

# **Trade Facilitation in Times of Extreme Events and Beyond**

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## **Abstract**

In situations of crisis, a global and connected world requires mechanisms to ensure that the characteristics of trade are not disrupted beyond what is necessary, proportionate and non-discriminatory for the achievement of the stated objectives (often security, health). Current regime has few multilateral mechanisms to ensure a continuous trade flow, often depriving both origin and destination of goods of their benefit. While the Sars-Cov2 crisis may be an example of the lack of these safeguards, we believe that through careful adaptation of existing and established principles, trade can be facilitated in situations of need. In this paper we study the design of the triggers and whether they are likely to be one of the few viable options to prevent a wild-west-style fracturing of the multilateral arena. Current and former crises hampering international trade guide this paper's aim to find fair and sustainable trade facilitation solutions, and thereby 'building back better' to improve the resilience of future catastrophes, as the approaching climate crises.

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### List of Acronyms

Agreement on Trade Facilitation (TFA)  
Dispute Settlement Body (DSB)  
Least Developed Countries (LDCs)  
Regional Trade Agreements (RTAs)  
Trade Facilitation (TF)  
United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP)  
World Trade Organization (WTO)

## Introduction

Trade facilitation (TF) is key for a robust multilateral trading system and a prosperous world economy in everyday life, but even more so in times of extreme events. A complete implementation of the World Trade Organization (WTO)'s Agreement on Trade Facilitation (TFA) is estimated to reduce trade costs by 14.3 percent and stimulate international trade to around \$1 trillion annually, and the poorest countries would make the largest profits<sup>1</sup>. The Agreement, adopted in 2013 and in effect as of 2017, is set to simplify trade through the shedding of light on customs procedures and facilitation of movements, resulting in speedier and more transparent procedures, reductions of costs and increased accessibilities to new markets. As such, the TFA provides opportunities for all and pays particular attention to developing and least developed countries (LDCs, as per the TFAs nomenclature), and their implementation of the agreement.

In times of crises, the multilateral trading system, including the TFA, is tested and the social and economic divide is accentuated even further. Governments are the expected actors to respond with mitigating measures, and often do so in the context of a legal vacuum. The Sars-Cov2 pandemic brought many countries to adopt protectionist measures; impeding actors to trade, forcing businesses to temporarily shut down or increasing export restrictions of medical equipment and agricultural products. Such measures cause insecurity and lead to less investment and trade.<sup>2</sup> In the first quarter of 2020, international trade declined by 5 percent, and the EU's Director-General for Trade forecasts a decrease of 9.7 percent in world trade for the whole year of 2020<sup>3</sup>. The ones suffering most of the unstable environment are developing and least developed countries, and micro, small and medium enterprises (MSMEs) as vulnerable populations, in particular women, are most exposed to structural vulnerabilities<sup>4</sup>.

In the presence of a crisis or turbulence in the world trade order, a complete implementation of the TFA could assuage fears, improve trust in other nations and ensure availability of essential goods for everyone. The TFA could provide assistance to a shrinking economy that suffers from lost opportunities, and contribute to an effective socioeconomic response in times of crisis such as Sars-Cov2 or future unknown ones. While public spending is important in these circumstances, no country is independent from another, and all sustainable trading opportunities should be encouraged. The TFA could contribute with a brick in the socioeconomic framework of "building back better" and show that facilitating sustainable trade can pay part of the hefty price tag of global crises<sup>5</sup>.

This article analyses TF from the lens of the 2019 pandemic to contextualize the TFA. The arguments are not limited to Cov-Sars2 but rather remain applicable to other worldwide catastrophes like the Global financial crisis, past and future natural disasters induced by climate change or not (hurricanes, tsunamis etc.). We argue that the TFA needs to be reformed in order to

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<sup>1</sup> WTOa. 'Trade Facilitation'; With an adequate reallocation of income resulting from international trade, all peoples of a society can benefit from exchanges of goods and services.

<sup>2</sup> EU, 'The impact of the Covid-19 pandemic on global and EU trade Chief Economist Team, DG Trade, European Commission' (European Commission, 2020), p.1; Kommerskollegium. 'Protektionismus unter corona' (June 2020).

<sup>3</sup> UNCTAD. 'Covid-19 causes international trade to collapse'. (June 2020); The EU, 'The impact of the Covid-19 pandemic on global and EU trade Chief Economist Team, DG Trade, European Commission', (European Commission, 2020), p.2.

<sup>4</sup> OECD. 'Policy Responses to Coronavirus (COVID-19) Trade facilitation and the COVID-19 pandemic'. (OECD, April, 2020). WTOb. 'African Group Statement on the Implications of Covid-19' WT/GC/219 TN/C/20, (WTO, June 2020), paragraph 1.13.

<sup>5</sup> WTOa. 'Trade Facilitation'; The IMF has projected that over two years, the global economy will lose \$12 trillion due to the ongoing pandemic ( See: <https://blogs.imf.org/2020/06/24/reopening-from-the-great-lockdown-uneven-and-uncertain-recovery/>).

swiftly respond to current and future social, economic and climate change crises. A complete implementation of the TFA, with a strong multilateral collaboration and coordination, contributes also to the reach of SDGs, and in particular SDG8 which can serve as an accelerator for the implementation of the other goals.

In short, this article reviews the Trade Facilitation Agreement's bottlenecks as well as facilitating mechanisms for responding to global crises requiring a multilateral response. It pays a particular focus to developing and LDCs, with experiences drawn from previous and current crises. It also identifies future risks. We will further show that even in the presence of the TFA, there are few, if any, remedies that can be efficiently implemented in a coherent and cohesive manner, whereas especially situations of crisis require a robust, coordinated and rapid response. Recommendations to a complete TFA implementation, which could be applicable to other trade agreements (e.g., regional ones), are provided for, ensuring inclusive, resilient and sustainable trade for all.

The article is contributing to the 'policy hackathon' on Model Provisions for Trade in Times of Crisis and Pandemic in Regional and other Trade Agreements, organised by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and World Trade Organization (WTO).

### **The Current Legal Framework**

Globally, the current situation resembles more a patchwork of different legal frameworks, than a unified one. On one hand, regional associations (whatever form they may take) govern trade measures between its Members. In addition, the WTO's pioneering Agreement on Trade Facilitation, adopted at the Bali Ministerial Conference in 2013 and in effect since 22 February 2017<sup>6</sup>, is aiming to facilitate formalities attached to cross-border trade. It requires accessible, transparent and streamlined border control of trading goods, allowing natural (women) and legal persons (MSMEs), trapped in a vulnerable position due to the societal structures, and the first to hit the wall in times of extreme events, to trade and access new markets<sup>7</sup>. The OECD argues that the Agreement's provisions is also a means of continuing importing and exporting during a pandemic like that of Sars-Cov2 as the TFA requires dematerialisation of certain administrative related documents, and thus contributes to the reduction of physical interactions of traded goods and speedy delivery of time-critical products.<sup>8</sup>

The agreement is currently not implemented by all member states of the WTO, not least because of its treatment under the provision 'Special and Differential Treatment'<sup>9</sup> of developing countries and LDCs allowing them to implement the TFA according to their individual capacities and timelines<sup>10</sup>. One may therefore legitimately question whether, in times of global crisis, a not-yet

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<sup>6</sup> The FTA was ratified by two-thirds of the Organisation's Members and thereby fulfilled the requirements of entering into force.

<sup>7</sup> While the OECD writes that TF may have a significant influence on MSMEs to trade and to become a part of global value chains (see: <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/#section-d1e60>), the Trade for Development Initiative Run by the WTO's Enhanced Integrated Framework posits that women are among the most severely affected by the containment measures during Sars-Cov2. And female entrepreneurs who are overrepresented in MSMEs and with less profit margins than men have seen a significantly worse situation during the pandemic, potentially decreasing their trading businesses. (See: <https://trade4devnews.enhancedif.org/en/op-ed/industries-post-covid-19-gender-responsive-approach-global-economic-recovery>).

<sup>8</sup> OECD. 'Policy Responses to Coronavirus (COVID-19) Trade facilitation and the COVID-19 pandemic'. (OECD, April, 2020).

<sup>9</sup> Section II, Article 13 and 14 of the FTA.

<sup>10</sup> WTOc. 'Implementation Dashboard' Accessed at the latest July 27 2020.

implemented agreement can effectively govern relations between nations, or whether the fallback (i.e. national regimes, regional cooperation or ad-hoc cooperation) is the more likely outcome. Nonetheless, its provisions provide useful guidance on how to deal *efficiently* with these types of situations. Currently, there is no case law related to the TFA and its provisions but three requests for consultation have been lodged at the WTO; albeit without any outcome yet.

Our analysis will therefore cover the TFA in a hypothetical approach, assuming that its implementation would ensure full compliance with it and how its provisions can be adapted and made more efficient to deal with situations requiring urgent, decisive and robust response, as needed in times of crises.

The mere fact that the current trade regime was immediately overruled by individual decisions during the first phase of the Sars-Cov2 pandemic (see below), indicates that it is severely lacking the tools to respond to unpredictable and unprecedented situations. This urgently needs to be addressed, as the emergence of new crises is not so much a question of *if* but of *when*<sup>11</sup>. Currently, there is a severe lack of potency in the global trade regime to deal with crises of planetary magnitude; yet, results are primarily sought on the national level. If the current pandemic showed one thing, than that the availability of solutions requires global action, as crises rarely concern themselves by state frontiers.

### **Failures of the Current Regime**

As was amply demonstrated during the first months of the Sars-Cov2 crisis, the rapidity of closures across the world sent ripple effects throughout the global trading system, which collapsed and, in particular, brought global supply chains, producing necessary appliances and products to respond to this pandemic such as Personal Protective Equipment (PPE) as well as agricultural and sanitation products, to its knees<sup>12</sup>. The reasons for this were twofold: On one hand, global trading routes and means ceased operations<sup>13</sup>, thereby reducing the available cargo capacity. On the other hand, differing trade regimes held up, prevented entry to affected countries, or at least made delivery more difficult than would normally be the case<sup>14</sup>. In addition, countries prevented, slowed down or delayed delivery of PPE that found its way to its territory<sup>15</sup>. The affected countries had little to no remedies available and if they did, their legal effectiveness is at least doubtful on the international level<sup>16</sup>. Nonetheless, time is of essence in situations such as a global pandemic or crisis in general.

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<sup>11</sup> As is commonly the case with events which present tail-end heavy properties.

<sup>12</sup> OECD. 'Policy Responses to Coronavirus (COVID-19) Trade facilitation and the COVID-19 pandemic'. (OECD, April, 2020); Kommerskollegium. 'Protektionism under corona' (June 2020).

<sup>13</sup> UNa. 'Supply Chain and COVID-19: UN rushes to move vital equipment to frontlines'. (May 2020)

<sup>14</sup> By way of example, Commission regulation 2020/402 effectively prevented exports of PPE from the EU to third countries. Within the European Union, border checks in March 2020 amounted to an average of three hours and several Member States of the EU allow copies of proof of preferential origin during the pandemic but will demand the original later (see <https://www.tullverket.se/nyheter/nyheter/certifikatforformansbehandlingfranvissalandermedanledningavcoronaviruset.5.153f8c8c16ffad23c22b6d.html>). Other measures not limited to the EU and adopted during the pandemic were reducing possibilities of border crossings, introducing health checks controls at the borders resulting in longer transits, as well as border controls. In addition, in some countries, border agencies had limited capacity in ensuring a secure working environment: the Sars-Cov2 social distancing requirement to stay safe, was not always possible with the measures in place. (See <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/#section-d1e60>)

<sup>15</sup> J. Dahinten & Matthias Wabl. 'Germany Faces Backlash From Neighbors Over Mask Export Ban. (Bloomberg. March 2020).

<sup>16</sup> While legal review inter-EU is usually expedient, such cannot be said of other adjudicating bodies, such as the mechanism of Dispute Settlement Body (DSB), according to its own rules.

However, one needs to keep in mind that the *very definition of extreme events* prevents us from simply taking the learning from the current pandemic and apply this to the future. Thus, improving PPE supply chains and medication transits, ensuring legality of means, etc.. will not prevent future disastrous outcomes. Instead, a systemic approach should ensure that the framework that governs the global trading regime will be able to deal with as-of now unknown extreme events<sup>17</sup>. Such a system will naturally be largely reliant on assumptions made from the past, considering the science as a guiding principle, but will need to be sufficiently open to allow for future situations that require swift action to be accommodated.

In addition, as pointed out by Barbara Matthews in her Mercatus Policy Brief on the topic<sup>18</sup>, fundamental changes to the way our current supply chains and supply networks are set-up may contribute to further restrictions, or the maintaining of restrictions introduced by states throughout the pandemic, thereby reducing the pressure to innovate on a trade regime that may be regarded as obsolete by some policymakers<sup>19</sup>.

This risk of unprecedented needs in another crisis is real, and contains in and of itself significant potential for harm in the medium to long run:

Firstly, we do not know what the next event of the kind we currently see will be. Maybe a shortage of PPE will be the least concern nations face as the event hits, but domestic production reduced the availability of other resources, creating a less efficient value chain that cannot react in an appropriate manner to the challenges faced then.

Secondly, a shift to domestic production will most certainly decrease output in the least developed countries since capacities cannot be expanded indefinitely, thereby reducing their ability to grow and advance their economies, as they either do not possess the necessary level of expertise and resources to produce the relevant goods locally, or are required to produce other goods differently in order to accommodate basic human needs for their populations.

### **Building Back a Sustainable, Facilitated Trade Framework**

Sustainability is, in the context used in the following, understood as being a *viable* option that fulfills three criteria:

- a) It is sufficiently robust to deal with as-of-yet unknown events of large magnitude;
- b) It is sufficiently simple to allow implementation by LDCs and developed nations alike, to a similar extent; and
- c) It is sufficiently rapid to ensure enforceability in extreme circumstances.

Regarding the first aspect, it is imperative that the TFA, as is currently in force, be amended with “must implement” provisions that govern cases crucial for times of crisis. This includes chiefly the expedited introduction of eFormalities regarding customs clearance and enforcement. Currently, especially LDCs have not implemented the relevant provisions of the TFA and may therefore face both importing and exporting issues when moving goods across borders. While there is no

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<sup>17</sup> One may think of natural disasters, pandemics, climatic shifts, or as-of-now entirely unknown situations.

<sup>18</sup> B. Matthews. ‘Liberalize, Sanitize, Digitize: Three Urgent Trade Policy; Priorities in a Pandemic Age’ (Mercatus Center George Mason University, April 2020), p.4.

<sup>19</sup> For example, requirements to produce PPE domestically.

possibility to immediately remedy this,<sup>20</sup> future agreements and adaptations to the agreements will need to take this into account and ensure their near-immediate implementation to avoid disruptions.

Furthermore, technologies such as Internet of Things (IoT) solutions<sup>21</sup> for shipment tracking, surveillance and verification of integrity to prevent unauthorized changes to shipments - enabling true end-to-end security and would, in the medium run, enable near real-time clearance and expedition, which are both crucial in times of crisis (border-agency cooperation, currently only in Cat A in Europe, North America & Middle East) should be fostered. IoTs allowing to become paperless at all border controls would enhance safer trading for those delivering necessary equipment and products. In some regions, countries have transitioned to digital trading systems, yet the regions of Asia-Pacific, Sub-Saharan Africa and the Middle East and North Africa are far from reaching their fullest potential<sup>22</sup>.

The relevant provisions of the TFA should therefore more be seen as key enablers for effective trading relationships allowing importers and exporters to adjust easier to unprecedented demands deriving from extreme circumstances, than as obligations to ensure smooth value chain handling, as their joint implementation not only benefit countries with strong export-oriented markets, but also overall availability of goods across borders, thereby reducing the risk of shortages for critical supplies, regardless of their nature.

Notwithstanding the foregoing, it is equally important to ensure that *the integrity of the customs procedures themselves* remains a priority for states implementing these measures. Therefore, the customs procedures need to account for sudden disruptions of value flows. For example a sudden increase in transit, creation of global hubs (such as the UN airbridge to African countries amidst the current pandemic<sup>23</sup>) without jeopardizing the imports and exports to the country in question. This can only be achieved through sufficient funding of border agencies, training and infrastructure, which are all investments that cannot happen in the very short term. It is therefore paramount that especially developing and LDCs are given the means through existing initiatives such as Aid for Trade and the Enhanced Integrated Framework to enable their agencies to work effectively and to accelerate a full implementation of the TFA, which brings us to the second criterion.

Implementation of the TFA criteria was and is cumbersome, especially for developing countries and LDCs. The adoption of Harmonised System Code (HSN)<sup>24</sup> (etc.) is a step in the right direction,

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<sup>20</sup> Aside from calling for a reduction to 0% on most, if not all, tariffs, as done by multiple authors and institutions promoting “pandemic best practices” (which in itself is dubious, as best practices only gradually evolve - a situation not akin to a fast moving pandemic).

<sup>21</sup> For an overview, see <https://www.forbes.com/sites/forbestechcouncil/2020/07/22/supercharging-the-supply-chain-how-iot-technology-is-changing-logistics/>.

<sup>22</sup> Especially with regards to processed and cleared declarations; trade related tax payments; certificates and signatures; risk management. (OECD see: <http://www.oecd.org/coronavirus/policy-responses/trade-facilitation-and-the-covid-19-pandemic-094306d2/#section-d1e60>)

<sup>23</sup> UNb. ‘COVID-19: Humanitarian air deliveries to Africa ramped up with dispatch from UN’s new cargo hub in Belgium’ (UN, Africa Renewal, May 2020); In addition, hubs in other jurisdiction have been established by the UAE that was also providing the aircraft for the aforementioned airbridges.

<sup>24</sup> Harmonised System Code. (See: <http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>.)

as well as the risk-based approach<sup>25</sup> mandated by the TFA as they permit to concentrate an agency's resources on the most critical shipments, but it will in and of itself not be sufficient to face a crisis of international magnitude. For example, the importation of medical goods would likely be regarded as high-risk shipments by virtue of their nature; yet, these were the products sought the most in the current pandemic. We simply do not know which goods may be required going forward when the next adverse event strikes. Therefore, the risk based approach needs to be flexibilised, which again posits that developing and LDCs will be enabled to enact effective procedures that both fulfill the TFA obligations, but give them enough flexibility to quickly adapt to new situations. As is already the case, the major demand voiced by LDCs<sup>26</sup> is with regards to training, technologies and infrastructure, all of which require longer run-up times. Therefore, from a policy standpoint, the introduction of programs aimed at capacity building to reach complete implementation of the TFA is crucial.

Coupled with this activity, a clear and coordinated inclusive multi-way communication of the benefits and possible disadvantages should be shared with and by all WTO Members, and in particular those who lag behind in the implementation of the TFA's provisions. Successful communication would prevent additional hurdles of trade in times of crises.

While every domestic legal system is different, it is nonetheless possible to create a toolbox for implementation of such systems comprising risk-assessment for expedited clearance standardised IT solutions and legal frameworks covering both. Whether this is done in a forum such as WTO, UN or in the context of yet-to-be-established RTAs is negligible. In particular these frameworks, which would likely take the form of best-practices, given the fact that most developed countries already implemented the obligations set forth in the TFA, would improve interoperability between non-RTA countries, as the baseline which is used for each of them is the same. Cooperation needs to be sufficiently robust to allow rapid alignment and common approaches even in times of crisis, which was not the case during the early stages of the present pandemic. This brings us to the third point: All means implemented need to be able to withstand high pressure environments, sudden changes of trade flows and political changes such as an "my country first" logic exhibited in particular by some WTO Members during the last months.

How can a system be sufficiently robust to withstand crisis? A first start would lie in a verification, jointly, with the actors actually being responsible for the majority of the economic activity - research has shown that such collaboration can be beneficial<sup>27</sup>- of the to-be-implemented system. While Grainger in his overview concerns himself mostly with the UK, the "frustration" felt by private actors seeking to either import or export can be transposed to most other countries as well<sup>28</sup>. The mere fact that a sector specialising solely in import or export (trading/handling) is often found in jurisdictions having more complicated procedures, agencies or rules to follow, testifies to that<sup>29</sup>. However, "cutting red-tape" is not the holy grail of trade inefficiencies, as the balance between domestic priorities (e.g. SPS measures) and administratively simpler trade needs to be maintained. This requires careful fine tuning and adaptation measures in times of crisis on the side of

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<sup>25</sup>H-H. Wu, 'Refining the WTO TradeFacilitation Agreement in the Face of an Uncertain Trade Environment: Challenges and Opportunities'. (Trade Law Development, 2019), p. 129.

<sup>26</sup>See <https://tfadatabase.org/state-of-play> for an overview.

<sup>27</sup> The WTO Trade Facilitation Agreement; A. Grainger, 'The WTO Trade Facilitation Agreement: Consulting the Private Sector'. (Journal of World Trade, 2014). p.1186.

<sup>28</sup> Ibid.

<sup>29</sup>For example in the European Union, exporting across intra-EU borders has become significantly easier, thereby bringing more companies to sell cross-border directly rather than relying on middlemen doing the import/export business.

government actors, as a system skewed too heavily in one or the other direction will fail under stress<sup>30</sup>. While there is no “one size fits all” approach, there are certain measures that especially the private sector, which plays an important role in mitigating the negative effects of adverse events, tends to favor, namely,

- a. Unification of governmental agencies: Instead of dealing with multiple agencies involved in customs clearance, imports, etc., actors will have one agency to turn to that handles all of the required tasks;
- b. Digitization of procedures, including many of the provisions touched upon by the TFA; and
- c. Reliability of service: availability of the required personnel, facilities and infrastructure required for doing business.

While the added flexibility of the TFA for developing countries and LDCs is beneficial for *accepting the TFA*, their result - that is non implementation of obligations - can have unfortunate consequences for these jurisdictions in times of crisis. It is therefore paramount that in times of crisis, faster decision making on the national level is enabled through the world trade framework.

### **Robust Frameworks**

In taking a concept spearheaded by Nassim Taleb, one should thrive to be *at least* robust to systemic shocks. While unlikely, states have imploded, eroded, vanished due to external shocks that laid bare inner dysfunction, preventing them from taking effective precautions, or simply reacting appropriately to external shocks. Some of them may have been visible, some others continue to amaze scholars up to this day, such as the collapse of the Roman Empire<sup>31</sup>. Therefore, the framework in which trade should operate needs to be designed in a way that prevents itself from collapsing in a situation of crisis.

Special care should therefore be taken to sufficiently empower the entry points into the territory - ideally more than one for each means of freight (air/land/sea)- to enable the criteria set out in the previous section. This can be achieved gradually through the LDC mechanism contained in the TFA (art. 14 to 16), or expedited through targeted capacity building operations carried out by the countries already operating such a model<sup>32</sup>.

Countries wishing to improve based on the TFA obligations should therefore focus to a) digitize customs clearance & related procedures b) improve cooperation with other countries and their agencies and c) reduce runtimes. A typical approach would be twofold: An increase in physical capacity to hold import and export freight since storage often becomes a problem once trade flows are disrupted, coupled with an expansion of IT systems following international standards used by proficient border agencies. This is no easy feat, as the Doha rounds showed (and the lack of implementation by many countries) that the financial commitments are significant. Therefore, instead of often going directly into the general tax accounts, customs duties could, for the time during implementation, be used to finance the expansion of customs’ agencies service offerings and only after having achieved a desired level of “robustness” be again affected to the general

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<sup>30</sup> And in both situations endanger the health of the population - either through too few goods, or goods of questionable quality.

<sup>31</sup> Take the collapse of the Roman empire - there are certainly as many theories about its demise as there are roads to Rome. (See: <https://courses.washington.edu/rome250/gallery/ROME%20250/210%20Reasons.htm>)

<sup>32</sup> It is important to note that, as was shown in the EU example, the mere fact that the *capacity exists*, does not mean, that it is also used.

budget. While this proposal may seem radical, countries should see these investments as insurance against adverse events, and not investments into infrastructure.

While not expressly mentioned herein, a decisive fight against corruption is an important aspect of empowering border agencies, as only impartial agencies can provide the necessary level of institutional trust and transparency needed to ensure good operations.

Through a digitised clearance system, countries can react faster and safer to shortages (and reduce administrative overhead for certain types of shipments, automatically prioritise them, etc.), and thereby ensure continuous supply<sup>33</sup>. The same is true for transits: If the general system is interoperable, countries may be less inclined to outbid others, as there is transparency both on the capacity of the market and trade flows, versus opaque situations that require manual work to follow and later-on distribute shipments. In addition, shipments can be distributed on the most effective and quickest way possible instead of routing them via “friendly” nations or organising air bridges, as was the case during the current pandemic, thereby also saving CO2 emissions, fuel and lastly, generating savings. This not only reduces transaction costs, it also improves availability, considers constraining the contribution to climate change and thereby prevents both real and perceived shortages.

Improvements in infrastructure work similarly and ensure that even in disruptive situations, required businesses can be conducted safely and efficiently, thereby preventing shortages in supplies.

The aforementioned aspects only work in conjunction with the general, already existing trading framework and largely repose on existing TFA provisions. Nonetheless, especially LDCs should prioritise them in order to be better prepared for the next disruptive event, in addition to ensuring increased GDP and creating economic opportunities for its nation’s natural and legal persons. It should however be noted that these recommendations do not work in an isolated environment: It is paramount that the overall framework of trade is adhered to by all Members of the WTO.

### **Enforcement**

Enforcing the TFA is another issue. As outlined above, there is currently no DSB mechanism to enable a speedy and timely decision making within the WTO, ordering injunctions that permit immediate corrective actions pending the main proceeding’s decision. Nor does the mechanism prevent situations of WTO Members acting according to might is right which hurt the most disenfranchised populations the most - not least, LDCs at-large.

In the context of a future extreme event, where the nature and scope is yet to be determined, the trade facilitation mechanisms must be in place to mitigate the negative effects on trade and thereby, possibly nefarious impacts on the health and livelihoods of populations. While the TFA is limited to creating a robust, transparent trading system crossing borders, the DSB mechanism would not enable a timely adaptation to the unprecedented circumstances. A self-executing obligation allowing immediate corrective action could be a time and cost efficient response to the occurrence of an extreme event. Such mechanism would be limited to the ongoing crisis which ideally would be declared by the competent international body (WHO, UN, etc.). While this may also seem extreme, it could mitigate an ongoing crisis’ negative effects in a rapid manner, for example as the

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<sup>33</sup>OECD. ‘Policy Responses to Coronavirus (COVID-19) Trade facilitation and the COVID-19 pandemic’. (OECD, April, 2020).

climate changes' effects, or providing medical equipment to persons in need, and thereby building back better. It is important to note that countries should not be able to self-declare these situations, as such a powerful clause is otherwise ripe for abuse. Nonetheless, unprecedented times require unprecedented means. Such self-execution can be assured through the emergence of more technology used in trade, automatically prioritising, clearing and distributing goods. This system will only work if most nations sign-up to subdue themselves to its execution. Legal challenges to this approach should be dealt with using an arbitral panel that, akin to some RTAs currently in force, would have the power to halt the measures, pass injunctions, and be open to private entities finding their rights infringed upon.

As mentioned above, crisis relevant current legal instruments do not determine what constitutes extreme events. Future crises requiring international coordinated responses remain to a large extent unknown. It is likely that they may be climate change induced, or related to the structures of our globalised society. For that reason, it is essential to use a broad language ensuring that the majority of future extreme events requiring a multilateral response are covered, and not only in times of pandemics, which is a very real risk we currently observe. Otherwise we will be “building back better” more than once - which can and should not be our long-term goal.

### **Conclusion**

Trade facilitation is paramount for a robust multilateral trading system and a prosperous world economy. The importance of TF increases in times of extreme events. This article presents the opportunities and shortcomings of the TFA in the world trade order. The Agreement contributes to stability and prosperity. To this end it may contribute to micro, small and medium enterprises, as well as peoples' left behind, in particular women, to benefit from a larger market. Through the ongoing pandemic we identified issues hampering the TF, such as protectionist policies border controls, as well as the difficulty of legally defining as-of now unknown extreme events. The risks of not knowing the nature or scope of the next crisis hinder the identification of future needs (products, human resources etc.). We argue for a sustainable trade framework to align to the aspirations of the UN's 'building back better': it must be robust, simple and accessible, and allow rapid response at the arrival of the next extreme event. We claim that the provisions of the current TFA must be implemented fully, and that enforcing mechanisms shall take the format of self-executing obligations through arbitration but only in times of a crisis. Self-executing obligations would allow states to respond timely and coherently to a crisis, and thereby hamper its negative societal effects.

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