound to resolve disputes as outlined in Articles XXII and XXIII of GATT 1994.

This section discusses the TFA by highlighting: (A) the TFA’s projected beneficial effects, (B) the Global Alliance, (C) implementing the TFA, and (D) regulating and enforcing the TFA in the face of protectionism. These sections are intended to explore some of the more unique aspects of this multilateral agreement, and whether these qualities create an agreement that can overcome protectionism.

A. Projected Effects of the TFA

The projected monetary benefits of TFA implementation are staggering: the TFA is estimated to reduce global trade costs from 12.5% to 17.5%. A study from the Organization for Economic Cooperation and Development (OECD) claimed a mere “one percent drop could save as much as $40 billion in trade costs.” This is a monumental amount of monies that will predominately benefit low to lower middle income countries and increase their opportunity to participate in trade. In a 2016 report by the International Trade Center (ITC), in connection with United Nations Network of Experts for Paperless Trade and Transport in Asia and the Pacific (UNNExT) and the United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP) division, the TFA was described as benefitting income distribution and small and medium enterprises (SME). Moreover, it is posited that the TFA “will also help developing countries attract more FDI (Foreign Direct Investment), increase customs revenues and reduce the incidence of corruption.”

B. The Global Alliance for Trade Facilitation’s Role

The Global Alliance for Trade Facilitation (GATF) consists of three major...
private sector organizations: (1) the International Chamber of Commerce (ICC); (2) the United States Chamber of Commerce-affiliated Center for International Private Enterprise (CIPE); and (3) the World Economic Forum (WEF). The United States Chamber of Commerce took a leading role in support of the TFA, which led to its formal adoption. Garnering the full potential of a multilateral agreement on the TFA’s scale required the government, private sector, TFA members, and IGO’s to work together for a common goal. Developed nations including the governments of Canada, Germany, the United Kingdom, and the United States created the GATF alongside private sector international organizations. GATF partners worked diligently and closely to craft a “unique public-private platform to leverage business expertise, leadership and resources to support effective trade facilitation reforms measured by real-world business metrics.”

Rather than being an enforcement mechanism on the back-end of potential TFA disputes, the GATF is tasked with creative problem solving in TFA implementation from the beginning. Having such support on the front-end of implementing the TFA’s ambitious goals could quell many foreseeable problems with TFA compliance before issues of corruption or faulty implementation could arise. The GATF, on the front-end, thus promotes proper implementation and makes the TFA more self-enforcing than was previously thought.

C. Implementation

The ICC argues that implementing the TFA’s potential for maximum beneficial results can be a smooth transition if domestic governments make the following four key points—“business engagement, ambition, speed and a coherent approach to implementation”—permanently at the top of their respective agendas. The ICC has repeatedly emphasized that businesses and governments must work

70. Id.
71. Id.; see also INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), supra note 68.
72. Hoekman, supra note 5 (“The weakness of the TFA in terms of offering foreign export interests strong mechanisms to enforce its provisions and thus to make the TFA self-enforcing means other institutional arrangements can and must be used to support implementation, including regional integration arrangements and concerted action by multilateral development agencies. The epistemic community that supported the TFA effort does not need the WTO to continue to provide support to governments and stakeholders that aims to improve trade facilitation performance.”).
73. See INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), supra note 68.
together “to cement opportunities the TFA will bring for development, job creation and poverty reduction.” With the GATF and Trade Facilitation Agreement Facility (TFAF) poised to help countries design implementation of the TFA, these resources are likely to create a smooth and organized partial or full implementation.

There are three categories of provisions that apply to different countries based on their needs and stage of economic development: Category A, Category B, and Category C. Category A contains provisions that a developing country or a least-developed country members to the TFA designate for implementation once the TFA is entered into force. In the case of a least-developed country member, implementation must begin within one year after, which is February 22, 2018. Category B contains provisions allowing developing or least-developed countries to designate “for implementation on a date after a transitional period of time following” the TFA’s entry into force. Category C contains provisions similar to Category B, with the additional requirement that Category C states acquire the capacity to implement the TFA with assistance or support for capacity building. Such support “may take the form of technical, financial, or any other mutually agreed form of assistance provided.” The TFAF’s Work Plan for 2017 has nine major tasks: (1) match Category C countries with developed nations; (2) create a grant funding program; (3) create and facilitate national workshops on implementing the TFA; (4) create regional workshops similar to (3); (5) assessing national needs; (6) create dedicated thematic workshops; (7) educate chairs of national trade facilitation committees; (8) include training materials on the TFAF website; and (9) facilitate outreach and promotional activities for the TFA.

The TFA as implemented has already circumvented some difficulties that countries, like Brazil, faced in changing domestic laws that encouraged trade facilitation measures. The difficulty historically arose between the competing interests of businesses that want simple, streamlined procedures for trade, and governments, which willingly adopt strict foreign trade measures.

74. Id.
75. About the Facility, WORLD TRADE ORGANIZATION, http://www.tfafacility.org/about-the-facility (The TFAF was “created at the request of developing and least-developed country (LDC) Members to help ensure that they receive the assistance they need to reap the full benefits of the Trade Facilitation Agreement, and to support the ultimate goal of full implementation of this new Agreement by all Members.”).
76. Trade Facilitation Agreement, supra note 54, § II, art. 14.
77. Id.
78. Id.
79. Id.
80. Id.
81. Id.
83. Jose Marcio R. Rego Filho, The Importance of the Agreement on Trade Facilitation to Brazil and the World Economy, 26 J. Int’l Tax’n 52, 53 (Jun. 2015); see also INTERNATIONAL CHAMBER OF COMMERCE: WTO TRADE FACILITATION AGREEMENT (TFA), supra note 68 (“A report from the Peterson Institute for International Economics commissioned by the ICC Research Foundation estimates that the TFA has the potential to deliver an unprecedented stimulus to the word economy with
agreements are binding on those states who are members, and supersede domestic authority in principle. José Márcio Rego Filho, an associate with the Tax and International Trade Area of Pinheiro Neto Advogados, in Sao Paulo, Brazil argues the WTO's TFA will inherently prevent local authorities from discretionary trade facilitation procedures or costs, and further posits:

[Execution of the Agreement will not only bring direct benefits to the world economy [...] but also give new impetus to the WTO, creating a more favorable environment for negotiations of more complex and divergent matters, all of which is of utmost importance in enhancing the economic development of all WTO member countries.]

Because of observable positive results in Brazil's implementation, the TFA appears to be a beneficial and innovative mechanism to promote trade while fostering necessary certainty.

D. TFA Regulation and Enforcement Despite Protectionism

The optimism surrounding the TFA should duly be met with skepticism as an agreement must be enforceable to have teeth. A key consideration, then, must be how to ensure businesses and governments adhere to the TFA's policies to reap its benefits with confidence. The International Monetary Fund's (IMF) involvement could add teeth to the WTO's agreements, as the IMF's rules in combination with "WTO Agreements provide the legal basis for cooperation." Over the last decade, drastic changes occurred in IMF and WTO global strategies from its policies in the 1990's that garnered criticism. To do this, it will be important to know whether there are mechanisms that can deter protectionist acts, or create binding consequences for noncompliance with the TFA. As Ambassador Punke noted:

WTO Members cannot have confidence in a system where WTO adjudicators overstep the boundaries agreed by WTO Members in the DSU and the WTO Agreement. And if Members do not have confidence that the WTO dispute settlement system will not add to or diminish their existing rights and obligations under agreements they have approved domestically, they will not have confidence that they can conclude new agreements and credibly say domestically what those new agreements mean.

Essentially, the concern is whether nations will commit to "the legally binding limits on their trade barriers and subsidies that they have also negotiated" if the

a boost of up to US$1 trillion.

84. Filho, supra note 83, at 53 ("[A]ccording to the International Chamber of Commerce (ICC), once implemented, the agreement could boost global trade by as much as U.S.$1 trillion and lead to a 10% reduction in trade costs.").

85. Have Teeth, FREEDICTIONARY.COM, http://idioms.thefreedictionary.com/have+teeth (To "have teeth" a law "it has the power to make people obey it.").


87. Ambassador Michael Punke, supra note 43.
available dispute settlement systems neither add to nor diminish rights and obligations. The WTO acknowledges that dispute settlement mechanisms is “the central pillar of the multilateral trading system,” because absent a “means of settling disputes, the rules-based system would be less effective because the rules could not be enforced.” Thus, the WTO’s official stance lies in enforceable hard law, but only after negotiations between disputing states take place. According to economic and legal scholars, the WTO’s “dispute settlement system is widely considered one of the most successful international resolution systems.” However, because the WTO inherently relies on state consent, thus, “even its hard-law texts contain certain forms of wording that locate them at the soft-law end of the spectrum, where effective litigation is difficult or impossible.”

The WTO’s binding agreements usually pertain to “transparency, fees and procedures that are imposed or applied by customs authorities[,]” rather than by blanket governmental leadership authorities. Importantly, many scholars consider WTO obligations non-binding “in an international law sense[,]” though the WTO includes a branch that, by its name, would seem to encompass non-compliance—Dispute Settlement Understanding (DSU). Some TFA “provisions can in principle be enforced through the WTO dispute settlement system. Others are of a “best endeavors nature” that is inherently subjective or “soft law[.]” Best endeavors-type matters will include sensitive matters “e.g., [c]ustoms cooperation

88. The WTO Can, supra note 1 (“WTO agreements require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted.”).
91. A Unique Contribution, supra note 89 (“First stage: consultation (up to 60 days). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.”)
92. Low, supra note 90 (“Intergovernmental contracts may encounter even more difficulty in this regard because political and commercial interests are blended and shape outcomes in ways that are less frequently encountered in private contracts.” Moreover, “even if the WTO dispute settlement system has justifiably earned a reputation for effectiveness, this is against a background where enforcement relies in no small part on state consent. Punishment mechanisms for non-compliance are largely limited to trade retaliation and the withdrawal of equivalent concessions. Retaliatory options are highly circumscribed in disputes between small and large countries because of the size disparity.”)
93. Id. (“Justiciable hard law rests on fragile foundations because the law is international, not national. It applies among sovereigns. Enforcement mechanisms are circumscribed and rely heavily on state consent”).
94. Id.
95. Hoekman, supra note 5, (emphasis added); see also Ambassador Michael Punke, supra note 43.
97. Hoekman, supra note 5.
and exchange of information, something on which there were and are concerns by developed countries and not just developing economies[,]" "activities of other government agencies at the border." 98

Multilateral agreements are no longer about enforcement. Rather, multilateral agreements focus on parties volunteering. This follows studies in social behavior that volunteering participation is more effective than mandatory rules. 99

The current understanding of the TFA is that upon its implementation, "enforcement is left to the standard WTO mechanisms, including greater transparency for domestic consumers, the operation of the TFA Committee[.]" 100 However, "many of the provisions of the TFA are not self-enforcing" as it relies on the WTO's DSU system. 101 The United States formally heralded international agreements as a way of achieving the "greatest economic benefits offered by the global trading system[,]" but only if all trading partners are required to "abide by their commitments and play by agreed upon rules." 102

Despite threats of protectionism from the current United States administration, it would be difficult for the United States to do so without violating certain obligations to its own people, not to mention its international obligations. 103 The United States' Foreign Affairs Manual on Treaties and Other International Agreements states that to terminate an agreement to which the United States is a party:

Terminations of treaties or other international agreements are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized by the Secretary or an officer specifically authorized by the Secretary for that purpose. 104

Regarding termination of an international agreement, termination cannot unilaterally occur unless formal authorization is established for such termination, and all interested government agencies have the opportunity to express their opinion. 105 Moreover, there is no definitive determination on whether the President

98. Id.
100. Hoekman, supra note 5.
101. Id.
102. Ambassador Michael Punke, supra note 43.
103. Tucker, supra note 49 (For example, the current President of the United States could create higher tariffs on Chinese imports, but he would "almost assuredly face a challenge at the dispute settlement body if he tried to do so, as it is a blatant violation of most-favored nation rules. (For this reason, the policy would also probably be ineffective and likely lead to more imports from third countries.")).
105. Id. (A Circular 175 memorandum (as well as accompanying documents) should be prepared that takes into account the views of the relevant government agencies and interested bureaus within the
of the United States has such unilateral authority to terminate multilateral treaties and agreements.\textsuperscript{106} The current administration, in theory, could “ask the U.S. Congress to repeal the TFA’s ratification and withdraw[,]” but this would be a deplorable action.\textsuperscript{107} Some industries have already felt the crushing effects of the United States’ decision to remove itself from the TPP.\textsuperscript{108} It is evident, at least from the excessive, needless financial losses the Texas agriculture industry is incurring, that withdrawing from such multilateral agreements serves to crush opportunities for United States wealth.\textsuperscript{109}

If the United States breaches its TFA obligations, WTO member nations may punish the United States through sanctions, as “the WTO is not so much a global government as it is a framework for structuring retaliation” or, in the alternative, disregard the United States as a global economic powerhouse entirely.\textsuperscript{110} Noncompliance or withdrawal from an IGO, however, is currently untested:

Members will remain bound, however, by conventions adopted by international organizations which they have separately ratified...like international treaties, binding decisions of international organizations seek to create rules of law—the continuing applicability of which may not be unilaterally denied. On the other hand, a legal obligation to comply with binding decisions may no longer be felt once the member has withdrawn. It will also be difficult for the organization to supervise compliance with such decisions. International sanctions will no longer be possible.”\textsuperscript{111}

It remains to be seen whether the United States will continue to “place an unprecedented emphasis on enforcement of existing trade agreements.”\textsuperscript{112} Alternatively, an IGO’s scope and binding reach may become definitively determined to answer whether withdrawal from an IGO releases a former member

\textsuperscript{106} David M. Ackerman, \textit{Withdrawal from the ABM Treaty: Legal Considerations}, http://congressionalresearch.com/RS21088/document.php?study=Withdrawal+from+the+ABM+Treaty +Legal+Considerations (“Nonetheless, it remains the case that there has not been a final judicial determination of the constitutional parameters governing the termination of treaties.”).


\textsuperscript{108} Courtney Gilmore, \textit{Trump’s Policy on Trade Costing Cattle Ranchers Thousands Each Day}, NBCDFW.ORG, http://www.nbcdfw.com/news/business/Trumps-Policy-on-Trade-Costing-Cattle-Ranchers-Thousands-Each-Day-415319203.html (Texas cattle, which “leads the nation with a total number of 248,800 farms and ranches, covering 130.2 million acres” are incurring a loss of over $400,000.00 USD per day.).

\textsuperscript{109} Id.

\textsuperscript{110} Tucker, \textit{supra} note 49.


\textsuperscript{112} Ambassador Michael Punke, \textit{supra} note 43.
from prior binding decisions under that organization’s rules.113

In sum, WTO members may find that the United States’ involvement in international trade is unnecessary, which would make trade with the United States both irrelevant and expensive. Thus, while “[p]ulling out of the WTO should not be feared for any necessary economic fallout. The U.S. and world could get by just fine” but, the potential chain reaction in retaliation from WTO member nations and the WTO’s DSU mechanism could cause it problems for international diplomacy.114 It is not possible to determine whether the WTO’s DSU’s will effectively address a breach under the TFA until and unless a dispute arises. But, the United States may be the first nation to discover whether the TFA has the teeth necessary to bring a WTO member into compliance. There may be cause for optimism as—to date—protectionism and populist governments are no match for international multilateral obligations.115

V. NON-PROTECTIONIST CRITIQUES OF THE MULTILATERAL TRADE AGREEMENTS

The widely-accepted theory is superbly elegant in its simplicity—trade is a conduit for peace.116 The thought behind this theory is that bilateral and multilateral trade limits the incentive for a state to instigate international conflict because of the dependence created between two or more nations for resources provided through such trade.117 However, a widely-accepted idea is not necessarily a fact.118 There are three major issues raised by economists, political scientists, and scholars around WTO agreements: (1) DSU enforcement; (2) whether globalized trade effectuates peace; and (3) whether WTO agreement benefits reach the developing and least developed nations as intended.

The first major issue with WTO agreements generally is regarding WTO DSU enforcement. There could be a lack of consensus on what a WTO enforcement means in practice, as the WTO DSU’s appellate body appears to be more of a gap filler for instances negotiating governmental bodies lack the mechanisms to resolve disputes.119

The second is whether such multilateral agreements create peace. Economists, political scientists, and scholars have created formulas to test the theory that trade creates peace.120 The results can seem counterintuitive to the standard ‘trade equals

113. Termination of Membership, supra note 111; Ambassador Michael Punke, supra note 43.
114. Tucker, supra note 49.
115. The WTO Can, supra note 1 (“Trade rules...deter protectionism.”).
117. Id.
118. Fact, OXFORD ENGLISH DICTIONARY, https://en.oxforddictionaries.com/definition/fact (“A thing that is known or proved to be true.”).
119. Tucker, supra note 49.
120. Emilie M. Hafner-Burton & Alexander H. Montgomery, War, Trade, and Distrust: Why Trade Agreements Don't Always Keep the Peace, 29 CONFLICT MGMT. & PEACE SCI. 257, http://pages.ucsd.edu/~ehafner/pdfs/Paper_Hafner-
peace’ theory, depending on the variables used in the experiment:

While there are a group of states that fulfill the conditions for the liberal peace, for many states at the fringes, membership [in international trade institutions, like PTAs and the WTO] can actually increase conflict by defining hierarchies of access centrality and dependence that cause conflict with those at the bottom of those hierarchies.

Overall, however, the consensus is that there is less truth in a black-or-white theory of trade creating peace. Rather, bilateral and multilateral trade is likely to induce certain types of peace (i.e. stable political relations), while other types of conflict are negatively influenced by such agreements:

Trade globalization also affects the nature of war: Multilateral openness increases the probability of local wars but should deter global conflicts. Our model and empirical results also suggest that regional and bilateral trade agreements which foster regional and bilateral trade flows may have positive consequences for political relations. The positive political implications of these agreements may become even more important as multilateral trade flows increase.

One variable to consider is the effect of tariffs, that have historically crippled the positive aspects of global trade when left unchecked. Bilateral and multilateral agreements preceding the TFA could not overcome tariffs even through free trade agreements, multilateral trade agreements, or bilateral treaties, as no formal multilateral agreement through the WTO existed until the TFA.

The third major problem with WTO agreements is that they may not necessarily reach certain least-developed nations that could potentially benefit from the agreements. Indigenous communities from all parts of the globe find the WTO’s efforts do not protect indigenous peoples, who are largely recognized as some of the most impoverished groups in the world. Groups like the Asia Indigenous Peoples Pact (AIPP) go so far as to claim the WTO violates the rights of indigenous peoples. Indigenous criticism of the WTO stems from the indigenous peoples’ desire to be formally domestically and internationally recognized as sovereign because “[u]ntil [indigenous persons’] right to self-

121. Id. at 273.
123. Philippe Martin, Thierry Mayer, & Mathias Thoenig, supra note 122.
125. WTO’s Trade Facilitation Agreement enters into force, WORLD TRADE ORGANIZATION, https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm (stating it was the first multilateral deal concluded in the 21-year history of the World Trade Organization).
127. Id.
determination is respected, genuine sustainable development will not be achieved.” Thus, the TFA’s benefits may not reach a large population of least-developed economies within indigenous communities, which is problematic pursuant to its stated goals.

The problematic aspects of WTO agreements are legitimate concerns. However, it is difficult to imagine that a twenty-two-year-old mechanism will perfectly resolve the major issues that have always plagued peace and trade. WTO agreements like the TFA, while imperfect solutions, appear to largely benefit the WTO’s stated goals. Thus, the TFA’s benefits most realistically and pragmatically outweigh its more problematic aspects.

VI. CONCLUSION

Based on structures and hierarchies of international law, bilateral and regional agreements countries may create should “inform it and to spur [the TFA] on to action” rather than hinder continued bilateral and multilateral treaties between groups of nations. It remains to be seen whether the United States’ engagement in the Global Alliance could be affected; however, it is likely if the United States determines to leave the WTO entirely, that there could be a hole left in the Global Alliance that could severely hinder TFA implementation, at least, initially.

In conclusion, the TFA’s inherent structure and adoption that supersedes previous tariff structure could, perhaps, encourage a more peaceful and economically sound world. Whether the United States’ current administration chooses to continue to neglect its obligations under treaty law, withdraw from the WTO which it helped create and foster, or economically deplete its own people, the TFA will likely overcome such a setback and continue to be a beneficial mechanism for the world economy. While it could be a stretch to stipulate that the TFA will be a direct cause of world peace, it is reasonable to find that this pragmatic multilateral trade agreement will invariably benefit the global economy for those states that choose to adopt it. Thus, the global economy under the TFA’s guidance and structure should at least be a cause for optimism in an uncertain time for the world economy overall.

128. Id.
129. Ambassador Michael Punke, supra note 43.
130. Id. (stating “it is no exaggeration to say that the openness of the U.S. economy to goods and services is one of the most important sources of global economic stability” as of December 2016).
131. Tucker, supra note 49.
132. Id.