LEGAL PERSPECTIVE ON THE TRADE FACILITATION AGREEMENT (TFA): INDONESIA CASE STUDIES

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Abstract: The application of trade facilitation needs further analyses in the context of Indonesian’s law. So far Indonesia does not yet ratify the trade facilitation agreement. In one hand the trade facilitation is a compulsory requirement that must be fulfilled by a state, in other hands the state does not provide a legal instrument. The consequence is legal uncertainty to those parties who want to invest their money in Indonesia. The trade facilitation will also in line with ASEAN programs. Those programs have same purposes to fasten the movement of goods and services by providing legal certainty on trade facilitation foundations. The WTO TFA can be used as ‘soft-law’ for Indonesian legal framework to apply trade facilitation enhancement, although it is not yet ratified by Indonesia. The WTO TFA will easily appropriate and have legal force if the implementation of the WTO TFA into Indonesian national legal structure is also noticeable.

Keyword: trade facilitation, legal perspective, ASEAN programs
Introduction

The activities of trade facilitation agenda in global trade has been proposed greatly at the international level, such as at the WTO, the WCO, OECD, UNCTAD, UN/CEFACT, UN/ECE, the World Bank, ITC, UNCITRAL, IMO, and ICAO, etc.; at regional level, such as NAFTA, APEC, European Union, and other FTAs; and at Non-Governmental Organisations (NGOs) level, such as IATA, ICS, IRU and the ICC (Staples, 1998; Grainger, 2011, 2012, 2014; Mustra, 2011). At international level, the WTO is the only multilateral trade organisation, with 164 members and autonomous customs agencies, which deals with global rules of trade. Generally known, developing countries and LDCs represent two-thirds of the WTO members.

Awareness of how to reduce unnecessary trade costs at the border and introduce certain elements of trade facilitation, by concluding such a multilateral agreement on trade facilitation, in order to tackle the costs, has become a significant part of prolonged discussion within the WTO Doha Round Negotiations (Duval, 2007; Scott and Wilkinson, 2011; Ismail, 2008; Wilkinson, 2006, 2009), particularly the implementation-related issues and concerns (Finger and Wilson, 2007) and a discussion of needs, priorities, and costs associated for making provision of technical assistance and capacity building of a developed countries and donors for developing countries in the implementation (Finger, 2008; McLinden, 2006). A number of

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proposals from some of the WTO Members for improved performance have been tabled and predicted an outlook on the future of the negotiations (Shin, 2001; Finger, 2008; Bolhofer, 2007).

Trade facilitation agenda in the WTO has been raised as a negotiated discussion in a multilateral working group, as one of the four, so called “Singapore issues”, the other three working groups were trade and investment, competition policy, and transparency in government procurement, at the first WTO Singapore Ministerial Conference in December 1996. After several years of exploratory work, the WTO members formally agreed to launch negotiations on trade facilitation on 1 August 2004, on the basis of modalities in Annex D of the work programme of Doha Development Agenda (DDA) 2001, the so-called “July Package” (Neufeld, 2014).

However, the understanding of trade facilitation has changed from its initial description at 1996 Singapore Ministerial as “the simplification of trade procedures” to a more narrow definition of DDA 2001, which described as “the movement, release and clearance of goods” (Woo, 2003).

In the WTO negotiations, the discussion of trade facilitation covers therefore customs matters with a view to simplifying, modernising, and harmonising the customs administrations among the WTO Members in order to give benefits for trading activities. Nevertheless, earlier, the scope of trade facilitation in the negotiations was being related to other WTO provisions and agreements. Those are: Agreement on Technical Barriers to Trade, the Application of Sanitary and Phytosanitary Measures, Import Licensing Procedures, Rules of Origin, Implementation of Article VII of the GATT 1994 (Customs Valuation), Pre-shipment Inspection, GATS, Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with imports and exports), Article IX (Marks of Origin) and Article X

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7Yuen Pau Woo, Trade Facilitation in the World Trade Organisation: Singapore to Doha and Beyond’ 270-279 in Will Martin and Mari Pangestu (eds), Options for Global Trade Reform: A View from the Asia-Pacific (Cambridge University Press 2003)
(Publications and Administration of trade regulations) of the GATT 1994 (Shin, 1999; Duval, 2007).\(^8\)

Until finally, the negotiation was concluded into the WTO Trade Facilitation Agreement (TFA) at the ninth WTO Ministerial Conference Meeting in December 2013 in Bali, Indonesia. This conference concentrated on three issues: trade facilitation, Least Developing Countries (LDCs) and agriculture. The WTO TFA became the first substantial output of the WTO round of Multilateral Trade Negotiations (MTN) and proof as the survival of the WTO Multilateral Trading System (MTS). The WTO TFA changes the WTO legal system once it was inserted into Annex 1A and enforceable to be implemented.\(^9\) The WTO members adopted a Protocol of Amendment to insert the WTO TFA into Annex 1A of the WTO Agreement on 27 November 2014. This is in line with paragraph 1 of Article X:3 of the Marrakesh Agreement Establishing the World Trade Organisation (date 15 April 1994 and enter into force 1 January 1994). The WTO TFA will enter into force once two-thirds of the WTO members have agreed to ratify the agreement into their domestic laws.

The WTO TFA has three sections: Section I contains provisions for expediting the movement, release and clearance of goods, including goods in transit, clarifies and improves the relevant articles V, VIII and X of GATT 1994, and also sets outs provisions for customs cooperation. Section II contains Special and Differential Treatment (SDT) provisions that allow developing countries and LDCs to determine when they will implement individual provisions of the Agreement and to identify provisions that they will only be able to implement upon the receipt of technical assistance and support for capacity building. Lastly, section III contains provisions that establish a permanent committee on trade facilitation at the WTO, require members to have a national committee to facilitate domestic coordination and implementation of the provisions of the Agreement.\(^10\)

However, while waiting to come enter into force or if the WTO TFA fails to enter into force, it could still form the basis for a primary soft law agreement, even acting as a precursor to a legally binding treaty instrument for all of the Members.

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\(^9\) As per 29 July 2016, Afghanistan has become the 90th WTO member to ratify the WTO TFA. Available online at <http://www.tfafacility.org/ratifications> accessed 4 August 2016

\(^10\) Available online at <https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> accessed 4 August 2016
On the other hand, some scholars argued that the WTO TFA is another example of form without substance because of its failure to bring reciprocity to bear on the acceptance of discipline over trade controls and failure to give operational content within the GATT/WTO legal system to provision of assistance to developing countries (Finger, 2014). Nevertheless, once the WTO TFA enters into force and developing countries put a lot of resources in the implementation, the WTO TFA has the potential to reduce total global trade costs by a significant amount and streamlining the flow of trade across borders and promote economic development and raise the standards of living in these countries (Hamanaka, 2014; Elms, 2014; Khanderia-Yadav, 2015).

The WTO TFA provides flexibility for developing members by allowing them to accept only the legal obligations they attach as “schedules”. Therefore, the implementation of trade facilitation through the WTO TFA may vary among one developing country and LDCs to other developing countries and LDCs. The WTO TFA takes Special and Differential Treatment (SDT) provisions in order to make the implementation practicable by introducing a category system that allows each developing countries and LDCs to check their readiness on each provisions of the WTO TFA when it comes to the implementation and, if not ready, they may decide what it needs in terms of related assistance and capacity building support. Therefore, the obligations in the WTO TFA fall into three categories: Category A, obligations that are fully mandatory upon entry into force of the agreement, Category B, obligations that will become mandatory when or if a further condition or commitment occurs, and

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11Mary E Footer, ‘The (Re)turn to Soft Law in Reconciling the Antinomies of WTO Law’, (2010) 11(2) Melbourne Journal of International Law, 241-276. She argues that the WTO Agreement on Trade Facilitation could be the primary soft law instrument the same as the Information Technology Agreement (ITA), which was formed pursuant to a Ministerial Declaration and adopted at the first WTO Ministerial Conference in 1996. Under the ITA, the WTO members agreed on the basis of a so-called ‘Modalities and Product Coverage’ approach, to eliminate all duties on listed IT products as between themselves. The Draft Consolidated Negotiating Text on trade facilitation was adopted by General Council back in 2004 and subsequently endorsed in Hong Kong Ministerial Declaration in 2005.


Category C, obligations that are inherently aspirational, or of a soft-law character (Elliason, 2015).

Implementing the WTO TFA is another big issue that will hamper every WTO Members in the future. The devil is in detail. In the WTO TFA, the devil is the implementation. The cost of implementing trade facilitation through the WTO TFA is difficult to quantify for two reasons; first, trade facilitation reforms are rarely carried out independently of other broader policy objectives, such as customs modernization and secondly, costs may vary considerably depending on the type of trade facilitation measures considered, such as diagnostic, regulatory, institutional, training, equipment and infrastructure, awareness-raising, political will and operational details (The WTO, 2015). Implementation issues also bring implications, such as legislative, administrative, and procedural implications (legal framework implications), potential infrastructure implications, financial and other resource implications, as well as technical assistance and capacity building requirements (Widdowson, 2005; Hamanaka, 2014).

Apart from the WTO TFA, there is actually international treaty which was intended as a blueprint for modern and efficient Customs procedures in the 21st century and is assumed to offer projection of trade facilitation agenda and it lies in the World Customs Organisation (the WCO). It is the International Convention on the Simplification and Harmonization of Customs procedures (Kyoto Convention), originally established in 1973 and entered into force in 1974. The Kyoto Convention contains general provisions and special annexes dealing with customs procedures and ensures that it can meet the current demands of governments and international trade needs. The WCO Council adopted the revised Kyoto Convention (RKC) in June 1999 and entered into force on 3 February 2006. The revised Kyoto Convention promotes trade facilitation and effective customs control through its legal provisions and simply efficient customs procedures (Staples, 1998; Masserlin and Zarrouk, 2000; Widdowson, 2005; Hamanaka, 2014).

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Widdowson, 2005; Grainger, 2011; Wolfgang and Kafeero, 2014; Khandeia-Yadav, 2015).\(^\text{17}\)

In the WTO negotiations on trade facilitation, there was argument that the WTO should “give focus to the simplification of trade procedures by concentrating on customs modernisation” and strengthen the WCO RKC to be more binding, as it is the single most comprehensive prospect for true international trade facilitation. In this regard, the WTO should have incorporated the WCO RKC into its structure (Staples, 1998; Masserlin and Zarrour, 2000). However, the WTO is the only organisation providing a credible framework for binding commitments in its law through its Dispute Settlement Mechanism, rather than other international or regional organisations, particularly the WCO (Masserlin and Zarrour, 2000; Duval, 2007; Wolfgang and Kafeero, 2014). Even the WCO RKC tends to be merely as ‘soft-law’, which are in the forms of recommended practices, and therefore not easy to implement, these characteristic, diversity and greater flexibility, is very important in the context of international trade facilitation which involves a number of stakeholders including states, the private sector, NGOs, international organisations and many others (Wolfgang and Kafeero, 2014). In relation to the WTO TFA and the WCO RKC, a comparative study of the two ‘laws’ reveals that the WTO TFA is mainly a reflection of the WCO RKC provisions, even the very few aspects of the WTO TFA which are not regulated by the WCO RKC are, in fact, catered by other instruments and recommendations of the WCO, such as SAFE Framework, and some other WCO Tools (Wolfgang and Kafeero, 2014).

**Discussion**

On 31 July 2014, Indonesia had notified the Preparatory Committee the following provisions of the WTO TFA under Category A, which will be implemented upon entry into force: Article. 6.3 (Penalty Disciplines), Article.7.1 (Pre-Arrival Processing), and Article.10.6 (Use of Customs Brokers). However, up to date now,

Indonesia hasn’t yet ratified the WTO TFA into their domestic laws. Additionally, scope of WTO TFA is very narrow, as it only covers about expediting the movement, release and clearance of goods which aims to clarify and improve relevant aspects on Article V (Freedom of Transit), Article VIII (Fees and Formalities Connected with Importation and Exportation) and Article X (Publication and Administration of Trade Regulations). Those aspects are mostly dealing with Customs works in practice. Moreover, implementing the WTO TFA in developing countries, particularly Category B and C, will remain tremendously uncertain since both donor’s and developing countries’ commitment will be tested, and also depend on both a transition period and a sufficient provision of capacity building and assistance (Elms, 2014). Developing countries might be reluctant to change their national laws and customs rules and procedures, not because the changes are unimportant but they might want to minimise a detrimental impact on business practices and overhaul of their legal system (Hamanaka, 2014).

In the case of Indonesian legal framework, Indonesia has recently ratified the WCO RKC into domestic law through Presidential Regulation Number 69 on 7 July 2014. Moreover, Indonesia has also engaged with other countries in ASEAN and APEC region and concluded some of regional trade agreements (RTAs), for example ASEAN Customs Agreement, ASEAN Trade in Goods Agreement, ASEAN Economic Community (AEC) and APEC Trade Facilitation Action Plan. Indonesia had ratified Charter of ASEAN into domestic law through Law number 38/2008, ASEAN Trade in Goods Agreement into domestic law through Presidential Regulation Number 2 on 5 January 2010, and ASEAN Agreement on Customs through Presidential Regulation Number 137 on 17 October 2014. Those agreements were basically reached in order to hasten the movement of goods, services and labours in the region and lied some provisions on trade facilitation issue. For example, Article 45 (1) of ASEAN Trade in Goods Agreement gives provisions that ‘Members states shall develop and implement a comprehensive ASEAN Trade Facilitation Work Programme’. It seems that in some of RTAs, trade facilitation issue has been included as one of important factor in trade policy. Additionally, there is an increasing close relationship between the WTO TFA, international convention, such as the WCO RKC, RTAs and domestic law in terms of
trade facilitation agenda, but caution is needed in addressing the potential tension among them (Wang, 2014).  

As mentioned above, up to now, Indonesia has not yet ratified the WTO TFA into their domestic law. However, as one of the WTO Members, Indonesia had ratified the Marrakesh Agreement Establishing the WTO through Law Number 7/1994 concerning Ratification of the Agreement Establishing the World Trade Organization. In April 2016, it was informed that Indonesia will soon ratify the WTO TFA as it is still in the process of ratification. It is hoped that it can be immediately included in the Indonesian National Legislation Programme (Prolegnas). This needs a political commitment between government and People's Representative in order to ratify the Agreement.

The implementation of the WTO TFA would also correlate to the acceptance as well as the good faith implementation of the WTO TFA into the national laws of its members. Preamble of the VCLT, paragraph 4 stipulated that “Nothing that the principles of free consent and of a good faith and the pacta servanda rule are universally recognised”. In addition, Article XVI.4 of the WTO Agreement stipulated that “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the Annexed Agreements”. Moreover, when the WTO TFA comes into force, Article 24.2 of the WTO TFA rules that all provisions of this [WTO TFA] Agreement are binding on all Members, and Article 24.3 rules that Members shall implement this [WTO TFA] Agreement from the date of its entry into force. Developing country Members and least-developed country Members that choose to use the provisions of Section II shall implement this Agreement in accordance with Section II.

Traditionally, Indonesia adopts civil law system in its legal framework and also covers to, such as, procedures law, contract law, religion law and customary law. The 1945 Constitution of Indonesia, as amended four times in 1999, 2000, 2001 and 2001, does not indicate the status of international agreements in domestic law. The only provision that states ‘International Agreements’ is only stipulated in Article 11 paragraph 1, 2 and 3 which states that ‘(1) President, with the approval of the People’s

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Representatives, may declare war, make peace treaties and conclude international agreements with other countries; (2) President in making other international agreements that will produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will requires an amendment to or the enactment of a law, shall obtain the approval of the People’s Representatives; (3) further provisions regarding international agreements shall be regulated by law.”

Furthermore, International agreements has been enacted into domestic law under the Indonesian Law Number 24 of 2000. However, the Law again does not clearly indicate the status of international agreements in domestic law. Article 10 of the Law Number 24 of 2000 only implies the type of legislation used for ratification of international agreements and must be made by the Law, with the approval of People’s Representatives, if it relates to the issues of, namely: (1) political matters, peace, security and state security, (2) the changes of which affects the territorial sovereignty, (3) the sovereignty rights of Indonesia, (4) the human rights and the protection of environment, (4) the formation of the new law, and (5) the loan agreement and grant. Other subject matters mentioned above are ratified by the Presidential Regulation, which does not need approval of People’s Representatives.

Similarly, the Law Number 12 of 2011 concerning the formation of making rules of the Law does not, again, either mention or indicate the legal status or position of international agreements within the Indonesian legal framework. It is essential to note that Article 7, paragraph 1, of that Law structures the hierarchy of legal law in Indonesia. It means that it will bring the status of enforceability and legal binding to all subjects in Indonesia. Article 7, paragraph 1, stipules types and hierarchy of rules consists of, namely: the 1945 Constitution of the Republic of Indonesia; People's Consultative Council Decree; Law; Government Regulation Replacing the Law; Government Regulation; Presidential Regulation; Province Regulation; and Regency/Municipality Regulation. The 1945 Constitution of the Republic of Indonesia is the highest hierarchy of rules making in Indonesia. Therefore, there are two legal obligations in ratifying international agreements into Indonesian national law: ensuring its conformity with the 1945 Constitution of the Republic of Indonesia and
transforming it into national legal framework (Hikmahanto, 2016). These obligations must be carefully performed in order that international agreements really ensure its harmony with Indonesian constitution, give benefits to national state, and avoid international hidden intervention towards national sovereignty through international agreements (Hikmahanto Juwana, 2016).

**Conclusion**

As mentioned above, in the context of Indonesian legal framework, the implementation of trade facilitation agenda under international agreements through the auspices of the WTO TFA must be further analysed in the context of Indonesian domestic law. It is a question of legal status and enforceability of international agreements in implementing trade facilitation agenda in Indonesia, with or without ratification process. Furthermore, the implementation of the agenda might also be in line with others agenda at the regional and national level, such as the WCO RKC and ASEAN Trade Facilitation agenda. Those agenda were reached to the same purpose of the WTO TFA: to speed up the movement of goods by regulating some provisions on trade facilitation elements.

The WTO TFA might be as ‘soft-law’ within Indonesian legal framework in implementing trade facilitation reform, with or without ratification instrument. The WTO TFA will only be applicable and enforceable if the implementation of the WTO TFA into Indonesian national legal system is also recognisable. In this respect, how the implementation of the Marrakesh Agreement Establishing the WTO (the WTO Agreement), the WCO RKC and ASEAN-FTA into Indonesian legal framework or domestic law should be looked at as a clue, as this is likely to give some clues as to how implementation of the WTO TFA is likely to proceed in Indonesia.

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Bibliography


Yuen Pau Woo, Trade Facilitation in the World Trade Organisation: Singapore to Doha and Beyond’ 270-279 in Will Martin and Mari Pangestu (eds), Options for Global Trade Reform: A View from the Asia-Pacific (Cambridge University Press 2003)


Website:
www.tfafacility.org/ratifications> accessed 4 August 2016
www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm> accessed 4 August 2016