After Bali: What Happens Next with Asian Trade Facilitation?

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Abstract

The 2013 Bali agreement on trade facilitation was hailed as a breakthrough. It represented the first time the World Trade Organization members successfully concluded a multilateral trade agreement among its members. But there is a lack of understanding of what is contained within the agreement among many of the individuals commenting on the deal as well as across many of the member state officials charged with implementation. This paper explores the content of the agreement and then considers how Bali will actually alter the situation of trade facilitation on the ground. At this time, it is difficult to predict what Bali might mean for companies because the agreement itself has so many flexibilities. Since every WTO member could potentially implement the deal differently, it will be hard to know precisely how countries or companies might benefit, especially for goods crossing into developing countries—leading to ongoing, challenging conditions for some time to come.

Getting Trade Facilitation on the Agenda

In December 2013, the World Trade Organization (WTO) members finally managed to salvage something out of long-stalled global trade negotiations. The Bali package represented an agreement with three parts: trade facilitation, a small piece on agriculture mostly around stockpiling and subsidies for food security, and measures to support the least developed country (LDC) members of the organization.

This paper takes an in-depth look at what the nearly 160 members of the WTO agreed to do in the portion on trade facilitation (TF). This section of the agreement was not part of the larger, original negotiating agenda first put forward in Doha, Qatar, in 2001. Instead, TF was added as a negotiating topic in 2004 at the Hong Kong meeting of trade ministers. It was included largely because officials recognized the potential for serious economic gains if trade could be speeded up and made easier at border crossings.

At the time of inclusion on the agenda, the mandate for negotiations was relatively narrow. To get the topic onto the table, ministers instructed officials to focus attention on improving three elements of the existing 1994 General Agreement on Tariffs and Trade (GATT) Articles V, VIII and X. These articles covered expedited movement of goods, release and clearance of goods (particularly the fees associated with these actions), and issues related to movement of goods for landlocked countries (or, more broadly, goods in transit).

In general, it is always harder for member countries to resist negotiations intended to clarify provisions that already exist. Since WTO members write the

rulebook, it is difficult to argue after the fact that further discussions intended to iron out any ambiguities are a poor idea.

Trade facilitation itself was an area that was ripe for discussion, as WTO members had such a wide variation in approaches to the topic. WTO rules existed, as noted, but were relatively thin. Most countries are simultaneously members of the World Customs Organization (WCO). The WCO does have a variety of rules and suggested provisions intended to speed up the time and reduce costs of moving goods across borders. But since the WCO is a non-binding, voluntary organization, members are under no obligation to follow any WCO commitments.

Some countries recognized the value of speeding up customs processing and reducing costs on their own. Singapore, for instance, consistently ranks at or near the top of charts measuring the speed of clearance. Containers can clear customs at the port in as little as 23 seconds. The country took steps unilaterally to integrate risk assessment procedures and build platforms to support faster TF starting in the 1980s. Because Singapore recognized the virtues of being a trade hub, it has consistently built on its efforts over the years to drive down costs and time as much as possible.

Unilateral action is not the only way that countries have achieved improved TF. Some have also pursed enhanced facilitation as part of larger integration efforts. The poster child for such programs, of course, is the European Union. But even outside the EU, other regional agreements also often force improved trade facilitation.

This is true even when TF is not actually on the negotiating table. For example, the Association of Southeast Asian Nations (ASEAN) does not explicitly

negotiate around TF. The mandates contained with ASEAN, even in the movement towards the 2015 ASEAN Economic Community (AEC), do not include many of the things addressed in the Bali TF such as advance rulings, fees and charges information, release and clearance of goods rules and so forth.

But ASEAN, nevertheless, does have a focus on TF that goes beyond Bali in some ways. In particular, ASEAN has a strong emphasis on the single window concept. This is an idea that a trader has only to enter trade data once and it will be transferred automatically to all the various agencies needed for cargo clearance. Eventually, the 10 ASEAN National Single Windows are supposed to be linked together to form a seamless ASEAN Single Window (ASW).

In order to achieve an eventual ASW, ASEAN officials in various offices and ministries are forced to work backwards and think about harmonization in areas across different TF elements now. Therefore, without explicitly putting TF on the ASEAN agenda, the inclusion of the ASW project onto ASEAN's master plan has automatically pushed many TF elements into ASEAN member states.[1]

Another mechanism frequently used in Asia to get improved TF is through APEC. Business firms clearly understand the importance of faster, smoother cargo processing. The tight connections between business and government in the APEC system has meant that TF has been part of the APEC agenda since the very beginning with all sorts of roadmaps, action plans, and pathfinder initiatives. However, APEC is also non-binding, so the extent to which members pick up and implement the various good ideas is less obvious.

[1] Of course, these elements would work better in ASEAN if it worked without the ASEAN-X system where not all 10 ASEAN members are expected to implement any given commitment. Instead, somewhere between 10 and 0 members may actually move ahead with any idea. Because ASEAN has no enforcement mechanism, there is no way to get the remaining members to ever move either (or at least not at this time).

In sum, there is no shortage of TF initiatives in Asia. Whether they are implemented unilaterally, bilaterally, or regionally may not make terribly much difference either. For many practices, faster or smoother processing of goods automatically spills over to all goods regardless of origin or destination. It is not possible to discriminate among goods.

But this is also a rather patchwork and inefficient way to get TF done. It works relatively better in Asia where many countries are committed to the idea of moving cargo quickly and efficiently and where most are well-connected through a series of free trade agreements (FTAs). Even if the FTAs do not directly address TF or customs, countries that sign multiple FTAs are more likely to take unilateral action to improve TF.

In other parts of the world that are less connected, or less connected to their immediate neighbors, the impetus for improved TF has traditionally been less. Hence, statistics capture a wide variation in the times required to move cargo across borders. [2]

It was in this messy and largely ungoverned environment that members decided to move forward with trade facilitation in 2004. TF had been discussed in the multilateral setting before, as part of the so-called "Singapore issues," first raised in the Singapore ministerial meeting in 1996. At that time, it was included as one of four working groups.[3] But WTO members were not comfortable with including these items when the trade agenda advanced in 2001 at Doha and all

[2] *Time Release Study* (World Customs Organization: Geneva) 2011.

[3] The other working groups were trade and investment, trade and competition policy, and transparency in government procurement.

four issues were dropped. TF was resurrected in Hong Kong with a relatively narrow mandate and the negotiations began.[4]

So What Is the Content of the Bali TF Agreement?

It is beyond the scope of this paper to discuss the various twists and turns of the negotiations. Instead, what matters is what actually came out of the negotiation process in the Bali agreement[5] and what it means for member countries on the ground in Asia in the future.

Few people seem to have actually read the text of Bali, so it worth examining the 13 articles in straightforward language.[6] The first 12 articles essentially set out what customs officials are obligated to do in member countries. The final article stipulates the institutional arrangements for the agreement at the WTO.

In general, the purpose of the agreement is to ensure a common base for members across a variety of customs elements. For some members, the implementation of Bali will mean no change at all in procedures. For others, the extent of changes could be significant.

Article 1, for example, covers the publication and availability of information. Members are now required to inform traders, governments and others of procedures such as import, export and transit procedures, including all forms and documents required. These same groups need to be notified of all

[4] For an excellent review of the negotiation process see "The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement," Nora Neufeld (WTO: Geneva, 2014).

[5] The Bali agreement, of course, covered more than just trade facilitation, but this paper only examines the TF portion of the deal.

[6] Clearly, anyone actually planning to use the agreement should consult the text of the agreement, found at: http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm.

applied rates of duty, taxes, fees and charges. They must be told of the rules used for classification of products and rules of origin laws. They must know about any and all import, export or transit restrictions. There must be appeal procedures in place. All of this information must be placed on the internet as much as possible, with clearly defined enquiry points.

Before going any further in detailing the requirements of the Bali deal, it is important to note that this agreement includes legal language that is much more flexible than past WTO agreements. The lawyers can argue about the extent to which this is the case. But a quick glance even at Article 1 on publication requirements highlights the point. Many of the provisions include phrases like, "Members shall, within its available resources," (Article 1 3.1). This flexibility grows further with each article of the agreement.

Article 2 provides companies (or traders) an opportunity to comment on any proposed law or regulations related to movement, release or clearance of goods. This article, however, comes with many caveats.

Article 3 allows traders to obtain an advance ruling about their goods. In English, it lets companies know ahead of time (before goods are shipped at all) how customs officials will classify their products and what rule of origin criteria they will use for their products. It will help firms because without advance rulings, a company's cargo can get stuck literally on the docks for days, weeks or months while the firm waits for a determination about how to properly classify the goods and, therefore, what rules will apply to the products. In Bali, members agreed on the procedures for granting advance rulings.

If the ruling is viewed as unfair, under Bali, traders now have the right to appeal or review under Article 4. Again, this comes with many hedges, but is

intended to give members the right to have an appeal or review carried out in a non-discriminatory manner.

This spirit of non-discrimination, impartiality and transparency is also in Article 5. But of particular note in this article is a set of procedures to cover food, beverages, and feedstuffs that must now be tested based on risk, as appropriate. Such testing must be terminated when the adverse conditions no longer apply. In addition, if goods are detained, the importer or carrier must be notified promptly. If any samples show an adverse finding, members have to grant a second test, upon request.

Article 6 spells out at length what members are allowed to do about fees and charges (but not taxes). For example, information about fees and charges must be published and no new changes are allowed unless adequate time is allowed. Fees for customs must be limited to the approximate costs of services rendered. Any penalties that are levied on goods can only be imposed for a specific breach of the law, regulation or procedure with the amount of the penalty commensurate with the breach. This must all be done in writing. Members agreed that they would avoid conflicts of interest in collecting penalties and duties.

The next Article 7 also updates existing rules in the WTO on release and clearance of goods. This is where the "meat" of the agreement can be found. Members agreed to allow documentation to be submitted ahead of the arrival of goods and to allow electronic payments for duties, taxes, fees and charges. Goods can now be released before the final determination of duties, taxes, fees and charges, once appropriate guarantees are put into place. Members promised to scan cargo with a risk management system and concentrate on high risk

consignments rather than inspecting every shipment or a high percentage of cargo. A post-clearance audit can be used to help ensure compliance. Members can also publish the average cargo release times. Publication of this information alone could help spur many necessary changes by highlighting the length of time some countries take to process cargo—knowledge that is not commonly recognized today.

Bali also contains extensive commitments for Authorized Operators (AO). The AO system is supposed to also speed up clearance of goods by granting some traders or companies this designation ahead of time and giving them special benefits based on their track records. For members that use such a scheme, these are provisions that apply to operators that are preselected (or AO designation could be granted to all). Such designation cannot be given arbitrarily or restricted to just small and medium enterprises.

Traders enrolled in the AO scheme have to receive at least three of the following benefits: lower document and data requirements for shipments; lower rates of physical inspections and exams; rapid release times; deferred payments of duties, taxes, fees and charges; comprehensive guarantees or reduced guarantees; single customs declaration for all imports/exports; or clearance at the operator premise or customs location.

Additional provisions in this article include a section related to expedited shipments for air cargo to ensure that air cargo will move faster. Finally, WTO members also took on a set of promises for perishable goods with an overall commitment to release these goods in the shortest possible time under normal circumstances. To get this done, it might even include operating outside normal

business hours and providing proper storage facilities pending the release of goods.

Article 8 covers the cooperation and coordination of border agencies to facilitate trade by aligning working days and hours, procedures and formalities, developing common facilities, joint controls, and establishing a one stop border post control. Article 9 allows goods intended for import to enter.

For many customs offices, Article 10 may prove problematic, as it spells out specific requirements related to paperwork. For example, members promised to use the least trade restrictive documentation measures, to accept electronic copies, and to not require originals. Customs officials are encouraged to use relevant international standards whenever possible. They are also encouraged to move to a single window system for customs using appropriate information technology. They may not require pre-shipment inspections for tariff classifications or customs valuations and they may not introduce mandatory customs brokers. Goods are allowed for temporary inward or outward processing without import taxes or duties.

Article 11 spells out in greater detail the provisions that apply to transit and landlocked countries. Article 12 covers rules and provisions intended to get customs officials of member countries to cooperate more with one another. It particularly covers the exchange of information between members and the appropriate and inappropriate uses of information.

Finally, the last Article 13 establishes a WTO Committee on Trade Facilitation and describes what it should do. Each member is also required to have a similar committee at the domestic level.

Why the Controversy?

Given that TF is designed to move goods faster and cheaper and that doing so generally brings benefits, why has there been such an uproar over the Bali deal? The immediate problems can be put into two broad categories which will be discussed in turn. First, although in the long run, in the aggregate everyone benefits from TF, in the short run, some are harmed. Second, the potential costs of implementation could be substantial.

Although the OECD study predicts substantial global trade gains from a fully implemented Bali TF deal, not every country will benefit equally.[7] Just as important, not every element in domestic societies will stand to gain from Bali. For example, in countries that currently employ large numbers of individuals to manage physical documentation around imports, these jobs could vanish as WTO members migrate towards online processing of forms.

The replacement of these jobs may not happen immediately, of course, but over time, if members are actually progressing towards a single window for customs facilitation, traders will be able to input all necessary documentation just once from the comfort of their office and have it sent to every necessary agency. Something similar could happen with customs brokers and other groups of individuals currently employed in many WTO member countries to help traders navigate a complex and potentially shifting environment.

This leaves aside the individuals who also benefit personally from the current structures in place in many countries who receive all manner of side payments to expedite certain shipments or paperwork or to reduce the size of

[7] *The WTO Trade Facilitation Agreement: Potential Impact on Trade Costs* (OECD: Paris), Feb 2014.

duties or penalties. Increasing transparency and clarity on the rules can make it more difficult for such individuals to prosper in a new environment.

Even if we leave aside such cynical reasons for concern over Bali, many members view Bali with suspicion because this agreement attempts to impose a set of overarching rules on all WTO members. Given that the nearly 160 members have widely varied needs and domestic conditions, many members are concerned that rules and regulations that have been carefully tailored to suit local conditions may be upended by sudden adherence to inappropriate global regulations.

The second category of complaints has much to do with the cost of implementation. Certainly, not everything in the Bali deal is going to cost money. For example, the requirement to allow submission of documentation electronically should not, in principle, cost money. Bali does not mandate that documents be submitted electronically. It simply allows the submission to be made via a computer at this point.

However, even this apparently simple requirement has a catch—in many developing countries, the legal system does not allow for the electronic submission of signatures. So prior to the submission of documentation electronically, countries will have to revise legal codes to allow the submission of signatures electronically otherwise traders will be forced to submit both hardcopies and electronic copies.

But it is also true that trade facilitation can be tremendously expensive. Depending on how it is defined, speeding up trade in goods and lowering costs can involve building new ports, replacing antiquated airports, upgrading road crossings, creating cold storage facilities for customs, developing integrated risk

assessment systems to allow various ministries to talk to one another and screen only high risk cargo, and so forth. The WTO membership made a conscious decision not to get involved in demanding members to upgrade what might be called the "hard infrastructure" of TF but to try to focus on the "soft side" of the equation.

The two, however, cannot be entirely separated. It is not possible to ask countries to quickly process perishable goods if countries have no mechanisms in place to identify these goods, sort them out from other kinds of cargo, places to store such cargo, or facilities with personnel to screen perishables available at the right times with the right equipment and skills to properly screen such cargo. An LDC member that only has one laboratory in the whole country is clearly ill-equipped to rapidly screen perishable cargo no matter what sort of "soft side" improvements it makes in customs processing procedures.

The WTO Bali deal does include potentially significant resource investments for developing countries, especially those that want to fully carry out all the commitments. For example, the implementation of a single window electronic submission system for documentation is a substantial undertaking. Done correctly, it is much more than simply moving the existing customs forms onto a computer form. In fact, if all that is happening is the straight translation of the existing paperwork onto an electronic platform, it is not worth doing.

A true single window system allows the trader to input all the necessary information once. This information is then taken by every single group that might potentially need such information—customs, agriculture ministry for SPS issues, defense for any possible security issues, health ministries and others, plus the air, sea or land port authorities, cargo agents and more. The single window

system should distribute the information as necessary to all the relevant actors, allow each to begin any processing immediately and in parallel with others, and flag any high risk shipments for inspection before the cargo even arrives. Creating such a system is not just about installing a few computer monitors and processors in the basement of customs, but getting government agencies to think carefully about why they need information, what they do with data, how they can more efficiently work together, and then building an architecture that will allow a big portion of government and the private sector to communicate with one another. Implementation of such a commitment will take both time and money to be fully effective.

Implementation is When?

The Bali agreement on trade facilitation has very unusual set of provisions in Bali, the so-called Section II. The WTO agreements usually include Special & Differential (S&D) treatment provisions that provide developing countries, and particularly Least Developed Countries (LDCs), with less restrictive rules or greater flexibility than the developed economies. In this agreement, to simplify greatly, S&D was provided in a very unique manner.

In Bali, developing countries were promised assistance and capacity building support for implementation of the agreement. The implementation of the agreement was tied to the provision of support for capacity building. If support was not forthcoming, then implementation was also not fully required.

Further, members could divide their own commitments these three different categories. The first set of commitments, Category A, included all provisions that members promised to implement immediately upon entry into

force of the agreement.[8] The second set, Category B, could be implemented later, at a set period of time after the entry into force of the agreement.

But the third set, Category C, was most interesting. Developing countries were allowed to place items into this category where implementation is to be dependent on *both* a transition period and sufficient provision of capacity building and assistance.

The entire agreement does not enter into force until 2/3 of all member states ratify the agreement. The timeline provided by the WTO Secretariat suggests that, at the time of entry into force, all members should have notified the Secretariat of their intentions about which provisions will be placed into which categories with a provisional timeline for implementation of Categories B and C.[9] Within one year, the Secretariat envisions members notifying their definitive dates of implementation for Category B. At the same time, members are supposed to have notified donors of their intentions for Category C, including their proposed timelines for implementation. Within 2.5 years, the Trade Facilitation Committee should be notified of progress on Category C, along with definitive timelines for implementation.

If that were not enough flexibility, LDC countries get additional options, such as the ability to shift items between Categories B and C, automatic extensions on deadlines, and exemptions from dispute settlement.

[8] Note that developed economies were automatically obligated to implement the entire agreement on entry into force.

[9] WTO Secretariat, "Trade Facilitation Agreement Special and Differential Treatment for Developing Countries", tfa_dev_count_brochure_e-2, accessed June 10, 2014.

Show Me the Money

About two thirds of the membership in the WTO are developing countries. Section II promises that implementation for at least some of the provisions in the agreement now rest on the provision of capacity building and other types of assistance. But the document approved in Bali is curiously lacking in details about who, exactly, is going to provide this assistance. Even more critical, the Bali agreement does not specify how members will actually pay for all this capacity building.

The relevant section reads only: "9.1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least developed country Members, on mutually agreed terms and either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least developed country Members to implement the provisions of Section I of this Agreement."

Capacity building is an expensive business. It is tricky to get right as well. It is not possible to just train customs officials, for example, over one weekend and assume that they can now safely shift whole procedures to new systems as a result. The Committee is supposed to coordinate all the donor activity related to TF, but it is only tasked specifically with holding one meeting per year devoted to the task.

The End Result

Trade facilitation hold tremendous promise. The countries that stand to benefit the most are likely developing countries.[10] This is because they have poor facilitation measures in place across most WTO member countries—trade is unnecessarily slow, restrictive, cumbersome or expensive. It drives up costs for consumers and producers alike.

The figures produced by the OECD have highlighted the impact. If fully implemented, the Bali deal could reduce costs by 14.1% of total costs for low income countries, 15.1% for lower middle income countries and 12.9% for upper middle income countries.[11] Gary Hufbauer and Jeffrey Schott have calculated the gains from trade facilitation implementation at more than $1 trillion.[12]

The Bali agreement contains some very welcome language that clarifies previously vague provisions, especially those relating to fees, release of goods and transit. Countries that implement this deal should no longer be able to arbitrarily revise customs rates of duty, apply inconsistent standards for food safety, demand that traders use mandatory customs brokers, or any of a myriad of potential roadblocks and obstacles that make trade difficult across borders.

In short, the gains are substantial with much of the benefits likely accruing to developing countries. Yet it remains tremendously uncertain

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[10] The OECD has a database to estimate the effects of the Bali deal on member countries. Find it at: http://www.oecd.org/tad/facilitation/indicators.htm.

[11] *The WTO Trade Facilitation Agreement: Potential Impact on Trade Costs* (OECD: Paris), Feb 2014.

[12] Hufbauer and Schott, "Payoff from the World Trade Agenda 2013," (PIIE: Washington, DC).

whether WTO members will opt to seize the opportunities. Partial implementation dramatically reduces the gains from the agreement.

The agreement itself is riddled with flexibilities. For nearly every statement in the text that begins with "members shall" it continues "to the extent possible" or some such language that makes it frankly impossible to know in advance whether or not a member might carry through with the commitment or how robustly a member might do so.

Second, because implementation itself in developing countries is tied to the receipt of capacity building this is likely to be deeply problematic in practice. This is particularly the case when there is no specific provision of who, exactly, is meant to provide which capacity building, to what extent, for what officials, how often, for how long, and so forth.

Self-certification is never a recipe for robust implementation. Already the deadlines are slipping and a backlash is building up against the entire agreement.[13] Some members want to tie Bali to the entire WTO Doha package. Others want to delay implementation even of Category A items. This means that the items placed into Category C are very unlikely to ever see the light of day in some countries.

In a new world increasingly tied together by the rise of global value chains where firms can place exactly the right slice of the production chain in exactly the right geographic space best suited to the job, countries with poor trade facilitation will not be able to capture value, jobs and benefits. If it takes 6 weeks to process goods clearance and requires 30 forms to get the job done, companies cannot compete.

[13] See Greg Rushford, "Power Plays in the WTO," *Rushford Report*, June 3, 2014

But the good news for Asia is that most of the countries in this region generally have better trade facilitation already than that. If the WTO members can now take advantage of the Bali agreement to push forward domestic reforms to improve TF procedures, the prospects for growth in the region should be bright.