

# How to Trade

*An analysis of the WTO trade facilitation negotiations*

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Fall 2018

# **How to Trade**

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<http://www.duo.uio.no/>

Printed: Webergs Printshop

35 040 words (39 124 incl. Appendix)

# Abstract

This thesis analyses the negotiations that led to the adoption of the Trade Facilitation Agreement (TFA) in the World Trade Organization (WTO). In 2013 members of the WTO adopted the first multilateral trade agreement since the WTO was established in 1995. The adoption of the agreement marked the end of 17 years of discussions, and nine years of negotiations. With the stagnation of the Doha round of negotiations as a backdrop, this thesis investigates how and why members were able to reach an agreement on trade facilitation. By investigating why the TFA was adopted, and why it was adopted in its specific form, this thesis challenges the conventional wisdom about the dynamics of negotiations within the WTO.

Drawing on institutional theory, this thesis finds that the TFA was adopted because members wanted to reduce the collective action dilemmas associated with un-harmonized customs systems. Furthermore, the negotiations in the WTO affected how actors' rated their options, which again affected the dynamics of the negotiations. Throughout the negotiations, members relied on the expertise and authority of other organizations within the trade facilitation field. The final agreement mirrors this reliance, as well as being the legacy of enduring political struggles for influence.

# Acknowledgements

First and foremost, I would like to thank my supervisor Helge Hveem for his guidance and encouragement throughout the process of writing this thesis. His patience and academic proficiency has been invaluable to me. Thank you for being positive, encouraging, and just the right amount of strict. I also want to express my deep gratitude to Kari, Bernard, Karl Henrik and Daniel at the Institute for Social Research for giving me the opportunity to be part of the Civil Society team at the Institute. Furthermore, I want to extend a big thanks to the Permanent Mission of Norway to the WTO and EFTA in Geneva. The insights I gained from being an intern at the Mission has been of the utmost significance to this thesis.

Deep gratitude is also extended to the informants that contributed to this project, and especially to Benedicte Fleischer with the Norwegian MFA. It has been an honour to learn from the most knowledgeable people in the field, and this thesis would not have been possible without their contributions.

I would have never thought I would write a master thesis embedded in institutional theory. For this, I have to thank Tom Christensen and Torbjørg Jevnaker. Who would have thought that institutional theory could be so exciting?

My sincerest gratitude goes to my family for always being my biggest cheerleaders. Your continuous support and good advice is invaluable to me. Finally, Endre – thank you for your patience, support, and for always volunteering to walk the dog.

Responsibility for mistakes and inaccuracies remain entirely mine.

Oslo, 2018-11-14

# Table of contents

<b>1</b>	<b>A new multilateral trade agreement</b>	<b>1</b>
1.1	<i>Introduction</i>	1
1.2	<i>Trade facilitation and the agreement</i>	2
1.3	<i>Why study the Trade Facilitation Agreement?</i>	2
1.4	<i>Previous research on WTO negotiations</i>	3
<b>2</b>	<b>Theoretical framework</b>	<b>7</b>
2.1	<i>Rational choice institutionalism</i>	8
2.2	<i>Historical Institutionalism</i>	11
2.3	<i>Sociological institutionalism</i>	15
2.4	<i>The Concept of Power in the new institutionalisms</i>	18
2.5	<i>Organizations as institutions</i>	19
2.6	<i>The case for a complementary institutional approach</i>	20
2.7	<i>Critique of the new institutionalisms</i>	21
<b>3</b>	<b>Method</b>	<b>23</b>
3.1	<i>Choice of case and method</i>	23
3.2	<i>Sources of data</i>	24
3.3	<i>Validity and reliability of the study</i>	27
<b>4</b>	<b>Empirical enquiry</b>	<b>31</b>
4.1	<i>Background</i>	31
4.2	<i>How it began (1996-1999)</i>	32
4.3	<i>Negotiating whether to negotiate (2000-2003)</i>	36
4.4	<i>Launching negotiations (2004-2008)</i>	41
4.5	<i>Battle of the brackets (2009-2013)</i>	46
4.6	<i>Adoption of the Trade Facilitation Agreement and aftermath (2013-2017)</i>	53
4.7	<i>Key actors and their positions</i>	55
4.8	<i>National and regional trade facilitation reforms</i>	57

<b>5</b>	<b>Analysis</b>	<b>60</b>
5.1	<i>Rational Choice Institutionalism</i>	60
5.2	<i>Historical Institutionalism</i>	67
5.3	<i>Sociological Institutionalism</i>	74
5.4	<i>Combining the new institutionalisms</i>	81
<b>6</b>	<b>Concluding remarks</b>	<b>85</b>
6.1	<i>Main findings</i>	85
6.2	<i>Implications for institutional theory</i>	86
6.3	<i>Implications for the literature on WTO negotiations</i>	87
6.4	<i>Implications for WTO negotiations</i>	88
	<b>Literature</b>	<b>91</b>
	<b>Appendix 1: List of informants</b>	<b>101</b>
	<b>Appendix 2: Interview guide</b>	<b>102</b>

## List of figures

Figure 1: Operationalization of theoretical concepts	28
Figure 2: Motivations for the establishment of trade facilitation bodies (Percentage)	58
Figure 3: Number of existing national TF bodies	59
Figure 4: Process of imitation	77

## List of abbreviations

ACP	African, Caribbean and Pacific group of states
APEC	Asia-Pacific Economic Cooperation
CTG	Council for Trade in Goods
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
EU	European Union
GATT	General Agreement on Tariffs and Trade
HI	Historical institutionalism
ICTSD	International Centre for Trade and Sustainable Development
IMF	International Monetary Fund
LDC	Least Developed Countries
NGTF	Negotiating Group on Trade Facilitation
NTB	Non-tariff barriers
OECD	Organization for Economic Cooperation and Development
RCI	Rational Choice institutionalism
RKC	Revised Kyoto Convention
S&DT	Special and Differential Treatment
SI	Sociological institutionalism
TACB	Technical assistance and capacity building
TF	Trade facilitation
TFA	Trade Facilitation Agreement
TFAF	Trade Facilitation Agreement Facility
UNCTAD	United Nations Conference on Trade and Development
UN	United Nations
US	United States
USTR	United States Trade Representative
WCO	World Customs Organization
WTO	World Trade Organization



*We should seek to learn the lessons of the Trade Facilitation Agreement – from the nature of the agreement itself, to how it was struck. Reaching agreement was not easy. It took hard work, commitment and dedication. The stars did not align; we aligned the stars.*

- Roberto Azevêdo



# 1 A new multilateral trade agreement

## 1.1 Introduction

The World Trade Organization is facing the greatest crisis of its 23-year existence (Baschuk 2018), and multilateral co-operation is on the wane. A trade war between the United States and China and a broad-based increase in tariffs worldwide is evidence of a protectionist turn in world trade. The situation was very different in the winter of 2013. The members<sup>1</sup> of the World Trade Organisation (WTO) had just concluded The Trade Facilitation Agreement (TFA) – the first multilateral trade agreement to be concluded since the WTO was established in 1995. The main goal of the TFA is to reduce «red tape» in world trade by simplifying required paperwork, modernizing and harmonizing customs procedures (WTO n.d.- a). The agreement is thus expected to positively affect the growth in world trade.<sup>2</sup>

The conclusion of the agreement marked the end of 17 years of discussions and nine years of negotiations. Trade facilitation (TF) was put on the WTO's agenda in 1996, and officially included in the WTO work through the Doha Development Agenda (DDA) in 2001. When the topic of trade facilitation first appeared within the walls of the WTO, members were strongly divided on fundamental aspects, most importantly whether there should even be negotiations on trade facilitation in the WTO (Neufeld 2014: 4-5). It is somewhat remarkable, then, that eventually all 164 members signed the agreement, upholding the principle of consensus. The Agreement entered into force in February 2017, when the threshold of ratifications was met (WTO 2017).

In this chapter, I will give an introduction to what trade facilitation actually is and the most important provisions of the agreement. I will discuss the development aspect of the TFA, and review previous research on the topic. Finally, I will present the central research questions and the outline of the thesis.

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<sup>1</sup> In the WTO, the word «member» is consistently used instead of country, as not all members are considered independent states.

<sup>2</sup> Estimates of economic gains resulting from the TF agreement vary. Some studies predict that it could increase global GDP by up to USD 1 trillion and create 21 million jobs (Hufbauer & Schott 2013). Others anticipate that the combined effect of the fully implemented TFA could reduce total trade costs by almost 14.5 per cent for low income countries, 15.5 per cent for lower-middle income countries, and 13.2 per cent for upper-middle income countries (Moisé & Sorescu: 2013)

## **1.2 Trade facilitation and the agreement**

In the 1990s, cumbersome documentation requirements, non-transparent regulations, excessive delays at the border and related business losses constituted increasingly costly non-tariff barriers (NTB). The effect was near nullification of much of the gains from trade secured through historically low tariffs (Panitchpakdi 2005: 3). A study by the United Nations Conference on Trade and Development (UNCTAD) estimated that an average trade transaction involved as much as 30 parties (UNCTAD 1994). TF thus aims at making the chain of transactions between those 30 parties as quick and cost-effective as possible. One of the most important provisions of the agreement include committing national governments to ensure that information about national customs procedures is easily accessible. This includes information about what documents are needed at border crossings, prices and taxes imposed, a description of the national customs procedures and so forth.

Developing – and least developed countries (LDCs) are expected to see the biggest average reduction of trade costs following the implementation of the agreement (Hoekman & Shepherd 2015). The link between development and TF was acknowledged from the start, because successful inclusion of developing countries in the world economy depend on their ability to create systems that support and promote smooth trading procedures. Establishing those systems globally is even more important for land-locked developing countries as these countries depend on the systems of their neighbouring countries (World Bank & UN 2014: 10). A Trade Facilitation Agreement Facility (TFAF) was also created at the request of developing and least-developed members to help ensure that they receive the assistance needed to reap the full benefits of the TFA and to support the ultimate goal of full implementation of the agreement. Making the terms of implementation acceptable to the developing and LDC members of the WTO was a critically important factor in reaching an agreement (Neufeld 2014: 8).

## **1.3 Why study the Trade Facilitation Agreement?**

Since the economic crisis of 2008-2011, world trade has been, and continues to be, under increasing pressure. The crumbling of multilateral agreements in favour of regional- and bilateral trade agreements, paired with the reluctance from the former champions of liberal free trade to undertake new negotiations, threatens to dismantle the rules-based multilateral trading

system. Many scholars not only point to the increasing isolationism in the foreign politics of Western states, but also to the fact that the WTO has not managed to stay relevant in the face of new challenges (Draper 2015). As the current round of Trade negotiations has been underway for 17 years, it is easy to see their point. While many scholars have tried to explain the lack of progress in the DDA (Schwab 2011, Pritchard 2009, Cho 2010, Kleimann & Guinan 2011), little attention has been afforded the foremost positive development in this period, namely the adoption of the TFA. Studying why members succeeded in reaching an agreement is interesting because the findings may result in lessons learned for negotiations in other areas of the negotiating mandate. Could it be that negotiations were conducted differently than in other negotiating areas? Was it the topic of trade facilitation or the negotiating process that enabled agreement? If the latter is the case, there might be ways of applying these modalities in other areas of the DDA. Whether one views free trade positively or negatively, it should be relevant to study the single most important development within the multilateral trading system for the past 23 years. Although highly interesting, an ethical debate over the pros and cons of free trade remains outside the scope of this analysis.

## **1.4 Previous research on WTO negotiations**

A few scholars and students have analysed the TFA from a law- and economics perspectives (Gregorsson 2014, Eliason 2014, McDougall 2017), and some have analysed the TFA through case studies of one or more countries (Ersya 2016, Yean 2017). All of these contributions concern how different provisions of the agreement relate to either existing national legislation, or to other international agreements. To my knowledge, there is no previous research on the TF negotiations from the political science perspectives. No scholars have tried to analyse the dynamics of the negotiations or how and why members were able to reach an agreement. The closest contribution in this respect is the detailed account of the negotiations offered by Nora Neufeld in «The Long and Winding Road: How WTO Members Finally Reached a Trade Facilitation Agreement» (2014). The article covers the negotiations as seen from her viewpoint as the person in charge of the negotiations from the Secretariat. In her account, she largely concludes that members were able to reach an agreement because of the ambitious consideration for the needs of the developing- and least developed members, as well as the inclusive, bottom-up approach taken to the negotiations.

This conclusion stands in sharp contrast to the many other scholarly contributions regarding negotiations in the WTO more generally. Scholars have often focused on the concept of *power*, and tried to identify and explain the sources of imbalances in power in favour of the major developed members. In this tradition, Winham (1992) finds that the Tokyo Round of trade negotiations was conducted in a «pyramidal process» in which «agreements were usually initiated between the principal players – namely, the United States and the EU – and then presented successively to middle and smaller parties to establish a multilateral consensus» (Winham 1992: 55). Steinberg (2002) also found that the last five trade Rounds of the GATT/WTO start out with law-based bargaining, but are completed through power-based bargaining by the big members. Consensus rule in the WTO is essentially «organized hypocrisy» that disguises the true nature of power relations between states (2002: 365). Keohane and Nye (2000), Bello (2000) and McMichael (2000) find that the negotiations in the WTO is characterized by power-play among the major developed members, and that developing members have little to no say in the outcome. Furthermore, Elsig (2006) offers a compelling taxonomy of different facets of power, exemplified by the WTO Doha Round. He finds that imbalances in structural and procedural power<sup>3</sup> continue to characterize negotiations in the WTO.

Such accounts were supported by a growing number of case studies aimed at identifying the imbalances in power between members of the WTO. For instance, in line with Steinberg (2002), Jawara and Kwa (2003) and Narlikar (2004) find that the consensus principle is a *smokescreen* covering up the fact that developing members are excluded from taking part in decision-making, and are pressured by the big developed members to accept unfavourable deals. Kapoor (2004) finds that the lack of deliberation at the WTO yields power politics and unjust outcomes for the developing members. These accounts are essentially realist in nature, as they see bargaining outcomes as a function of interests and power. In fact, they do not attribute the institution that is the WTO any power at all. In their paper, Keohane and Nye, scholars usually associated with neo-liberalism state that:

to point out that regimes are central to international relations in a variety of areas is not to claim that international organizations themselves are powerful. On the contrary, they were designed as the creatures of states, and for the most part remain so (Keohane & Nye 2000: 2).

---

<sup>3</sup> Elsig's (2006) taxonomy of power will be further elaborated in Chapter 2.

The traditional debate on the WTO has taken place within the paradigmatic debate between realists and liberals, the latter arguing the importance of both actor agency and institutions (Shell 1995). Countering both the realist and liberal accounts were the proponents of more constructivist approaches in IR. For instance, Ruggie (1998) introduced the term «embedded liberalism». This was used to describe how the WTO does not merely reflect the power and interests of states, but also the social expectations, norms and economic ideas that were widely shared within a given field (Ruggie 2008). Picking up on key concepts from the realist, liberal and constructivist schools, were the proponents of the «new institutionalisms»<sup>4</sup>, who focus on the role of institutions in constraining powerful actors from pushing through their interests. In 1998, Philip Nichols was the first to advocate for the application of the new institutionalisms to the study of the WTO. He showed how analysing the WTO could provide new insights to our understanding of the development of the international trade regime. In this tradition, Gregory Shaffer and Joel Trachtman (2011) attempt to understand negotiations in the WTO from a rationalist perspective by focusing on the availability of «alternative choices» in developing institutions, clearly inspired by the liberal analyses of the WTO. This effort was met with criticism from sociological institutionalists, the cousin of the constructivist approach, arguing that the rationalist analysis misses the mark by overlooking the WTO's social dimensions and thus leaving behind several theoretical blind spots (Cho 2012). In between the rationalist and sociological contributions were the historical institutionalists like Chorev (2005), who finds that the establishment of the WTO in 1995 created a new balance of political opportunities and of influence, that has since characterized the institution. Similarly, Rixen and Viola (2016) investigates what constitutes change or stability in the GATT/WTO through the temporal lenses associated with historical institutionalism.

Nonetheless, considering the plethora of contributions from the traditional IR schools to our understanding of negotiations in the WTO, the new institutionalisms are remarkably underrepresented. Perhaps the reason is, as hinted at by Nichols (1998: 511), that trade scholarship itself is an institution not readily changed.

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<sup>4</sup> A comprehensive presentation of the “new institutionalisms” will follow in Chapter 2.

### **1.4.1 The research question**

Given that WTO members have struggled to advance the long-standing Doha negotiating mandate, studying the negotiations that led to the completion of the TFA is interesting in itself. Together with the fact that negotiations started with the membership being split into strongly opposing sides, the research questions guiding this thesis are: 1) *why was the Trade Facilitation Agreement adopted*, and 2) *why was it adopted in its specific form*. Any answer to the question «why?» must involve an answer to the question «what enabled members to agree?». To uncover this is the central goal of this thesis. The research questions are thus firmly embedded in a tradition of scholarly contributions trying to uncover the dynamics of negotiations in the WTO. It deviates from this embeddedness through the choice of case, because the TFA has not been the subject of much scholarly attention. Furthermore, as chapter 2 will show, the complementary theoretical approach also deviates from the largely realist approach to WTO negotiations in the literature. Taking up the challenge put fourth by Nichols (1998), the research questions will be answered through the lenses of the «new institutionalisms».

Because the full implementation of the agreement has yet to be completed, a review of the implications of the agreement will not be undertaken<sup>5</sup>.

### **1.4.2 Outline of the thesis**

Thus far, the topic and research question have been presented. In chapter 2, the theoretical framework of the thesis will be presented, and three institutional perspectives will be introduced. Theories rest on assumptions and these assumptions are utilized to derive expectations. In chapter 3, the method for collecting data and the mode of utilizing this data in relation to the theoretical framework is presented. Chapter 4 sets out a detailed narrative of the process from early mentions of trade facilitation, through the adoption of the Doha mandate and the later conclusion of the agreement. This is done to facilitate process-tracing and pattern-matching between theory and reality. In chapter 5, the empirical data is analysed separately from the three perspectives, before the explanatory value of the three are seen together. Chapter 6 concludes the thesis, and summarizes the main findings. Implications for future research on international trade negotiations are discussed.

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<sup>5</sup> For a review of the possible implications of the implementation of the TFA, see OECD (2018), Moisé & Sorescu (2013) and Fontagné, Orefice, & Piermartini (2016).



## 2 Theoretical framework

*Why was the Trade Facilitation Agreement adopted, and why was it adopted in its specific form?* Any answer to this enquiry will always rely on a certain set of assumptions. Or, as Cho (2012: 323) puts it: «the basis on which enquirers structure their perceptions [...] necessarily depend on their initial paradigmatic view». How individuals perceive of an historical event is not just a function of the facts available in the case, but also what «conceptual lenses» through which the individual analyses the situation. Utilizing theory in analyses is important for structuring and filtering information, and thus entails disregarding information not deemed important for the analysis. Because a new multilateral trade agreement changes the formal rules and regulations of the WTO and the world trading system at large, this is considered to be a case of institutional change. This conclusion is drawn from the fact that legal rules governing the multilateral trading system are subject to the Dispute Settlement Body (DSB) in the WTO. The TFA was inserted into the formal rules governed by the DSB. Thus, the TFA constitutes institutional change, because it added to the rulebook of international trade. Given the relatively modest contributions from the new institutionalisms to our understanding of WTO negotiations, this thesis will contribute to that end.

Because the new institutionalisms (Hall & Taylor 1996) is a diverse theoretical group, they allow for a complementary theoretical approach, with the goal of using the different theoretical underpinnings to explain different aspects of the institutional change at hand. Because our goal is to explain why an institutional change occurred, but also the specific form of the institutional change, three theoretical approaches will be utilized. The purpose of using theories is not to test them, as this would require a cross-case approach rather than a single-outcome study. Thus, the three theories are chosen to complement each other, not to compete. The goal is to see whether the three theories can help us better understand both the TF negotiations and the TF Agreement. Although an empirical enquiry should strive to be nuanced, the theoretical underpinnings that structure the analysis should not. Theories are not accurate reflections of a complex reality, but greatly simplified - and thus clear and precise - representations of ideas that are possible to recognize in real life in far more diffuse forms. In this chapter, I will present the three theories, their basic assumptions and the expectations we can derive from those assumptions. Inspired by the influential work of Hall and Taylor

(1996), the three theories utilized here are Rational Choice Institutionalism, Historical Institutionalism and Sociological Institutionalism.

## **2.1 Rational choice institutionalism**

Most analyses of trade negotiations employ some sort of rational choice perspective. Indeed, when citing the many benefits that might accrue from the full implementation of the TFA, I also assume a certain level of rent-seeking behaviour to be present. Initially, Rational Choice Institutionalism (RCI) arose from the study of American congressional stability (Shepsle 1989:134, Hall & Taylor 1996: 942), but has since been adopted by scholars operating in different corners of the political science sphere.

Rational choice institutionalists believe that most social situations are best understood as reflecting the actions and choices of individual actors, as opposed to reflecting the culture, structure and power-dynamics argued by scholars within the other strands of institutional theory. RCI scholars pay much attention to «how individuals build and modify institutions to achieve their interests» (Campbell 2004: 15). Unlike pure rational choice theorists, however, rational choice *institutionalists* also believe that there are factors that might constrain the set of choices perceived as available to the actor (Rakner 1996: 2). Such factors can be formal or informal rules or different types of structures. These factors are expected to be especially important for structuring actor's choice sets within already structured spaces such as organizations. Most RCI scholars share the view that cooperation is instrumental in its character:

In general, rational choice institutionalism sees politics as an arena in which individuals try to maximize their personal gain [...]. Rational choice institutionalism consequently sees institutions as providing a context within which individual decisions are set, but places the emphasis on 'individual' not context (Aspinwall & Schneider 2000: 10-11).

### **2.1.1 What determines action**

As RCI sees human action as the cornerstone of any social scientific explanation, the perspective rests on assumptions as to why and how actors in a given situation behave the way

they do. RCI can be said to rest upon four central assumptions about the nature of actors in a given situation. These four assumptions again influence the likelihood of institutions emerging and enduring.

Firstly, actors are perceived as having a fixed set of preferences that are determined exogenously to the institutions to which they belong. This means that preferences are formulated and maintained independently of the institutions where they play out. Rational choice scholars do not usually consider other mechanisms for the formation of actor's preferences (Peters 1999: 15). Secondly, RCI posit that actors behave instrumentally to maximize these preferences, and third, that this instrumental behaviour is of a strategic and calculating nature. Lastly, RCI posit that the strategic and calculating behaviour of actors is deeply affected by expectations about the behaviour of other actors (Hall & Taylor 1996: 945). These four assumptions make up the rational logic for establishing institutions. Thus, we can define rational actors as actors that has clear preferences, and always choose to perform the action with the optimal expected outcome for itself.

### **2.1.2 Why institutions are established**

Rather than institutions emerging, RCI sees institutions as being established consciously by actors. They do so for one main reason. RCI sees politics as a series of collective action dilemmas. This means that welfare-maximizing actors seek to obtain their own goals without regard for «the bigger picture». This can lead to sub-optimal solutions, in the sense that another outcome could be found that would make at least one of the actors better off without making any of the others worse off (Hall & Taylor 1996: 945). By creating institutional arrangements that to some extent can guarantee the compliance by other actors, the insecurity of not knowing the intentions of other actors is mediated. This allows for «gains from exchange» to take place without the fear of losing to your partners in the exchange (Hall & Taylor 1996: 945). RCI thus explain the existence of institutions by reference to the value the functions of that institution have for the actors involved. Actors are rational and calculating, but the menu of possible action alternatives is constrained by institutional rules and regulations, a point perhaps best illustrated by reference to a game of football. One might make the individual choice of participating in such a game, but once on the field, players will benefit from following the rules of the game.

An important feature of RCI is that it assumes that institutions can be seen as mutually beneficial agreements entered into by relatively equal and independent actors (Hall & Taylor 1996: 952). In other words, they assume that actors are of relatively similar power position, and thus asymmetries of power largely fall outside the scope of analysis for RCI scholars. This is not a straight-forward statement. Indeed, power is so commonly featured in RCI analyses it is easy to believe that power and power-asymmetries is an integral part of the RCI perspective (Moe 2005: 215). RCI scholars traditionally try to understand whether rational individuals will cooperate in the face of collective action problems. «Their explanations are built around mutual gains, credible commitments, self-enforcing equilibria, and other concepts that flow from the logic of voluntary choice. This is the analytic core of the theory, the root source of its logic, language, and formalization» (Moe 2005: 215). This thesis will employ the traditional RCI approach, where cooperation and design are the primary explanatory variables for the establishment of institutions.

In sum, actors desiring gains from exchange, create and maintain institutions to lower the transaction costs associated with the lack of institutional regulation, such as the lack of information, and the inability to monitor and enforce agreements. Cooperation, therefore, is instrumental, and is not a socially-ingrained or habitual practice. Actors are rational and equal, but constrained by institutional rules and regulations.

### **2.1.3 Expectations from the Rational Choice Institutional approach**

Based on RCI we are left with the following expectations of why the Trade Facilitation Agreement was adopted: The relevant actors involved are the lead negotiators from the member countries of the WTO, and the consensus principle affords all actors equal power positions. These actors have a set of preferences regarding TF that is independent of the negotiating institution. We expect the actors to have behaved in a strategic and calculating manner so as to maximize their preferences. Strategic and calculating behaviour is operationalized as any identifiable negotiating tactics aimed at reaching the actor's desired goals. Because we know ex post that the negotiations did in fact lead to an agreement, we must assume that these self-interested actors saw the establishment of an international agreement on TF as securing «gains from exchange», through removing insecurities about other actors' behaviour. Gains from exchange is operationalized as the explicit statement by actors of the potential gains from harmonizing customs procedures. In sum, the lack of harmonization in customs procedures

could be described as a collective action dilemma that led to a sub-optimal situation of unpredictability and inefficiency in world trade. The TFA is an institution created by rational and equal actors to mediate those problems.

## **2.2 Historical Institutionalism**

What primarily separates historical institutionalism (HI) from other institutional theories is the assumption that understanding an institution requires analysis of its origin and development over time (Rixen, Viola & Zürn 2016: 10). HI can help us to identify interactions between structures and actors, and emphasizes how power asymmetry is reinforced by institutional structures (Rixen et al. 2016: 10). The essence of the historical institutional perspective is that institutions «emerge and are embedded in concrete temporal processes» (Thelen 1999: 371). HI provides us with tools to study the legacy of formative events and reveal incremental change and the unintended consequences of institutional development. Moreover, the sequence of events matter; as when cooking, the result depends on the order in which the ingredients are added (Pierson 2004: 1). Where RCI focuses on unified actors, in this case states, HI sees states as a set of institutions which are in competition and capable of influencing the nature and result of conflicts between groups (Saurugger 2014: 90). HI is suitable for explaining the TFA because what HI scholars try to uncover is «why a certain choice was made and/or why a certain outcome occurred» (Steinmo 2008: 126).

### **2.2.1 Path-dependence**

A central concept to understanding why «history matters» is *path dependence*. Its aim is to account for how the menu of different options for action is limited by the decisions made in the past (Saurugger 2014: 91). In this analysis, the theoretical concept «path» is not understood as the emergence and survival of immutable institutions through repeated individual actions, but as the long-term development of an institution, shaped and adapted to by collective actors, or as North puts it (1990: 98-99): «Path-dependence is a way to narrow conceptually the choice set and link decision making through time. It is not a story of inevitability in which the past

predicts the future». The main question thus becomes: To what degree do previous decisions affect the available options for future decision makers?

To avoid stretching the concept of path-dependence, it is necessary to identify the event or decision that set the institutional development on a particular path, and the concrete mechanisms that maintained the path over time (Thelen 1999: 391, Pierson 2004: 20-21).

### **2.2.2 Critical junctures and feedback mechanisms**

Because path-dependence primarily explains stability, scholars needed an explanation for why institutions change. The explanation introduced was that some events or transitions establish certain directions of change and foreclose others in a way that shape future developments. These moments in time are often referred to as *critical junctures*. Critical junctures create trajectories within which path dependence occurs. There are, however, major variations in how the term critical junctures is used in the literature (Collier and Collier 1991: 27). Some scholars allow for considerable discretion on the part of the actors, while others see the room for decision-making as highly limited by antecedent conditions.

In this thesis, critical junctures are understood as «situations where an initial decision is made by influential actors utilizing a window of opportunity in a time of institutional fluidity» (Capoccia and Kelemen 2007: 354). Wilkinson (2001: 398) also proposes an analytical distinction between the terms «critical juncture» and «critical phase». A critical phase is an opportunity where institutional change can occur and become a critical juncture, but for various reasons remain an untapped opportunity.

In order for an institution to be path-dependent, there must exist positive feedback mechanisms that reproduce and maintain the path (Krasner 1988: 83). Without positive feedback mechanisms, institutions would not endure in their particular form as they are embedded in a constantly changing environment (Thelen 1999: 396). Several different types of feedback mechanisms have been identified (Arthur 1989, David 1985, Pierson 2004). This thesis will utilize Ikenberry's two main categories of feedback mechanisms, as reflected in Thelen (1999: 392-396), *coordination effects* and *distributional effects*.

Coordination effects, or incentive structures, mean that actors will adapt their strategies in ways that reflect and reinforce the «logic» of the system (Thelen 1999: 392). When actors adapt their strategies to institutional incentives and limitations, this adaptation will encourage further adaptation, because it creates vested interests in the survival of the institution (Thelen

1999: 393). Distributional effects mean that institutions are not neutral, but have inherent mechanisms for distributing power among actors. Institutions reflect and reinforce the patterns of power among the actors in a given institution (Thelen 1999: 394). Coordination effects relate to stakeholders' interest in preserving or changing existing institutions, while distributional effects affect the relative power of actors. Because institutions can maintain and strengthen power-asymmetries among actors, institutions can be seen as «enduring legacies of political struggles» (Thelen 1999: 388). The distributional and coordination effects from certain institutional arrangements can «feed back» to the institution so that «over time, some developmental paths become increasingly blocked, or inaccessible» as «decisions at one point in time can restrict future possibilities by sending policy off on to particular tracks

Critical junctures are often recognized only after they have happened. One way to identify that a critical juncture has occurred is suggested by Jevnaker (2012). Because a critical juncture affects future developments by triggering new positive feedback effects, one can identify such a juncture by tracing the origins of different feedback mechanisms. If a critical juncture has taken place, new feedback mechanisms will have arisen. The legacy of these feedback mechanisms may be «temporally lagged» – i.e. not initially felt but clearly visible at a later point in time» (Mahoney & Schensul, 2006: 457).

### **2.2.3 Institutional and Contextual Change**

One explanation for the transition from stability to change «is that policies or institutions are knocked out of their path dependencies by external and largely unpredictable shocks to the system» (Gains, John & Stoker 2005: 28). This explanation is not entirely satisfactory, however, because change is not always abrupt and externally motivated, but can result from e.g. political competition among actors (Gains & Stoker 2005: 28–9, Streeck & Thelen 2005: 8). In fact, institutional change is intertwined with institutional stability, because change occurs in path-dependent ways. Mahoney and Thelen (2010) build on Streeck and Thelen (2005), and propose a model for institutional change based on institutions' distributional effects. They assume that players with different resources want different types of institutions. Institutions often reflect the relative power of different actors. This is what forms the basis for institutional change: Where institutions represent compromise or struggle for influence or power, there will always be a dynamic element that enables change (Mahoney & Thelen 2010: 7).

Historical institutionalist analyses focus on institutional development over time, as well as the particular context in which they develop. As path-dependence does not occur in a vacuum, it is important to place the institution of interest in a contextual setting. This is important because crisis, reform or change in the institutional context can affect the feedback mechanisms within an institutions and thus force actors to re-evaluate their positions in light of the contextual change (Thelen 1999: 396).

#### **2.2.4 Expectations based on the historical institutional approach**

As this thesis attempts to analyse a case of institutional change, the first expectation is that change occurred in a path-dependent manner as a result of a critical juncture. This assumption entails the following sub-expectations: The initial decision was made by actors influential at this point in time. We assume that this decision triggered positive feedback effects, and that those feedback effects caused path-dependence. Further, path-dependence eventually led to the adoption of the TF agreement. In addition to these expectations, we assume that larger developments in the world would affect the process of institutional change, as this could cause actors to re-evaluate their positions.

An initial decision is operationalized as a single decision made by the WTO members. This would most likely be in the form of a ministerial declaration or other formal decisions. Although the consensus principle affords all members equal powers, de facto power-asymmetries allows us to distinguish between influential and less influential actors. Actors influential during the critical juncture thus become those that held the most informal power within the WTO negotiating process at the time that the initial decision was made. While a critical juncture is defined through the identification of different positive feedback effects during a previous period of time; positive feedback is operationalized as identifiable patterns in power distribution and cases of actor adaptation to institutional arrangements. The member states of the WTO are considered to be the main actors in the negotiating process. Path-dependence is operationalized as incremental steps in a set direction, increasing the probability that the TFA would be adopted. Larger historical processes are operationalized as other shocks, changes or reforms affecting the negotiations.



## 2.3 Sociological institutionalism

As in the historical perspective, sociological institutionalism (SI) is not merely concerned with analysing institutional change as a rational means to achieve more efficient institutional arrangements. Whereas the HI perspective focus on the bounded rationality of actors constrained by previous developments, SI focuses on the culturally specific practices adopted by institutions, and on how the symbol systems, cognitive scripts, and moral templates stemming from these culturally specific practices create the «frames of meaning» guiding human action (Hall & Taylor 1996: 947). Thus, they argue, even the most seemingly bureaucratic institutions have to be explained in cultural terms (Hall & Taylor 1996: 947). SI is specific in its explanation of how institutions affect individual behaviour. Institutions do so by providing the cognitive scripts, categories and models through which the world is viewed, and course of action decided (Hall & Taylor 1996: 948). This does not mean that actors are not rational or goal-oriented, but that what is perceived as «rational action» is itself socially constituted.

### 2.3.1 Logic of Appropriateness and legitimacy

From the perspective of sociological institutionalists, the «frames of meaning» guiding individual behaviour within institutions arise from concerns for legitimacy (Hall & Taylor 1996: 947). Where historical rationalist institutionalists often posit a world of actors seeking to ensure the fulfilment of a set of goals or interests, SI posit a world of actors seeking to define and express their identity in socially appropriate ways. Because SI focuses on the adoption of specific institutional forms, it can be valuable in explaining the shape and form of institutions.

In SI, «action is tightly bound up with interpretation» (Hall & Taylor 1996: 948), and interpretation is used to define the appropriate course of action. What constitutes the appropriate is what enhances the legitimacy of an organization within a broader *organizational field*. The organizational field refers to «a community of organizations that partakes of a common meaning system and whose participants interact more frequently and fatefully with one another than with actors outside the field» (Scott 1995: 56). Further, according to Scott (2008: 184), organizational fields can develop «around central disputes and issues.» In this respect, «a field is formed around issues that become important to the interests and goals of a specific group of

organizations» (Scott 2008: 184-5). Thus, in this analysis the relevant organizational field will be comprised of those organizations concerned with TF specifically.

An organization will adapt practices considered legitimate within its organizational field (Peters 2005: 107), thus enabling the spread of practices within an organizational field (Hall & Taylor 1996: 947). Sociological institutionalists thus expect institutional change to occur, not because it advances the means-ends efficiency of the organization but because it enhances the social legitimacy of the organization. Why some institutional arrangements are deemed appropriate and legitimate, while others are not has to do with the origin of the practices, and the sources of cultural authority. Once perceived as legitimate, this spurs further adoption of the institutional practice, which again feeds back to enhancing the legitimacy of this practice (DiMaggio and Powell 1991: 65). What organizational elements are perceived as important in deciding what is legitimate varies in the literature. DiMaggio and Powell (1983, 1991) highlight coercive, normative, and mimetic processes of reproduction. The assumption is that what is deemed legitimate by an organization depends on the coercive, normative or mimetic influence of the organizational field around the organization (Wooten & Hoffmann 2017: 56).

### **2.3.2 Diffusion, Institutionalization and Carriers of Institutional Practices**

There is a need to distinguish between diffusion and institutionalization. The former concerns the spread and flow of ideas and practices, the latter implies normative and cognitive stickiness of those ideas and practices (Colyvas & Jonsson 2011: 30). According to Rogers, diffusion occurs when «an innovation is communicated through certain channels over time and among the members of a social system» (Strang & Meyer 1993: 487-88). The intriguing aspect of studying diffusion is that it allows for network analysis of an organizational field, mapping lines of communication and influence within a given population (Strang & Meyer 1993: 487-88). Ideas diffused and eventually institutionalized within the organizational field of international trade might for instance be the idea of free-trade and liberal multilateralism. Studying how and when such ideas arose and gained traction requires identifying how «ideas move through space and time, who or what is transporting them, and how they may be transformed by their journey» (Scott 2014: 95). Diffusion of institutional practices can take place via a multitude of «institutional carriers». Carriers are «vehicles» that transport institutional practices within an organizational field, and potential carriers range from more concrete legal rules, obligations and standards, to more abstract and less interpretive schemas or institutional scripts (Scott 2001:

77). Scott (2014) identifies different types of carriers, which might affect institutional development in different ways. In the following, *symbolic systems*, *relational systems*, and *routines* will be discussed<sup>6</sup>.

Diffusion concerns itself with the movement of institutional practices within an organizational field. It is important however, to note that it is not the institutional practice itself that moves, but a theorized version (Büttner 2012: 41). *Symbolic systems* is a term that refers to the interpretation of an institutional practice, or in other words the theorization of a practice. Interpretation means that certain elements will be emphasized, while other elements are deemed less important, thus enabling a practice to «travel» and adapt to new contexts. This theorization enables us to see similarities between different situations and contexts, and gives us standard reflections and standard techniques which can be adapted to local contexts. Thus:

Standardized categories make it plausible for organizational analysts to provide recipes for successful management and motivate public authorities to dictate or provide incentives for approved forms. As these models gain a taken-for-granted, or rule-like status, it becomes advantageous for organizations to comply in at least symbolic ways (Strang and Meyer 1993: 491).

Theoretical models enter into a diffusion process in at least two relevant ways: First, they represent a knowledge base for potential adopters, identifying the conditions for adoption, and second, they provide adopters with generalized expectations of the outcome the institutional practice produce, i.e. effectiveness, fairness etc. (Büttner 2012: 42).

*Relational systems* are a second group of carriers, where social linkages help spread institutional practices. Such systems might be inter-personal, or concern organizations that operate in the organizational field. The idea is that practices are more likely to spread among organizations that have «common cultural ties» (Strang & Meyer 1993: 487). Thus, institutional practices are more likely to flow between different entities within the same organizational field, and more often flow from those entities deemed to be the most successful and legitimate (DiMaggio & Powell 1983: 152).

*Routines* is an institutional carrier that enables the transfer of tacit knowledge (Powell 2003: 882), and refers to the habitualized behaviour of actors within institutions. This carrier

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<sup>6</sup> Scott also presents a third type of institutional carrier, namely artifacts, see Scott 2003.

ensures that new actors within an institution are socialized into the standard operating procedures and mental scripts guiding human action within a given institution.

Institutional isomorphism can derive from institutional uncertainty (DiMaggio & Powell 1991: 69). Institutional uncertainty can come in the form of goal and/or solution ambiguity, and a problemistic search within a given organizational field might yield a viable solution (DiMaggio & Powell 1991: 69). Furthermore, normative isomorphism might result from the professionalization and the filtering of personnel participating in an institution (DiMaggio & Powell 1991: 70-1). The adaptation of an institutional practice might come unintentionally, or explicitly and knowingly.

### **2.3.3 Expectations from the sociological institutional perspective**

The Trade Facilitation Agreement was adopted in its specific form because this was regarded legitimate, and the shape and content of the agreement imitate theorized practices found within the TF organizational field. Because uncertainty is deemed important for the diffusion of institutional practices, it will be important for the analysis to identify sources of institutional uncertainty at the time of the negotiations. Legitimacy is operationalized as statement concerned with the light in which the WTO is viewed. A theorized practice is operationalized as statements and references by members to the way other organizations within the same organizational field operates. Uncertainty is operationalized as explicit statements by members of the WTO that they are not certain of where the organization is, or should be, headed, and not certain of what solutions would help meet the desired goals. The relevant organizational field is operationalized as other TF-related organizations such as the World Customs Organisation (WCO) and the Organization for Economic Cooperation and Development (OECD), but also development-oriented organizations like the United Nations, as the TFA was included in the Doha Development Agenda, and thus has an important developmental aspect to it.

## **2.4 The Concept of Power in the new institutionalisms**

Power is an explanatory variable in all three theoretical perspectives, albeit to a lesser extent in RCI. Elsig's taxonomy of power (2006: 4) distinguishes between structural power (capacities,

voting rights, positional strength)<sup>7</sup>, procedural power (e.g. bargaining skills) and ideational power (e.g. the role of norms). *Structural power* can be described as the possession of capacities (e.g. economic power, market size), and positional strength (dependence on reaching agreement, or ‘best alternative to negotiated agreement’, BATNA). Those actors who enjoy strong capacities and positional strength have more options in shaping negotiations than actors lacking this type of power (Elsig 2006: 4). *Procedural power* refers to the bargaining skills of actors. This refers to the use of negotiating tactics such as bargaining smartly, forming coalitions, and strategic use of information asymmetries. *Ideational power* is the most «fuzzy» of the three concepts, owing partly to the fact that there are many different «operationalizations» of the concept. Some see ideas as presupposing a particular interest, and an actor’s behaviour is explained through process of socialization within an institution, as in SI. Others see ideas as a tool to cover their true intentions, and legitimize their interests (Elsig 2006: 5).

Although the new institutionalisms rely on different concepts of power, they have something important in common. The new institutionalists counter classical accounts of power by focusing on the role of institutions in creating, maintaining, distributing and constraining power.

## 2.5 Organizations as institutions

The theoretical perspectives accounted for above give different accounts of what institutions and organizations are. In RCI, organizations are seen as tools at the actors’ disposal. The actors can establish, design, reorganize and end organizations as they see fit (Røvik 2007: 66). The SI, and to some extent HI, perspective see formal organizations as containing institutions, and institutions as containing organizations. While institutions are the rules of the game, organizations are the players (Saurugger 2017: 3). We can consider institutions as dependent or independent variables. When institutions are considered as dependent variables, institutionalist approaches analyse the emergence and establishment of organizations and their internal procedures based on formal and informal rules and the ways that these rules are used by the agents in the organization. Understood as independent or intervening variables, institutions are seen as parameters creating elements of order and predictability (Saurugger 2017: 3). In this

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<sup>7</sup> The way structural power is defined by Elsig (2006: 4) is different from the notion used by Robert Cox and Susan Strange in their writing.

thesis, no sharp distinction will be drawn between the concepts of organization and institution. The TF negotiations is believed to have included several informal and formal institutions, from the formal rules of the WTO, to the informal rules guiding actors' behaviour. Thus, institutions are seen as both the dependent variable (formal TFA), and independent variables (norms and rules influencing negotiating dynamic, negotiating modalities, decision-making procedures).

## **2.6 The case for a complementary institutional approach**

«It is not obvious that any one approach is superior to the others in capturing the complexities of change. There are several stories to be told and a necessary humility associated with the telling of any one of them» (March & Olsen 1998: 958). Much research on institutional change or stability do lean towards one of these theoretical schools. In the following, I will argue that the three approaches presented can fruitfully be combined to increase the amount of variance in the dependent variable that can be theoretically explained, a point also made by Immergut (1998: 28). A starting point is recognizing that the new institutionalist approaches have much more similarities than differences, as shown in the discussion of power, and can thus be used in parallel. At its most basic, all institutionalists argue that «institutions matter» (Saurugger 2014: 79). Before entering into the analysis phase of this project, it seems apparent that there could be relevant explanatory variables in all three theoretical frameworks. This is the main reason for choosing these theories to form the theoretical framework of this thesis. It seems likely that actors are to some extent rational beings, at the same time, it seems likely that both social structures and historical contexts play some role in determining the behaviour of actors. Consequently, a pragmatic view on institutions and institutional change is employed in this thesis. Actors are assumed to be rational and welfare-maximizing, at the same time as operating in social settings located in concrete temporal processes. However, Sanderson (1987: 315) stresses that combining different theoretical perspectives always entail the danger of creating more confusion than insight. To reap the benefits of a complementary approach, while avoiding blurring the lines between the theoretical perspectives, three separate analyses will be carried out before insights from each perspective are seen together.

## 2.7 Critique of the new institutionalisms

Although arguably suitable for a complementary approach, the theoretical perspectives have all been criticised for their prioritization of explanatory variables. Rational choice institutionalism is criticised for its lack of understanding of factors constraining rationality. Proponents of this view often see the WTO as a welfare-maximizing contract regarded as an instrument designed to achieve members' common interests (Cho 2012:324). In replacing very *real* actors with rational hypothetical actors, the analysis forgoes the fact that actor's rationality is in fact bounded by institutional constraints. Even though what distinguished RCI from traditional rational choice theory is the fact that RCI does take into account the way in which institutions constrain actors, it does not allow for institutions to affect actors' preferences, as these are seen as exogenous to the institution. In other words, RCI does not pay attention to informal institutions or to the socialization process through which the preferences of the actors are said to change during interaction. It also lacks an account of the process of preference formation, and an account of situations where actors are clearly not behaving rationally in a welfare-maximizing sense.

Where RCI is criticized for overestimating the rationality of actors, historical institutionalists are criticized for the exact opposite. Historical institutionalists sometimes underplay the room for manoeuvre and actor agency and over-emphasise the role of institutions and structures (Warleigh 2002: 8). In addition, because HI rests on the assumption that feedback loops reinforce the paths chosen, it is not clear why actors would suddenly prefer a different set of institutions. Even though this paradox is mitigated by the introduction of critical junctures to the theory, it is not clear how or why such junctures cause the switch from stability to instability.

As historical institutionalists criticize the premise of actor rationality and the «logic of consequence» in the RCI perspective, so does the sociological institutionalists. Where HI focuses on the role of history in limiting the menu of options available at later stages, SI emphasizes the «logic of appropriateness» in the determination of actor preferences. The latter has been the subject of much criticism from other institutionalist schools. If, by definition, the logic of appropriateness is the driving force behind the behaviour of actors, then how does one explain why actors behave in non-appropriate ways? Moreover, because what is deemed appropriate is grounded within the relevant organizational field, «the actor's behaviour is rendered predictable to the analyst by virtue of the context in which it occurs» (Hay 2006: 3). Thus, given the assumptions of the SI perspectives, actor's behaviour should be predictable by studying the institutional context with its norms, rules and identities.

The conventional critique of all the «new institutionalisms» is that they are incapable of dealing with change (Peters 2000). However, this critique is less fitting today than when the institutionalist approach first emerged. All the perspectives, especially HI, has developed more nuanced explanations for institutional change over the years. In RCI, change is explained by *design*, in which actors specify institutional design to achieve a desired result. In HI change is explained either through changes in the political context of the institution, or through endogenous *competition* between actors within a given institution. In SI, change is explained through *imitation* in which actors interpret institutional arrangements deemed to be legitimate by other institutions (March & Olsen 2011: 167).



# 3 Method

The purpose of this chapter is to present the research method employed in this thesis. I explain the choice of case and research method, and account for how data collection was handled. The chapter concludes with a discussion of the validity and reliability of the study.

## 3.1 Choice of case and method

The main reason for writing this thesis is an interest in trade negotiations. When examining such negotiations it appears relevant to study the single most successful case of multilateral trade negotiations since 1994, and thus, this thesis constitutes a case study. As a new multilateral trade agreement is considered to be a case of institutional change, what we are trying to figure out is why and how this specific institutional change occurred. The theoretical framework presents us with expectations as to how and why this happened. The role of the research method is to pair theory with empirical facts to see whether those expectations are met. This thus puts the choice of method within the realm of the Congruence Method, as developed by George and Bennett (2005). The Congruence Method concerns itself with «pattern-matching» between theory and the empirical world. The theory is already accounted for, while the empirical basis of the study will hinge on a single case, namely the TFA. A Case study is «a detailed examination of an aspect of a historical episode to develop or test historical explanations that may be generalizable to other events» (George & Bennett 2005: 5). The Congruence Method is useful in identifying possible congruence between theory and reality, but it does not identify causality (George & Bennett 2005: 186).

Because the case under review has already taken place, it does not allow us to observe the institutional change take place. Therefore, process tracing was undertaken as a way to qualitatively reduce the risk of spuriousness in the analysis. Process tracing is enabled by establishing a detailed narrative with explicit timelines, so as to better be able to distinguish between correlation and actual causality. It should be noted that what separates the research design of this thesis from being a purely historical account of the events, is the theoretical framework that structures our approach (George & Bennett 2005: 225). Although there is an inherent risk of introducing bias to the analysis when applying a theoretical framework, creating a detailed account of the process will allow for consideration of factors not predicted by the

theories. A case study is useful for gaining insights into a larger population of similar cases (Gerring 2007: 37). However, because the choice of case is based on an interest in that particular case and not the representativeness of that case, this study will not bring forth generalizable findings. It will however, be possible to use the findings in this study to extract some expectations of what aspects are likely to affect actors in similar cases, that is actors in trade negotiations in particular, or actors in multilateral negotiations more generally.

## 3.2 Sources of data

In order to create the detailed narrative needed for the analysis, official WTO documents are analysed to account for the positions of members and the timeline of the negotiations. In addition, interviews with elite informants that were involved in the negotiations will supplement the findings of the document analysis and add a depth to the analysis, which would not be readily obtainable without such interviews.

### 3.2.1 Qualitative document analysis

One advantage of studying the WTO is its extensive online database, with public records of all official WTO meetings, called minutes of meetings<sup>8</sup>. These are lengthy reports of all statements made during meetings from members, Secretariat or observers. These statements are either reproduced in the minutes as direct quotations, or as summaries of the main points of the statements. Members must approve the minutes before they are adopted as official records, and the minutes thus have high credibility of being representative of the actor's stated opinion (Bryman 2016: 553). Whether this *stated* opinion is actually representative of the actor's opinion cannot be revealed by studying these documents. Documents need to be recognized for what they are – namely, texts written with distinctive purposes in mind, different from the purpose of the researcher (Thagaard 2013: 59). Thus, interviews were conducted for this analysis to serve as a control mechanism. Similarly, these are records from *official* WTO

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<sup>8</sup> The publically available documents from WTO meetings and events can be found at <https://docs.wto.org/>.

meetings, and the WTO is infamous for its non-official, *green room*<sup>9</sup> meetings. Gaining insights into these meetings is difficult, but again, the interviews with elite informants participating in these non-official meetings will be important for unmasking positions and negotiations not accounted for in official documents. The analysis rests on the review of the 56 minutes of meetings from the Negotiating Group on TF, more than 400 official communications from members, 20 background notes from the Secretariat and all circulated proposals in the negotiations.

### **3.2.2 Semi-structured interviews**

Interviews with informants are important in this analysis to reinforce or clarify the empirical narrative established by the official documents. In this thesis, purposive sampling of data was employed to answer the research question. Purposive sampling means that sampling is conducted with reference to the research question (Bryman 2016: 410). The informants interviewed here were chosen because of their personal role in different phases of the negotiations. I would argue that the individuals interviewed for this thesis are the world's leading experts on the TF negotiations, and thus represent on aggregate a vital source of knowledge on this topic. One could always argue that there are other relevant individuals to talk to, but seeing as the negotiations involved 164 members and numerous observer states and organizations, a full analysis of all actor's positions was not possible. It did, however, prove very useful for the manageability of the analysis that WTO members formed alliances based on common positions in the negotiations.

In addition to choosing informants based on their roles in relation to the research topic, snowball sampling was also employed, where already selected informants suggested other relevant actors. In addition to contributing with knowledge about relevant actors involved in the negotiations, snowball sampling also revealed the connectedness of individuals in the negotiations, in line with Noy's findings (2008). When conducting the empirical enquiry, this connectedness made sense considering the high degree of informal negotiations and the tight relationship among negotiators that evolved. Snowball sampling can result in selection bias as

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<sup>9</sup> The term "Green room" is borrowed from the theatre, designating the proverbially verdant place where actors prepare themselves for a performance. In WTO context it is used generically to describe a style of negotiation in which only a select few countries are present (VanGrasstek 2013: 205)

actors may be inclined to recommend informants with a similar viewpoint as themselves. However, all informants suggested by interviewees had already been identified as relevant for the analysis, and most had already agreed to an interview at the time when the recommendation was made. In addition to identifying relevant interviewees, this method also served as an indication of relevance of interviews already planned or conducted.

Semi-structured interviews were carried out with elite informants. This type of interview involves a prepared interview guide (see Appendix 2), but give the interviewees leeway in how to reply (Bryman 2016: 468), and is the foremost common approach to qualitative interviewing (Thagaard 2013: 98). The strength of this approach is that the informants can bring up topics not included in the original interview guide, meanwhile the guide is relatively structured, which enables analytical comparisons between different interviews. Comparisons between negotiators and the Secretariat, and between negotiators from the opposing and supporting sides are relevant to make in this thesis to see if there are any interesting variations. I therefore argue that this warrants a certain degree of structure in the interview guide, while still allowing for flexibilities.

It can be difficult to gain access to elite informants due to their high-ranking positions and accompanying tight schedules. However, in this instance, I received positive replies to all my requests for interviews. It did, however, prove difficult to interview diplomats as their stationing in Geneva had ended, and some were either back in their native countries or stationed elsewhere in the world. Therefore, some interviews were conducted in Geneva, Switzerland, while others were conducted by phone. Phone interviews are normally associated with survey research, and are far less common in qualitative designs. However, due to some obvious advantages, some researchers are using this method. As in this case, telephone interviews are needed when interviewing dispersed groups. Further, it can be advantageous to interview by telephone when the questions are sensitive in nature because respondents may be less anxious about answering (Bryman 2016: 484). Reassuringly, most researchers find that there is little to no differences in the quality of data produced by face-to-face and telephone interviews, other than the fact that the interviewer is not able to study the body language of the interviewee (Bryman 2016: 485).

Seven elite informants contributed to this thesis (see Appendix 1). As mentioned earlier, the decision not to interview many individuals stems from the lack of selection criteria. The WTO has 164 members, all of which participated in the negotiations. Thus, interviews were conducted with informants from both the supporting and opposing side, secretariat members,

and negotiators that had a special role in the negotiations. In addition, background-conversations were carried out with additional informants that did not wish to speak on record. There are no measures for assessing whether a sample size is big enough. However, theoretical saturation can be a good indicator. To quote Bryman (2016: 412): «Saturation does not mean that the researcher develops a sense of déjà vu when listening to what people say in interviews, but that new data no longer suggests new theoretical insights». Together, the interviews, background conversations and the document analysis provided for a coherent picture to be drawn of the negotiations. Although more information could have proved useful for the analysis, a high degree of saturation was achieved in the data collection.

Because this analysis covers the timespan from 1996-2013, informant's memory could pose problems. Some informants did have trouble remembering specific names and dates, but overall- the informants recalled events with surprising clarity. This can perhaps be explained by the intensity with which the individuals were involved in the negotiations. Informants were contacted by e-mail in advance, and given a broad presentation of the project as including the purpose of conducting an interview. The informants were offered the possibility of anonymity, but none of them chose this option. Instead, subject to informant's permission, the interviews were tape recorded and informants were later presented with the quotes intended for use, with the possibility of retracting their statements. In sum, it is safe to say that the empirical enquiry would have been a poor one, had it not been for the insights of the participants in the negotiations.

The informants wished to emphasize that the views reflected by them in this thesis is their own, and not necessarily that of their former or current employer (see Appendix 1).

### **3.3 Validity and reliability of the study**

Two of the most important criteria for evaluating research designs are validity and reliability. Closely related to both concepts is the operationalization of variables. Figure 1 shows the operationalization of relevant theoretical concepts into empirical indicators.

Figure 1: Operationalization of theoretical concepts

	<b>Theoretical concept</b>	<b>Empirical indicator</b>
<b>Rational choice institutionalism</b>	Relevant actors	Lead negotiators from WTO members, considered to be equally powerful.
	Strategic/calculating behaviour	Any identifiable negotiating tactics employed to reach goal.
	Gains from exchange	Explicit statement of the possible gains from harmonizing customs procedures.
<b>Historical institutionalism</b>	Initial decision	Single decision (Ministerial declaration/formal statement by members).
	Influential actors	WTO members with the most informal power at the time of the initial decision.
	Feedback effects	Identifiable patterns in power distribution and actor adaptation to institutional arrangements.
	Path dependency	Incremental changes increasing the probability that the TF agreement would be adopted.
	Larger historical context	Exogenous shocks, changes or reforms affecting the negotiations
<b>Sociological institutionalism</b>	Institutional uncertainty	Explicit statements by members that they are not certain of the future of the WTO.
	Organizational field	Other trade- or development related organizations.
	Theorized practice	Similarities in institutional practices within the organizational field.
	Legitimacy	Explicit statements of concern with the light in which the WTO is viewed.

**3.3.1 Assessing the validity of the study**

We can assess the validity of the research by analysing whether the results of the research represent the reality we have analysed (Silverman 2011: 369-373). Construct validity, internal validity and external validity are all relevant aspects to consider in order to assess the validity of this study.

*Construct validity* concerns itself with the operationalization of variables, or the transformation of theoretical concepts into empirical indicators that can be identified and measured. In this case, this means identifying theoretical concepts within the three theoretical perspectives to operationalize these concepts into empirical indicators that can be observed in the empirical material. The operationalization of central theoretical concepts was presented in chapter 2, and are shown in Figure 1. Apart from the unconventional choice of operationalizing critical junctures indirectly by identifying positive feedback effects, the concept of feedback effects could also be operationalized differently, for instance as the stated support of actors in favour status quo/change. Although there are many ways to operationalize each concept, the operationalisations chosen appear to capture essence of the theoretical concepts.

*Internal validity* refers to whether we can establish that the causes predicted by the theoretical framework did in fact lead to the observed outcome (Thagaard 2013: 205). This case study does not allow us to make hard claims about causality. The effort to establish a detailed narrative does, however, give us the opportunity to perform process-tracing and qualitatively assess the likelihood of the outcome occurring independently of the predicted causes, in that the narrative can also bring forth explanatory variables not predicted by the theories.

*External validity* refers to the generalizability of findings (Seale 1999: 40-1). As stated earlier, this is neither possible, nor the goal of this thesis. This being the case, one should always strive to do more than explain the empirical phenomenon at hand (Gerring 2007: 20). Still, even contingent generalizations cannot be made based on a single case study. Thus, apart from understanding the empirical phenomenon that is the TFA, it is the goal of this thesis to extract some lessons that might serve as expectations to what aspects are likely to affect actors in similar cases.

### **3.3.2 Assessing the reliability of the study**

To achieve high validity, the analysis is dependent on high reliability (Hellevik 2011: 53). Reliability refers to the consistency of a measure of a concept, and essentially refers to whether others will get the same results from employing the same method (Thagaard 2013: 202). Although reliability in qualitative research can be hampered by the level of interpretation needed, the reliability is generally high in qualitative analyses, given the depth and detail with which analyses are undertaken and conclusions rest on. The main source of data in this study are publicly available documents related to TF, thus enabling other researchers to obtain the

same documents. Furthermore, the interview guide is available for others to see, and interviewees are cited by name, thus enabling others to check the truthfulness of the information presented by the researcher. Care was also taken to separate clearly the sources of information presented in the empirical enquiry, so that the reader will be aware of whether the information stems from documents or interviews.



## 4 Empirical enquiry

Thus far, we have established the theoretical framework for the analysis and presented the method through which the research question will be answered. Now we will delve into the substance of the TF negotiations. The purpose of this chapter is to establish a detailed narrative of the TF negotiations, to enable pattern matching between theory and reality. The chapter begins with briefly establishing the historical backdrop for the negotiations, before presenting the different stages in the negotiations, from early discussions to adoption of the agreement. After the WTO negotiations are presented, an overview of the positions of the main actors is presented, as well as a description of national- and regional trade facilitation reform efforts, and how these relate to the TF negotiations.

### 4.1 Background

Tracing the emergence of trade facilitation in the WTO is somewhat tautological, as the WTO and its predecessor GATT, is basically all about facilitating trade (Neufeld interview). TF is understood by the WTO (as well as this thesis) as «*the simplification and harmonisation of international trade procedures*», where trade procedures are the «*activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade*» (WTO n.d.- b). With this definition in mind, it is possible to distinguish the TF work related to the eventual TF agreement from other trade *facilitating* work in the WTO.

After the end of the Second World War, the Bretton Woods organizations were established to govern international economy and trade. When the effort to establish an International Trade Organization failed, the General Agreement on Tariffs and Trade (GATT) was established instead (Toye 2012). As a result of the Uruguay trade negotiating round (1986-1994), the GATT was formalized into the World Trade Organization in 1995<sup>10</sup>. All WTO members are bound to have their national legislation in line with the commitments undertaken within the WTO. With the establishment of the WTO, so came the enforcement mechanism that had been missing during the GATT years, namely the Dispute Settlement Body (DSB). This is

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<sup>10</sup> For in depth analyses of the Uruguay outcomes see: Croome 1999 and Josling, Tangerman, & Warley (1996).

important not only because it effectively governs the compliance of members, but because it gave major trading economies an incentive to bring new topics into the WTO and thus under the mandated area of the DSB (Priya 2007: 1). This would allow the DSB to ensure the compliance of members in more areas concerning international trade. The inverse of this argument is of course that the existence of the DSB creates a negotiating environment where all members are extremely cautious in undertaking commitments, a situation that naturally hampers progress in negotiations (Rixen & Viola 2016:14). In the WTO, negotiations start and end at Ministerial meetings. These meetings are held every two years, and will be a recurring feature of this empirical enquiry.

## **4.2 How it began (1996-1999)**

### **4.2.1 The Singapore Issues**

In the 1990s, the world saw a geopolitical shift that also had huge effects on international trade. The end of the Cold war, the opening of China to the West, the integration of the former Eastern European states into the European market opened new dimensions for international trade. At the same time, a transport cost revolution and new technologies had opened new doors for traders (Neufeld interview). This led to attention shifting from the traditional trade barriers, mainly tariffs, to the remaining non-tariff-barriers. According to Neufeld (interview), there was a widespread feeling among traders that something had to be done. The tariffs had come down drastically, but they were still having problems in international trade. Traders went to their governments, and pressure was mounting to remove the NTBs. This was also a time very different from today. Global trade, globalization and multilateralism was viewed very positively. There was a lot of momentum, the WTO had just been founded, and, according to Neufeld, «there was a positive vibe» surrounding world trade. All these things together led to an initiative on the part of some members to discuss measures to further facilitate trade.

In 1996, barely two years after the conclusion of the Uruguay round and the establishment of the WTO, the Singapore Ministerial was approaching. In the months leading

up to the Ministerial meeting, the European Union (EU)<sup>11</sup> and the United States (US) were pushing for the inclusion of four new topics to the negotiating agenda of the WTO. These issues were investments, competition policy, government procurement and trade facilitation, infamously known as the «Singapore issues». A month before the Ministerial conference began; the EU circulated a proposal on what elements should be included in the work program related to TF (WTO 1996). The main elements proposed by the EU was that the members should work to establish the role of the WTO within the TF field in relation to other relevant international bodies, and that members should agree to undertake «exploratory and analytical work» on TF. The EU called for the writing of a report about the impact of TF on trade and the scope for a more effective and transparent discipline within the WTO. The members should then decide, based on the report, how to proceed from there (WTO 1996).

Negotiations and even discussions of these new issues was strongly opposed by some developing countries, arguing that it was too soon after the Uruguay round to commence work on new issues. The developing countries argued that they were not yet done implementing the provisions of the Uruguay round, and that new issues would occupy more resources than they had at their disposal. This divide in the membership can be seen in the official statement of members during the Conference. Some referred to the Ministerial Conference as a forum to commence work on new issues (i.e. statements from the EU and the US, WTO 1996b), while others referred to the Conference as «a review forum to evaluate the progress of the implementation of the various Uruguay Round Agreements» (i.e. statements from Malaysia and Egypt, WTO 1996b).

Despite these opposing views, the Singapore issues were brought onto the Singapore agenda through a cover letter written by the WTO Director-General Renato Ruggiero. The letter stated that although there was no consensus on those issues, Trade Ministers may still wish to discuss them at the Ministerial Meeting (Khor 2007: 3). At the meeting, the EU and US did not devote any time in their official statements to the topic of trade facilitation, but both countries eluded to the fact that the WTO must be progressive and forward-looking (WTO 1996b). Despite the two biggest *demandeurs*<sup>12</sup> not mentioning TF in their official statements, a small group of about 30 members were selected to conduct informal discussions on a draft Ministerial

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<sup>11</sup> In this thesis, the names “European Union” or “EU” will be used throughout, even though until 2009, the official name of the EU in the WTO was “EC – European Communities”. The EU is a WTO member in its own right as are each of its 28 member states – making 29 WTO members altogether. While the member states coordinate their interests in Geneva and Brussels, the European Commission alone speaks for the EU and its members at the WTO.

<sup>12</sup> The French term “demandeurs” is often used in the WTO about a member requesting a particular outcome.

declaration from the Singapore ministerial conference, in which the new issues were included (Khor 2007: 3). The declaration, stemming from the exclusive, «Green Room» meeting was controversial because a majority of members were left out. Still, members agreed on a Ministerial Declaration, directing the Council for Trade in Goods (CTG) «to undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area» (WTO 1996c). Despite the opposition of many members, and the limited mandate of the Ministerial Declaration, trade facilitation had entered the realm of the WTO.

#### **4.2.2 The run-up to the battle in Seattle**

Members started working on TF soon after the Singapore Conference. As the Conference had produced a mandate of «exploratory» and «analytical» work, this influenced the debate in the first meeting of the Goods Council in February 1997. The EU, which in the run-up to the Singapore Ministerial had circulated a proposal for the writing of a report about the possible impact of a TFA, now requested the Secretariat to undertake a review of existing TF measures internationally (WTO 1997). The other members supported this proposal. Neither the EU nor the other members wanted to establish a Working Group on TF, as this was considered premature. The Minutes from this first post-Singapore meeting reflects how new and unfamiliar the topic of TF was at the WTO at this time, with the Norwegian representative pointing out that a definition of trade facilitation had yet to be proposed (WTO 1997).

The Secretariat, in a background note to the CTG, had outlined possible articles and provisions of the GATT, relevant for TF work. These were Article V (Freedom of Transit); Article VII (Valuation for Customs Purposes); Article VIII (Fees and Formalities connected with Importation and Exportation); Article IX (Marks of Origin); and Article X (Publication and Administration of Trade Regulations) (WTO 1997b). As information was gathered and discussions evolved, proposals were produced. In the first few years, the proposals were concerning a wide range of topics, and it seems as though the members were not quite sure what the role of the WTO should be vis-à-vis the other relevant international organizations<sup>13</sup>, but when the next Ministerial Conference was approaching, discussions intensified. Pressure built to define the scope and nature of the issues and to bring these issues onto the negotiating agenda

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<sup>13</sup> See WTO (1997b) for full list of what organizations deemed to be relevant.

of the WTO (Khor 2007: 4). The next step was thus to place these as negotiating issues in the draft of the Ministerial text for the Seattle conference in 1999.

The main problem was that the membership was still divided on the question of holding a new round of multilateral negotiations. This division led to what has later been dubbed «the battle in Seattle». A series of mass-protests led by anti-globalization activists, coupled with the fact that there were little agreement among Ministers, led to a dramatic breakdown of the Ministerial Conference, with ministers leaving the meeting early without any negotiating results (VanGrasstek 2013: 388). This was the first major setback in global trade since the creation of the WTO, and led proponents of binding rules on TF to refocus their efforts to highlighting the advantages of harmonizing customs procedures (Neufeld 2014: 4).

### 4.2.3 Alliances forming

As shown, in the beginning, the EU was the main *demandeur* for undertaking work on TF within the WTO. Delineating why the EU came to its position as supporter of the TFA is outside the scope of this analysis, as this would require analysis of a whole separate body of literature, namely that of EU integration theory. Establishing whether EU's positions in trade negotiations are a result of agreement among EU members or an autonomous Commission is a widely debated topic among EU scholars (Woll 2006, Meunier 2007). It is, perhaps, not so surprising that the most harmonized customs area in the world would be a supporter of similar endeavours elsewhere.

In reviewing the statements delivered during the Singapore Ministerial Conference, it is apparent that the opposition to bring «new issues» onto the WTO negotiating agenda was strong. Only 18 out of 122 members voiced support for commencing work on TF and the other Singapore issues (WTO 1996b). Although there was strong opposition from many members, there were hardly any issue-specific country groupings on any issue at this time (Priya 2007: 2). Two years after the Singapore Ministerial however, efforts to coordinate positions emerged, and coalitions were forming on both sides of the divide. *The Colorado Group*<sup>14</sup> consisting of the developed members and a few developing partners were proponents of trade facilitation,

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<sup>14</sup> The Colorado Group members included WTO members such as Australia, Canada, Chile, Colombia, Costa Rica, EU, Hong Kong, Hungary, Japan, Korea, Morocco, New Zealand, Norway, Paraguay, Singapore, Switzerland, and the US (UNECE n.d.)

and the *Core Group*<sup>15</sup> made up of all developing countries opposed both work on trade facilitation and on the launch of a new negotiating round more generally (VanGrasstek 2013: 375-6). It is difficult, however, to know whether there was opposition to TF, or more generally to embark on new negotiations so soon after the Uruguay round. Nevertheless, of the four «Singapore issues», trade facilitation was the only one that had not been given a dedicated committee. The subject was simply added to the agenda of the CTG (Neufeld 2014: 4).

## **4.3 Negotiating whether to negotiate (2000-2003)**

### **4.3.1 The run-up to the Doha Ministerial**

As noted, the debate of whether to embark on negotiations on TF was strongly influenced by the overarching disagreement on whether to launch a new negotiating round. As the Doha Ministerial meeting in 2001 was approaching, the negotiating climate in the WTO was not ideal for proponents of trade facilitation negotiations. As Blustein (2009: 68) notes:

The Europeans wanted a pledge to launch a new round that would include the Singapore issues – which was anathema to the developing countries. The United States, Australia, and the big farm exporters of Latin America wanted the agenda for negotiations to include proposals that would significantly open up agriculture markets and eliminated certain farm subsidies – which was anathema to the Europeans, the Japanese, the Koreans, the Norwegians, and the Swiss. Another group of countries, led by Japan, wanted the round to consider rules restricting the rights of countries to impose antidumping duties – which was anathema to the United States. The Americans wanted the WTO to begin dealing with the issue of labor rights, at least by creating a working group to study the trade-labor relationship – which was anathema to the developing countries. The developing countries wanted to change some of the terms of the Uruguay Round – which was anathema to the Americans, the Europeans, and the Japanese.

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<sup>15</sup> The Core Group members included Bangladesh, Botswana, China, Cuba, Egypt, India, Indonesia, Jamaica, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Zambia, Zimbabwe, Uganda and Venezuela. China left the Core Group during the period after the Cancun Ministerial Conference (Priya 2007: 11)

Much of the year 2000 was spent overcoming the disastrous Seattle conference. The work in Geneva proceeded on both formal and informal tracks. At the formal level, many General Council meetings were held, pursuing an approach of «negotiation by exhaustion» (VanGrasstek 2013: 396). Informally, the chairmen of the General Council consulted widely with the members, looking for areas where deals might be made. The WTO planners faced a deadline of July 2001, when a serious assessment would be undertaken of the prospects for launching a round. This was seen as the point by which a «go or no go» decision should be made on whether the objective of Doha Ministerial would indeed be to launch a round and what issues should be incorporated in its scope (VanGrasstek 2013; 396). July came and went, and the way forward was still unresolved. Keen to avoid another Seattle, members knew they had to resolve most of their differences before the Ministerial Meeting, and thus continued the formal and informal work of resolving differences during August and September of 2001 (VanGrasstek 2013; 397).

In the middle of these deliberations came an exogenous shock that would affect the negotiations and much else in the world. When Al Qaeda attacked the US on September 11 2001 they killed nearly 3000 people from 115 countries, but they also fundamentally changed how people perceived the world to be. This had an impact on almost all policy fields, and changed the dynamics of the international trade discourse. As Neufeld remembers it: following the 9/11 attacks, there was some debate about relocating the Ministerial from Doha, or postponing it, due to security concerns given that it was only two months after the attack. Some considered it a high-value target for further attacks and were afraid to go (Neufeld interview). However, it was agreed to go on with the plan of holding the fourth ministerial conference in Doha, Qatar. Despite the concerns that the attack might put a major strain on the negotiations, Neufeld also recalls that the climate at that time actually ended up being conducive to advancing the negotiations due to a shifting of the priorities of members. Only days after the attack, United States Trade Representative (USTR) Robert Zoellick advanced the argument that multilateral trade liberalization was a weapon in the war on terror (VanGrasstek 2013: 399). Because the attack was perceived as anti-globalization sentiments at its most illogical extreme, many countries refocused their efforts to strengthen multilateral dialogue and cooperation as a soft response to the horrific act of terrorism (VanGrasstek 2013: 399).

### 4.3.2 The Doha Ministerial

Compared to the Seattle Ministerial, delegates and ministers were much better prepared for the Doha ministerial meeting. Many disagreements had been resolved in Geneva before going to Doha, and although divisions remained among the members on the Singapore-issues, there was now a greater willingness on the part of key players to make accommodations and trade-offs. The Ministerial declaration from the Conference shows these compromises in the ambiguity of the language on TF:

Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area (WTO 2001).

As the text shows, members agreed to launch negotiations on trade facilitation after the *next* ministerial conference, subsequent to the *explicit consensus* by members. This language was put in place at the suggestion of India who did not support negotiations on TF at the time. What explicit consensus actually meant was left ambiguous to both members and the secretariat (Neufeld interview).

What was clear however, was that members had created a conditional negotiating mandate on TF, and if all members agreed by the next ministerial, the mandate would be upgraded to a full negotiating mandate. The Declaration refers to articles V (Freedom of Transit), VIII (Importation and Exportation) and X (Publication and Administration of Trade Regulations) of GATT 1994, the pre-existing provisions that were of relevance to trade facilitation. These articles had not undergone reform since 1947. Against the background of the immense change that had taken place in international trade in the past 70 years, it was evident to members that the Articles did not meet the needs the new millennium.

Besides the conditional negotiating mandate obtained, there were two outcomes from the Doha conference that would significantly affect the TF negotiations. One was the new focus



on the development aspect of trade, and the acknowledgement that the time where developed countries could impose rules and regulations on developing countries was over. The Doha round was supposed to correct the imbalances of the Uruguay round, and has widely been dubbed the Doha Development Agenda (DDA). Second, all the issues that were given a negotiating mandate in Doha were to be concluded simultaneously. In other words, nothing could be agreed until everything was agreed (WTO 2001). This is called «the single undertaking» and it has had a big impact on both the TF negotiations and the round at large as will be showed in this chapter. The Doha negotiating round was set to finish by 1 January 2005.

### **4.3.3 The Cancun Ministerial**

Right after the Doha ministerial, members commenced work on trade facilitation. However, the discussions in the CTG reflected the compromise of the Doha ministerial declaration. The EU wanted to speed up the work on negotiating modalities to be able to formally launch negotiations at the Ministerial in Cancun in 2003 (WTO 2003). The assumption made by the EU that members were in fact moving towards the launch of negotiations was objected to by many developing countries, reminding members that there was no guarantee of such negotiations launching in Cancun (WTO 2003b). These divergences were not bridged, and a month before the Ministerial conference was set to start in Cancun in 2003, a draft Ministerial text was circulated that clearly shows the divide in the membership. The draft contained two different options for the road ahead, and the two options could not be further apart:

[Taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration, we decide to commence negotiations on the basis of the modalities set out in Annex G to this document.]

[We take note of the discussions that have taken place on trade facilitation in the Council for Trade in Goods since the Fourth Ministerial Conference. The situation does not provide a basis for the commencement of negotiations in this area. Accordingly, we decide that further clarification of the issues be undertaken in the Council for Trade in Goods.] (WTO 2003c)

The first called for the launch of negotiations and set out related modalities. The second stated that members stood too far apart to launch negotiations. The two options reflected the strongly differing opinions held by members at this time. On the one hand, Japan and Korea insisted that all four Singapore Issues be negotiated. The African Union, LDCs, and African, Caribbean, and Pacific (ACP) countries, with the active support of Malaysia (and initially India) adamantly opposed negotiation on any of the four (Bagai, Newfarmer & Wilson 2004: 1). The EU, a primary proponent of starting talks on all four, proposed a compromise that only the last two issues, government procurement and trade facilitation, be considered and that the other two be dropped from the WTO work program (Bagai et al. 2004: 1). The Ministerial collapsed on the fifth day without achieving the requirement of «explicit consensus» set out in the Doha declaration (WTO 2003d). Because this requirement was not met, a full negotiating mandate was not obtained.

#### **4.3.4 Fifty shades of concern**

In reviewing the communications from members leading up to the Ministerial it is clear that many were reluctant to commence negotiations due to uncertainty about *inter alia* the possible cost of implementing such measures and the compensation mechanisms to cover those costs, as well as ensuring the policy space of developing countries in customs regulation and setting out the provisions for special and differential treatment (S&DT) for developing and least-developed countries (WTO 2003e, Boyonge & Kireeva 2008: 43). As Neufeld (interview) recalls, there were different degrees of opposition ranging from real concerns to different degrees of scepticism, or fifty shades of concern, as she calls it. In addition, some members were more vocal than others were, making it difficult to know who in fact had the biggest problem with negotiating TF. As Neufeld says (interview), «one shouldn't equate being very loud with having the biggest concerns».

Similarly, because positions were increasingly expressed through groups of like-minded members, it was difficult to delineate who actually had an issue with the substance of trade facilitation (Neufeld interview). On top of this came the developed-developing divide in the membership. Some developing countries were positive to negotiating TF, but because there were no developed countries *opposed* to TF negotiations, an impression emerged to some that TF was something that the developed countries were imposing on the developing countries

(Neufeld interview). This «political suspicion» meant that many developing members were sceptical about the intentions of the developed members (Wilson interview). Would this be yet another example of the developed members imposing commitments on the developing countries? Much of this initial political suspicion was related to the fact that negotiators did not really understand the concepts related to TF (Wilson interview). Because such negotiating dynamics were precisely what the Doha Development Agenda sought to avoid, a lot of resources were spent on demystifying TF through explaining different concepts (Wilson interview).

## **4.4 Launching negotiations (2004-2008)**

### **4.4.1 The July package**

After the breakdown of yet another ministerial, the members no longer even had a conditional negotiating mandate. The previous mandate was contingent on the explicit consensus by members in Cancun, and when this did not happen, there really was no mandate to continue work on TF. However, informal discussions continued among members, which is apparent from the WTO Documents database, as no official documents are publicly available from the six months following the Cancun ministerial. Informal meetings at the Heads of Delegation level discussed potential approaches to the Singapore issues. In fact, most issues were ironed out in informal meetings and then agreed in the formal negotiating room (Saeed interview). In December of 2003, Bangladesh, on behalf of the LDC group, supported by 15 other developing countries including China and India, submitted a communication on the Singapore issues, requesting that investment, competition and transparency in government procurement be dropped (WTO 2003f). Lack of consensus inspired the Chair to suggest continuing discussions on TF (Bhattacharya & Hossein 2006: 33, Bagai et al. 2004: 1). The debate carried on until April 2004, when the Core Group stated that they were prepared to discuss TF, but only for clarifying modalities for negotiations (Bhattacharya & Hussain 2006: 34). In addition to insisting that negotiations must be based on «explicit consensus», they called for the remaining Singapore issues to be dropped altogether from the WTO work programme, and expressed a desire to see prior movement in issues such as agriculture before starting discussions on TF (WTO 2003f).

A major breakthrough came in the summer of 2004. On the 1<sup>st</sup> of August, the General Council adopted the Doha Work Programme, a programme that outlines the road ahead for various topics in the DDA (WTO 2004). The paragraph on TF reveals that work had indeed been underway since the Cancun ministerial:

Taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council *both prior to the Fifth Ministerial Conference and after its conclusion* [Emphasis not in original], the General Council decides by *explicit consensus* [Emphasis not in original], to commence negotiations on the basis of the modalities set out in Annex D to this document (WTO 2004).

The paragraph is interesting for three reasons. First, only half a year after the failed Cancun ministerial, members agreed to formally launch negotiations on TF, without any official records of formal negotiations taking place. Second, it states that members have given «explicit consensus» to launch negotiations, giving due attention to the compromise entered into with India at the Doha ministerial. However, as Neufeld (interview) recalls, no formal vote was ever held. Rather, it was simply stated that the agreement on the modalities had been taken «by explicit consensus» without demanding anything else to fulfil the conditional negotiating mandate from Doha.

Third, the paragraph refers to the modalities set out in Annex D of the work programme. These modalities can be seen as agreed parameters for negotiations, and created the basis for the negotiations in the years to come. The modalities consist of ten points, whereby seven points focus on the needs of developing and least developed countries (WTO 2004). This work programme and its related modalities has later been called the «July package», and was hugely important for the negotiations that followed.

The Work programme also stated that members would not commence negotiations on the other three Singapore issues during the Doha round. Of the four Singapore issues, only TF was still on the agenda. This helped get the agreement to launch the TF negotiations, as it was no longer necessary to agree on negotiations in the other three areas (Neufeld interview).

#### **4.4.2 Annex-D Organizations**

The Doha Work Programme also highlights which organizations are deemed relevant for the TF negotiations. In order to make technical assistance and capacity building more effective and operational and to ensure better policy coherence, the International Monetary Fund (IMF), OECD, UNCTAD, WCO and the World Bank would be invited to attend the meetings of the Negotiating Group. The IMF, and the World Bank provided technical assistance to the developing members during the course of negotiations (Wilson interview). For instance, the World Bank circulated «support guides» to developing countries about the TF negotiations. The Bank also provided assurances of support for implementation of TFA obligations by developing countries (Wilson interview). UNCTAD played a very important role in the negotiations through simplifying and explaining concepts, and conveying the importance of TF for development-related goals (Bizumuremyi interview).

The World Customs Organizations was given a special role, as members agreed to «take due account of the relevant work of the WCO» (WTO 2004). The World Customs Organization (WCO) was established in 1952, and is an independent international organization whose mission is to enhance the effectiveness and efficiency of Customs administrations (WCO n.d.). Members had always been acutely aware of the TF work being undertaken in other international organizations, and in fact struggled to see what should be the role of the WTO vis-à-vis these organisations on the topic of TF. Already in Singapore in 1996, members referred to the need for «launching a coordinated approach on trade/customs procedures, ensuring a world-wide and multisectoral coverage» (WTO 1996). The same document also refers to the need to modernize the WCO «Kyoto Convention» on simplification and harmonisation of customs procedures. The Kyoto Convention, or «The International Convention on the Simplification and Harmonization of Customs Procedures», was adopted in 1973, and was revised in 2008. The goal of the Kyoto Convention was mostly the same as the TF initiatives in the WTO, namely to develop international standards that provide the predictability and efficiency that modern trade and commerce require (WTO 2002). However, the EU established that it was necessary to bring TF into the WTO because «The solutions proposed by UN, WCO and UNCTAD [...] have not been universally adopted by all WTO members, either due to lack of political will or because in some cases they have not met the specific needs or kept pace with changes in the ways of doing trade» (WTO 1996d). In addition, a significant feature of the WTO - as opposed to other bodies such as the WCO, is its dispute settlement system (Malone interview).

After adopting the July package in 2004, The WCO and the Kyoto Convention would play an important role in the negotiations as the world's foremost experts on international customs regulation.

#### **4.4.3 Negotiating group established**

The Annex-D modalities of the Work Programme called for the establishment of a Negotiating Group on Trade Facilitation (NGTF), and in November of 2004, the Negotiating Group was established. In the first year, the NGTF made a lot of progress. Sixty written proposals were submitted by more than 100 members (WTO 2005). By this time, a broad overview of the different aspects of trade facilitation as a concept began to emerge, and made it possible to identify areas of both convergence and divergence among members. Although steady progress was being made in the TF negotiations, this was not the case in other areas. The situation got so deadlocked that then Director-General Pascal Lamy suspended negotiations in all areas of the DDA. This would serve as a «time-out» whereby members could reflect on where to go next (WTO 2006). This was supported by the Core Group in the TF negotiations as they highlighted that no progress could be made on TF without progress in all other areas of the DDA (WTO 2006b).

When the negotiations resumed after six months, the Negotiating Group took up where they left off. The biannual reports by the Chairman of the NGTF all highlight that steady progress was being made throughout 2007 and 2008, but the part about S&DT for developing countries and LDCs did not advance as quickly as some of the other areas (WTO 2007, WTO 2008). The modalities in the July Package state that developing countries must be permitted to implement the provisions of the agreement in a gradual manner, and, where required, receive technical assistance and capacity building (TACB). Members had agreed that developing countries and LDCs would get flexibilities in implementing the agreement. It was not clear, however, what these flexibilities should be specifically. After some time, negotiations had more or less been deadlocked on the question of S&DT. Members agreed that implementation should be tied to the notion of capacity to implement the provision. However, most developing members wanted to decide themselves whether or not they had the capacity to implement, while other members wanted the full membership of the WTO to assess each member's capacity to implement the provisions (Hirsh interview).

There was an anxiety that the S&DT was falling behind the rest of the process. In July of 2007, the Core Group submitted a proposal on S&DT with some elements that are clearly visible in the final agreement. For instance, the proposal states that:

New TF commitments should therefore be approached in a way that would enable developing Members to commit to a specified minimal level or standard of implementation of commitments, with appropriate flexibility for least-developed Members, and subject to the provision of TACB where needed. Developing Members could then, at their discretion, progressively go into higher levels or standards of implementation as and when capacity exists to do so taking into account their development context (WTO 2007b).

In addition, the Core Group proposed dividing the provisions of the agreement into 2 categories, one with minimal commitments to be implemented right away, and a second category of commitments to be implemented at a later stage (WTO 2007b). At this point, the US drafted a proposal on S&DT, seeking to avoid the legal issue of assessing capacity, and rather come up with a process that would reflect the need for individualizing a country's circumstances, based on their capacities. This proposal was very well received by the members, and together with elements of the Core Group proposal, it formed the basis for Section 2 of the TFA (Hirsh interview). Work continued with many of the S&DT disagreements solved with the Core Group- and US proposals.

Work had resumed for a little over a year since the «time-out» in the DDA negotiations, when the situation was deadlocked again. At the July 2008 Ministerial in Geneva, the DDA was more or less declared dead. Despite some convergence on side issues, the political impasse on the core items like agriculture remained (Kleimann & Guinan 2011: 5). As a response to the dramatic breakdown of the whole round, members worked on ways to revive the talks. In December of 2008 in the meeting of the Trade Negotiations Committee, the chairperson of the committee Mr. Pascal Lamy said that some delegations had aired the prospect of an «early harvest» in elements of the Doha Work Programme (WTO 2008b). This would mean that members made use of the clause embodied in the Doha Ministerial Declaration that «[...] agreements reached at an early stage may be implemented on a provisional or a definitive basis» (WTO 2001). This would mean removing topics from the constraints of the single undertaking, and thus present the option of concluding some areas of negotiations before others. The statement by the Chairman was met with differing opinions. The developing countries mostly

highlighted areas in the agriculture negotiations as possible «early harvests», while the EU, Switzerland and Paraguay proposed TF as an appropriate area. Some delegations also stated that TF would not be a viable option for an early harvest as members were still too far apart (WTO 2008b).

#### **4.4.4 Capital-based officials**

Negotiations in the WTO involve Geneva-based diplomats, but often also capital-based officials traveling to Geneva for meetings of the negotiating bodies. These officials played an especially important role during the TF-negotiations, a point highlighted by all interviewees. At various occasions, member countries of the WTO would change their official positions upon the involvement of officials based in the capitals of various member states. Why this happened could have many explanations, one likely being that diplomats are seldom customs experts. When officials with on the ground-experience and intimate knowledge of how national customs procedures work enter the discussions, it is not difficult to imagine that positions might shift. However, the intense negotiating calendar of the WTO can pose difficulties for the poorer members of the WTO, as they lack the funds to augment their human resources from capitals to be adequately represented in all areas of negotiations running in parallel (Saeed interview).

This was a point highlighted by The Core Group and other developing members throughout the negotiations (WTO 2003f, WTO 2005c). When this became an issue, a fund was established, supported by Norway and the EU to finance the participation of capital-based officials from LDCs (Fleischer interview). This was very important, not only because the technical-level experts brought depth and knowledge to the negotiations, but because the funding showed good faith on the part of the donors (Wilson interview).

## **4.5 Battle of the brackets (2009-2013)**

### **4.5.1 First draft text issued**

At the first meeting of the NGTF in February 2009, Rwanda speaking on behalf of the African group wished to place on record that:



Any outcome of the TF negotiations should be an integral part of the Doha Package. It should not be treated as a stand-alone negotiating exercise and should not be separated from the rest of the Round. It was not possible to enter into a TF Agreement without having finalized the broader Doha work (WTO 2009).

This was a clear statement that the African group would not accept a TF agreement being negotiated separately from the single undertaking. This is the last meeting of the NGTF where official records of statements exist. In the coming meetings, the Minutes simply state that «The plenary session was adjourned and the informal working sessions commenced» (WTO 2009b, WTO 2009c, WTO 2009d, WTO 2009e). The purpose of the last two informal working sessions in October and November of 2009 was to «draft a consolidated negotiating text that would accurately reflect Members' positions» (WTO 2009e). In other words, between February and October of 2009, members had moved from standing far apart on crucial issues, to being able to negotiate a draft TF agreement.

The draft text was circulated in December of 2009. This was a major development in the history of the TF negotiations. Members now had concrete language to negotiate, instead of hundreds of separate proposals. Although this was a breakthrough, this marked the start of the «battle of the brackets». Brackets can be read as an «or», meaning that all language in brackets mark disagreements between members about what wording should be used in the final agreement. As the first paragraph of the draft text shows, disagreements on language were plentiful:

[In meeting its obligation under paragraph 1 of Article X of GATT 1994], [[a][each]] Member [to the extent possible] [shall [promptly]]-publish [[the following information][its trade-related [[legislation][rules, regulations]] and procedures via officially designated [/accepted] sources]] [or accepted sources] in a non-discriminatory and convenient manner, in order to enable [[interested parties][governments and traders]] to become acquainted with them, [including procedures carried out by third parties on behalf of the government] (WTO 2009f)

Not only is almost every word in a separate bracket, the entire paragraph is in brackets. The entire fifty-page document famously contained 1700 brackets. Although this looked chaotic from the outside, it was actually one of the key elements that ensured Members' continued confidence that they were in control of the negotiations (Hirsh interview). Because the text remained open, anybody, at any time, could propose a change to the text, and that proposal

would then be included in the text in bracket. This gave negotiators the confidence that they would always be able to give their input on the text.

The brackets in the first consolidated text can be grouped into two categories. The easy ones related to linguistics, and the difficult ones related to the level of commitment or the scope of the agreement (WTO 2010). For an agreement to be reached, 1700 smaller or bigger disagreements had to be reduced to zero. To get off to a good start, members decided to rid themselves of the easy brackets before delving into the difficult ones. These negotiations often took the form of open-ended meetings, meaning that they were open to everybody (Hirsh interview). These meetings were extremely well attended by the full membership. In 2010 the chairperson of the NGTF appointed several technical-level experts from different delegations as facilitators in the negotiations. The facilitators were tasked with coordinating and advancing negotiations on specific parts of the negotiating text, and help members find areas of agreement (Bizumuremyi interview). The facilitators often held open-ended sessions on specific proposals. The chair of the formal Negotiating Group was very respectful of the open-ended negotiating process, and did not push members too hard to find agreements. In the open-ended sessions, however, members could push a bit harder to remove some of the disagreements (Hirsh interview). The advantage of meeting in small groups is that delegates can speak more freely. For instance, it is difficult to focus discussion on the text of a proposal in a formal negotiating setting with 164 members. In the informal settings, you could identify policy concerns with particular language and explore possible solutions more freely (Hirsh interview). During this process, tons of brackets were disappearing. Many of the brackets were only being kept there by one or a few delegations, and could be removed through negotiations in open-ended sessions. Because of the DSB, developed countries also were conscious of this in the crafting and negotiation of commitments because everyone wants to be able to respect their legal commitments. This was probably not as important for the developing members, because they were confident that an agreement would have to have a very ambitious section on S&DT, in line with the modalities from the July Package (Malone interview).

In 2011, the eighth Ministerial Conference was held in Geneva, Switzerland. Since 2008, members had been discussing ways to revitalize the DDA. Some members had proposed to remove TF from the single undertaking in order to reach an agreement without the need to reach agreements in other, deadlocked areas such as agriculture and non-agricultural market access (NAMA). At the Conference, Ministers committed to advancing negotiations where progress could be achieved, including focusing on the elements of the Doha Declaration that

allow members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking (WTO 2011). Although members reiterated the commitment to a successful conclusion of the DDA, in reality, the single undertaking was abandoned. An important reason for doing so was the notion that the WTO had to deliver results to traders and governments should it maintain its important position globally (Hirsh interview). In fact, when reading the statements from the Ministerial, it is evident that members really were concerned with the state of play in world trade, and specifically, the future of the WTO. The EU opened their statement by saying that «the situation at this Organization is serious», and Pakistan called for a «gentleman’s agreement to [...] put a premium on the multilateral rules-based trading regime» (WTO 2011b). In fact, most members spent time speaking about the uncertain future for world trade in light of the then-ongoing financial crisis and the deadlocked DDA.

One of the major puzzles of the TF negotiations is that developing members agreed to remove TF from the single undertaking, given their interest in achieving results in agriculture and other areas. Thus, if you evaluate the political implication of removing TF from the single undertaking for developing members, one would not think it would be possible (Wilson interview). It should be mentioned here that when members discussed «an early harvest», TF was not the only fruit ready for harvesting. In fact, India and Bangladesh on behalf of the LDCs wanted results on cotton subsidies and duty-free-quota-free market access for LDCs (WTO 2011b). In addition, there was no clear perception of what the final outcome would be. Would it result in a stand-alone TF agreement, be a clarification of GATT or would it form part of a bigger package? In other words, members did not engage in the negotiations with a pre-conceived impression of what the outcome would be. This helped members to discuss the topic freely in a constructive spirit (Saeed interview).

Thus, an interest in revitalizing the DDA, possibly harvesting development-related results and lack of insights into the final outcome led developing members to agree to disregard the single undertaking and move forward with negotiations. However, Bizumuremyi adds that although Rwanda supported the TFA, he wonders if agreeing to make TF «an early harvest» of the DDA was giving up their best card. «If there was no TFA, maybe we would have reached an equilibrium for development in the WTO», he wonders, before adding «pacta sunt servanda»<sup>16</sup> (Bizumuremyi interview).

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<sup>16</sup> Latin for «agreements must be kept».

## 4.5.2 Informal negotiations

It is interesting to try to delineate who actually takes the decisions in negotiations. In theory, the WTO is member-driven, members are governments, and thus, a position is always a country-position (Neufeld interview). However, negotiators do not negotiate in a vacuum, they are not robots, they are people. They do get instructions from their governments, but the type of instructions negotiators get vary between members (Neufeld interview). Some get more instructions than others do, some get very broad instructions, and some negotiators use instructions creatively as a negotiating tactic. In addition, negotiators can influence the instructions they do get through their reports back to their government. If a negotiator is personally sceptical, the reports will likely mirror that scepticism, which in turn might result in the government taking a more sceptical position (Neufeld interview). Likewise, having the right people in the negotiations is very important. For instance, having a good negotiator in place enabled Norway to punch well above its weight in the negotiations (Malone interview). As Neufeld (interview) states, «in the end, it is the people behind the flag that really matters»

The importance of individuals in negotiations also lead us to the question of what forums were the most important for reaching agreement. In addition to formal and informal plenary sessions at the WTO headquarters, discussions were taking place in many other forums. Members met in smaller groups over dinner and cocktails to both discuss substance, but also to build friendships as Bizumuremyi points out (interview). This was of huge importance in the TF negotiations, as pointed out by all informants. «You have to know your counterpart in negotiations», as Fleischer puts it. Not only does this help to rid negotiations of misunderstandings, but it increases the trust and understanding between negotiators, and was of huge importance for the success of the negotiations. Eduard Bizumuremyi describes it as follows:

When you face each other, presenting your official views, without any kind of friendship and human kindness, negotiations become hard. However, when you come to know each other, whatever you present formally is not perceived as negatively by others. This helped to create a more dynamic negotiating environment (Bizumuremyi interview).

The importance of the informal gatherings was exemplified by Neufeld (interview) in describing how delegates met numerous times outside the WTO premises over coffee, lunches and dinners. As she recalls, these informal gatherings were sometimes far more important than

the meetings in the WTO. Saeed (interview) adds to this by saying that «without informal level consultations, no negotiations can be successful». However, in the WTO you need consensus in both fora. Because of the consensus principle, whatever you solve in smaller groups must be brought back to the larger membership (Neufeld interview, Hirsh interview, Saeed interview).

The informal meetings worked something like this: members would circulate a proposal, and then hold a meeting presenting this proposal. The proponents would then revise their proposal based on the feedback from the members. Once it became a fully integrated text, the proponents could no longer just go back and change the text (Hirsh interview). At that point, much of the substantive negotiations were in fact carried out in informal settings. By and large, members engaged in the informal gatherings based on technical considerations. Those who were opposed to a proposal for substantive reasons or because they wanted to preserve leverage did so in both formal and informal sessions, but it was harder to do so in the informal sessions because of the focus on particular language to ensure that it worked from a technical standpoint. Thus, the main advantage of such meetings were to «smooth the way» for the discussions in the plenary sessions (Hirsh interview). In addition, because the discussions were so technical in nature, issue-specific coalitions were formed. This helped break down the traditional barriers between developing and developed members, as these coalitions were cross-cutting the traditional cleavages (Wilson interview). A noteworthy feature of the TF negotiation process is thus that the North-South divide that has usually characterized negotiations in the WTO was not as sharp. Developed and developing countries filed joint papers on many issues, for example. For instance, the US and Uganda filed a joint paper on abolition of consular charges; Switzerland, Paraguay and Rwanda filed a joint paper on transit issues and India and US filed a joint paper on broader aspects of customs cooperation (Priya 2007: 10). However, as noted earlier, the TF talks were initially marked by a strong division between the developed and developing members. This non-divisive dynamic was thus something that evolved over time (Malone interview).

Because the negotiations were driven forward by the proposals of the members, with the broad membership contributing, the process was characterized by a bottom-up approach. However, the *demandeurs* took on a leading role in advancing proposals and holding informal sessions. A situation accurately described up by Wilson (interview) in stating that: «a bottom-up process requires a top-down leadership».

The importance of informal gatherings as well as that of individual negotiators can also make the negotiations vulnerable. As individual diplomats come and go during the course of

negotiations, the progress of the negotiations can come and go with them. Bizumuremyi recalls concrete instances where a change in negotiator led to a halt in the informal gatherings (interview). Likewise, Hirsh (interview) states that because of the turnover in Geneva, much of the history of the negotiations got lost every three or four years, so that negotiators did not always remember how the negotiations had gotten to where they had.

The combination of chair-and facilitator-led negotiations, as well as informal gatherings organized by members continued up to 2013, and two thirds of the brackets were gone by then (Neufeld 2014: 10).

### **4.5.3 «Friends of the chair» and DG led negotiations**

At some point in 2013, it became clear that work had to intensify if members were to reach an agreement at the Ministerial conference in Bali in December 2013. To tackle the remaining brackets, the Chair of the NGTF appointed four ambassadors as «Friends of the Chair», who were tasked with ensuring progress on a segment of the draft-consolidated text. This helped to drastically reduce the brackets, although those that were left were the most difficult ones to solve. The friends of the chair would work to find agreement among members on issues in informal groups, and then present the results of the discussions to the NGTF (Malone interview).

Furthermore, on 1 September, Roberto Carvalho de Azevêdo formally began his term as new Director General, succeeding Pascal Lamy in the role. Well known to the Geneva trade community from his five years as Brazil's ambassador to the WTO, he was familiar with the Geneva scene and the intricacies of TF negotiations (Bellmann 2014). As negotiations progressed, it soon became clear that a failure to deliver in Bali would represent a major blow for the WTO, de facto putting an end to the Doha negotiations. In this context, the political cost of a failure appeared significant (Bellmann 2014, Wilson interview). Members, and particularly leading players, had to show that they still believed in the multilateral trading system and show that the WTO could still deliver tangible results (Hirsh interview). This clearly introduced a sense of urgency (Bellmann 2014). A few days before the Bali Ministerial Conference, Director General Azevêdo presented a draft TF agreement. 1700 brackets had been reduced to 70, and the most contentious matters like S&DT were bracket-free (Neufeld 2014: 11).

## **4.6 Adoption of the Trade Facilitation Agreement and aftermath (2013-2017)**

Although the text was far from being agreed in Geneva in November, it was in good enough shape to leave it to ministers in Bali to agree. On 7 December 2013, ministers concluded 17 years of discussion and nine years of negotiations when they adopted the TFA. This marked the single most important development in international trade regulations since the establishment of the WTO. After being one of the contentious «Singapore issues», it ended up one of very few areas concluded in the DDA. An emotional Director General declared in Bali that members had «put the ‘World’ back into the World Trade Organization» (WTO 2013).

### **4.6.1 The Bali package and the TFA**

The Bali Package consists of ten separate decisions, covering four areas. It includes decisions on food security, cotton, four issues of importance to LDCs and the Trade Facilitation Agreement. The package forms part of the DDA. Although the package is the first multilateral agreement since the establishment of the WTO, its small scope compared to the intentions of the DDA was a fly in the ointment for some members (Melchior 2014: 4).

Section 1 contains provisions for customs cooperation, and expediting the movement, release and clearance of goods, including goods in transit. It clarifies and strengthens articles V, VIII and X of the GATT. Section 2 contains the S&DT provisions for linking implementation to capacity. The TFA allows developing countries and LDCs to determine when they will implement the individual provisions of the Agreement and to identify provisions that they will only be able to implement subsequent to receiving TACB (WTO n.d.- c). All members must categorize each provision of the Agreement into the three categories below.

- Category A: provisions that the member will implement by the time the Agreement enters into force (or in the case of a least-developed country within one year after entry into force)
- Category B: provisions that the member will implement after a transitional period following the entry into force of the Agreement
- Category C: provisions that the member will implement on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building.

Getting the S&DT chapter in place was hugely important for the success of the negotiations, and here, the turnover in diplomats may have worked in favour of the negotiations. By the end of the negotiations, few delegations were focused on the fact that the proposal was initially circulated by the US (Hirsh interview). This may have helped to avoid the tension that might have arisen from supporting a US proposal within some coalitions of members (Hirsh interview). Section 2 is important because it lays out a plan whereby members with different levels of development can work towards eventually abiding by the same rules (Wilson interview). The S&DT negotiations occupied a considerable amount of time and effort. However, considering the large initial reservations on the part of some members, the time was probably needed to dispel the doubts and concerns of many developing countries and to craft commitments and rules in this context (Malone interview).

Finally, the Agreement established the WTO Trade Facilitation Agreement Facility (TFAF), at the request of developing and LDC members. The main task of the TFAF is to secure resources for supporting the implementation of the TFA in the poorer member states of the WTO.

#### **4.6.2 Aftermath**

After concluding the TFA in Bali, ministers had called for a legal review of the agreement for rectifications of a purely formal character that did not affect the substance of the Agreement (WTO 2014). At a General Council meeting six months after the Bali Ministerial, India shocked the membership by stating that, «the TFA should be implemented only as part of a single undertaking including the permanent solution on food security». Without explaining the situation in too much detail, suffice to say that India would not sign the amended protocol without the promise of never to challenge India's food stockholding schemes in the DSB (ICTSD 2014). In other words, India vetoed the adoption of the TFA.

The matter that India wanted solved is a long-standing disagreement primarily between India and the US about the legality of India's food stockholding programmes. This led to intense negotiations between the two parties, and after four months, the disagreement was partly solved by extending the period indefinitely whereby no members can take India to the DSB over its stockholding programme. In November 2014, a year after the Bali Ministerial, members



adopted the amended protocol, and thus incorporated the TFA into the body of global trade regulations (WTO 2014b).

On 22 February 2017, a major milestone for the global trading system was reached. The first multilateral deal concluded in the 22-year history of the World Trade Organization entered into force when the WTO obtained the two-thirds ratification threshold from its 164 members needed to bring the TFA into force (WTO 2017). As of November 2018, 139 members have ratified the Amended Protocol, and thus signalled their acceptance of the incorporation of the TFA into global trade regulations (TFAF 2018).

## **4.7 Key actors and their positions**

Trying to delineate what members held what positions is difficult because the negotiations took so many years, and positions changed during that time. In addition, 29 new members acceded to the WTO from 1996 to 2013. For instance, heavyweights like China and Russia did not form part of the initial discussions, as they did not become members until 2001 and 2012, respectively. Although all members participated to some degree, Saeed (interview) estimates that 40-50 members were more active than the others in the negotiations.

### **4.7.1 The proponents**

On the supporting side of the TFA were all the developed members, and some developing members. These initiatives were initially led by the EU, but during the course of the negotiations, the US became an increasingly important driver in the negotiations. They wanted to ease the burden for their exporters, and the American logistics companies like UPS and DHL had large stakes in the TF negotiations succeeding (Fleischer interview). The US, in addition to tabling proposals, played a key role in formulating the S&DT provisions of the agreement, which was vital for the conclusion of the negotiations. As Fleischer recalls, they were very eager to reach an agreement, and because the TFA did not entail any important changes in their national customs regulation, they did not have to get the agreement passed in Congress (Fleischer interview). In addition to the EU and the US, all other developed members supported TF work in the WTO. Joining forces with the developed members were some developing

members (i.e. Colombia, Chile, Costa Rica, and Morocco). This was important because it helped reduce the polarization of a north-south divide, a point emphasized by Neufeld and Bizumuremyi (interviews). Together the proponents formed the Colorado Group in an effort to coordinate positions in the negotiations.

In addition to the proponents mentioned, China also played an important role after they acceded to the WTO in 2001. China was initially a member of the Core Group opposing TF negotiations, but left the group during the Cancun Ministerial (Priya 2007: 11). China has a special role in the WTO. They are classified as a developing member, but because they are the world's largest exporter, it was in their interest to push for the inclusion of TF in the WTO framework to make the customs process easier and cheaper for their exporters (Gao 2012: 63). Due to the size of their economy, many members also have issues with China making use of the S&DT provisions aimed at helping developing and least developed members. As Fleischer recalls, it was an implicit expectation that China would have to categorize most of the provisions of the TFA into Category A. It was important in the last stages of negotiations how China's categorization scheme would look like (Fleischer interview).

#### **4.7.2 The opponents**

Every member that opposed TF in the WTO were developing members. These efforts were either led by the Core Group, the African Group, or the LDC Group with India being the most vocal in its opposition. This is clear as India both required «explicit consensus» to launch TF-negotiations in Doha, and vetoed the amended protocol of the final agreement. In addition, both Pakistan and Brazil were very sceptical in the beginning (Neufeld interview). In the beginning, many developing members opposed TF work because they were not yet done implementing the agreements of the Uruguay Round, and were not ready to take on any new commitments. When members eventually agreed to launch a new trade round, the opposition to TF was more related to the fear that TF would be expensive to implement, but also the fear that TF measures would lead to a loss of revenue for the developing countries. The latter refers to the fact that customs revenue were a major source of income for the state in some developing countries<sup>17</sup>. Some of the opposition was not so much related to the substance of TF, but rather whether the WTO

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<sup>17</sup> In developed countries, revenue from customs only make up a small portion of the overall tax revenue for the state, while in the least developed countries, this portion was on average 45% of overall tax revenue (UNCTAD 2016: 12).

should develop legally binding commitments in this area, or whether it should still be the responsibility of national governments or other international organizations without enforcement mechanisms (WTO 2001b). It must also be kept in mind that the developing members would be the ones with the most amount of work to do to ensure compliance with the TFA. Taking a sceptical stance to the negotiations is thus quite logical. The change from opposition to support among some members is a key element in this thesis, and will be undertaken in chapter 5.

## **4.8 National and regional trade facilitation reforms**

In reviewing the Minutes from the negotiations, it is clear that while multilateral negotiations on trade facilitation reform were going on in Geneva, similar efforts were taking place at the national and regional level. At the time when negotiations on TF launched in Geneva, world trade was in the midst of massive changes. Globalisation of the supply chain had led to an immense increase in the volume of goods to be cleared through customs worldwide (Bolhöfer 2008: 31). Due to growing competition, companies were increasingly producing components and accessories in countries with the highest cost-effectiveness, often developing countries. Coupled with the growth in electronic commerce (e-commerce), this meant that customs needed to adapt (Bolhöfer 2008: 31). The realization that one needed to shift attention from the «software» of trade policy to the «hardware» of inter alia customs regulation, meant that the concept of trade facilitation was receiving unprecedented attention (Grainger 2008: 17). This led numerous countries and regions to start work on customs reform. In reviewing the literature on customs reform in developing countries it is clear that from the mid-1990s, many countries embarked on programmes to modernize their customs procedures. Wulf and Sokol (2004) study eight developing countries that embarked on customs reform in the 90s, while the World Bank noted a substantial increase in TF related assistance to developing countries during those same years (Finger & Wilson 2006: 17).

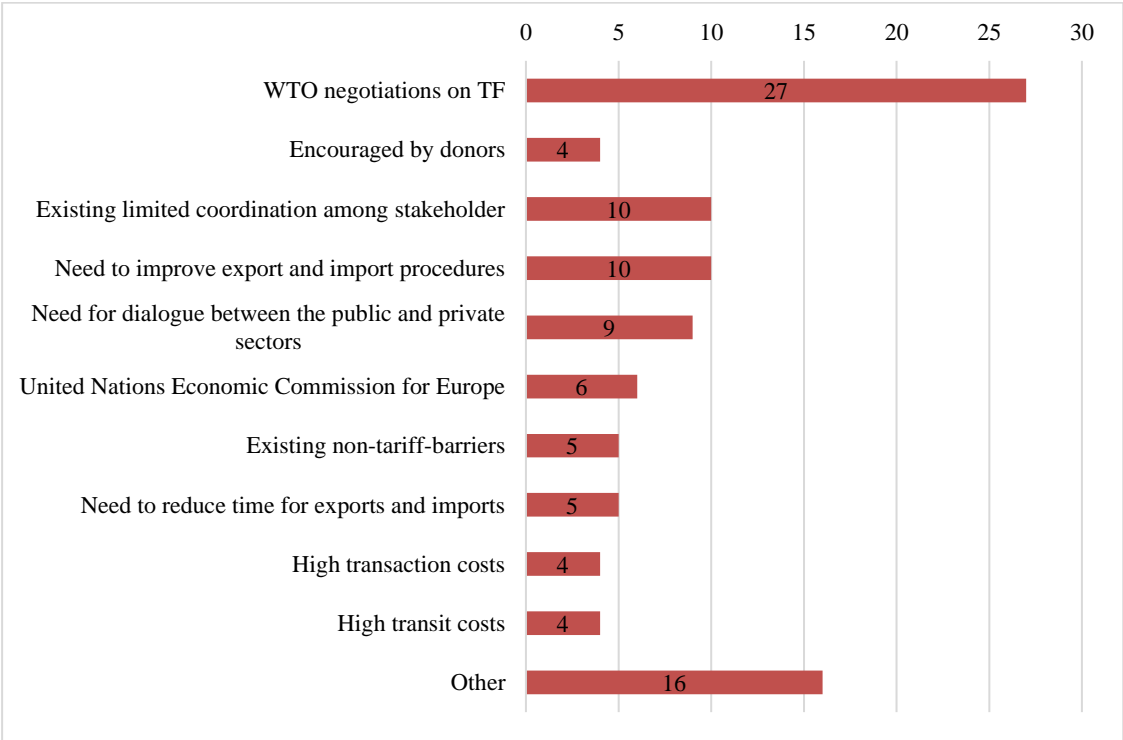
Those initial reforms were followed by a second wave of TF reforms across the world, with many regional initiatives taking the lead. Regional groupings such as Asia-Pacific Economic Cooperation (APEC), North-American Free Trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN), Southern Common Market (Mercosur), Southern African Development Community (SADC), East African Community (EAC) and the Gulf Cooperation Council (GCC) all embarked on programmes of customs modernization

(WTO 1998, Kafeero 2008: 70). Spending on TF specific projects increased from US\$101 million in 2000 to US\$391 million in 2006 (Grainger 2008: 17).

To analyse what effect the multilateral negotiations have had on national - and regional TF initiatives, we need indicators to measure TF efforts. As these efforts vary in scope and substance, we will use an institutional indicator that does not discriminate between types of trade facilitating efforts. One such indicator is to study the establishment of national trade facilitation bodies. In 2015, UNCTAD published a large study of the TF reforms 50 countries.

It is plausible to assume that these national and regional initiatives affected the WTO negotiations on TF, but it is equally plausible that the multilateral negotiations affected the national and regional efforts of customs reform (Zake 2011: 11, Kafeero 2008: 70, UNCTAD 2015: 25). In fact, in their study UNCTAD asked the countries what their main reasons were for establishing national TF bodies. The results can be seen in Figure 2.

Figure 2: Motivations for the establishment of trade facilitation bodies (Percentage)



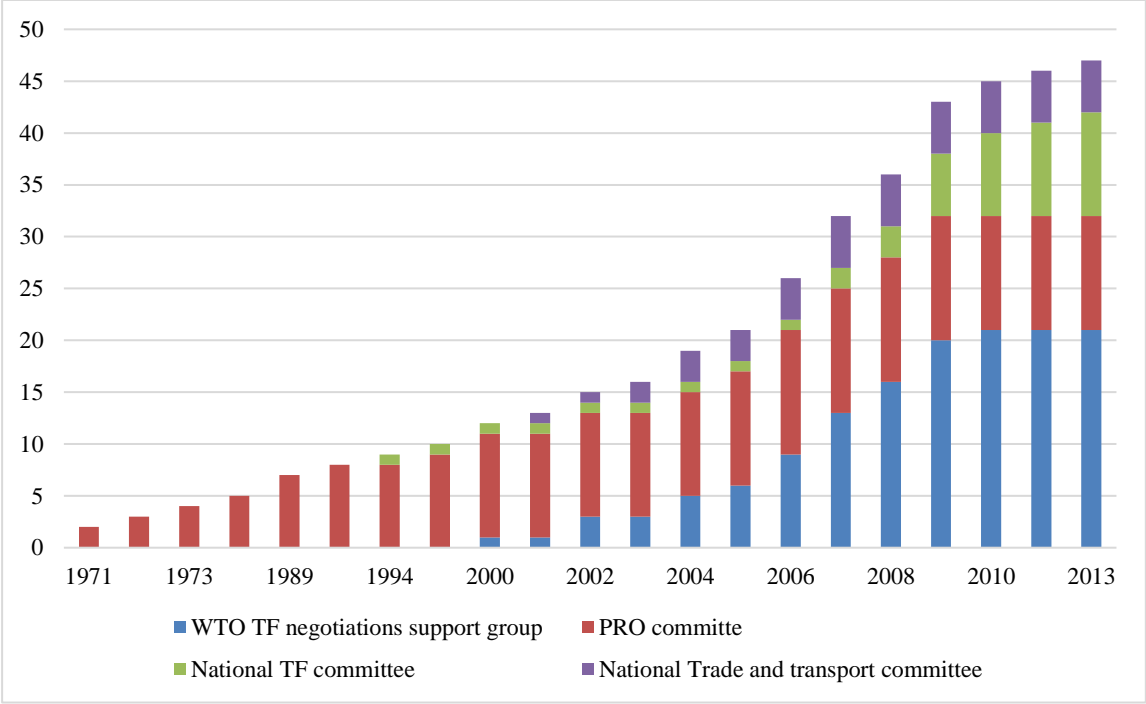
(UNCTAD 2015: 26)

As the figure shows, the main reason for establishing national trade facilitation bodies were the WTO negotiations on TF. Moreover, the report found that the main reasons for establishing such committees in developed countries were internally motivated, while the main reasons for

developing countries were externally motivated, namely by the WTO negotiations (UNCTAD 2015: 26). It is not clear how the WTO motivated such efforts, but it could mean either that they were inspired by the multilateral negotiations or that they wanted to catch up before a legally binding agreement entered into force. The TF bodies had three main goals: to facilitate trade by simplifying, standardizing or harmonizing trade procedures, to improve the country’s position in the TF negotiations, and to coordinate TF efforts (UNCTAD 2015: 29).

If the WTO was the main reason for establishing TF bodies, then the number of such bodies should mirror the developments of the negotiations. Figure 3 shows the number of existing trade facilitation bodies in the countries examined by UNCTAD.

Figure 3: Number of existing national TF bodies<sup>18</sup>



(UNCTAD 2015: 24)

The figure clearly shows a proliferation of national TF bodies during the course of the WTO negotiations. In fact, the growth was modest until 2004, from which the number of nationally established TF bodies increased dramatically. This can indicate that the negotiating mandate from the July Package of 2004 made TF reforms worldwide gain momentum, a finding also supported explicitly by the UNCTAD report (UNCTAD 2015: 25).

<sup>18</sup> For an explanation of the different types of trade facilitation bodies, see UNCTAD 2015: 27-28.

## 5 Analysis

The aim of this thesis is to explain *why the Trade Facilitation Agreement was adopted, and why it was adopted in its specific form*. The empirical enquiry was structured as a detailed narrative of the TF negotiating process. The empirical enquiry showed how members were initially divided in the discussions, and how members were eventually able to reach an agreement. This chapter seeks to identify the factors that led members to agree. The chapter starts by analysing the empirical material through the lenses of each of the theoretical perspectives presented in chapter 2. This approach was chosen to highlight the strengths and weaknesses of each perspective in accounting for the institutional change that is the TFA. Finally, the insights from each of the perspectives will be combined into a discussion of what the new institutionalisms can contribute with to our understanding of the trade facilitation negotiations and outcome. The goal is to assess what theoretical perspective has the greatest explanatory value, and to try to uncover the interaction between the different factors at play.

### 5.1 Rational Choice Institutionalism

As noted in chapter 2, RCI sees actors as rational. They enter into institutional arrangements because they believe it will be beneficial for them to do so. Although it is a rational act to enter into an institutional arrangement, once established, actors are constrained by the rules and regulations of that institution. Based on the theoretical assumptions of RCI we were left with the following expectations: the lack of harmonization in customs procedures could be described as a collective action dilemma that led to a sub-optimal situation of unpredictability and inefficiency in the world of trade. The TFA is an institution created by rational and equal actors to mediate those problems.

#### 5.1.1 The rationality of actors and preference formation

The relevant actors within the context of the WTO are national governments that make up the membership of the WTO. As has been shown, those relevant actors had differing preferences and positions when it came to the topic of TF entering the realm of the WTO, with the EU and

other developed countries being the main *demandeurs* for reaching a TF agreement. Opposing those efforts were many developing countries. According to RCI, those positions are rational positions to hold for those groups of members. In chapter two, rational actors were defined as «actors that has clear preferences, and always choose to perform the action with the optimal expected outcome for itself». In other words, the EU wanted the TFA because it was deemed as the optimal outcome for them, while India did not want the TFA because it was deemed a sub-optimal outcome for them. The EU is an institution with customs cooperation as part of its foundations. Both its experience in the implementation of such reforms, as well as its experience with the benefits accruing from those reforms, make it a rational position also to support customs reform and harmonization multilaterally. India, on the other hand, would have a long and costly road to customs modernization, and it would thus be rational for them to take a more sceptical stance to the TF discussions. So far, the positions of members do indeed appear to be rational.

However, in assessing the empirical material in chapter 4, this does not seem to account adequately for the change in position of some members. For instance, RCI fails to account for why members' positions changed rapidly when the negotiators in Geneva changed, a point highlighted by many of the interviewees (Neufeld, Fleischer, Bizumuremyi, Hirsh). If it is rational for Pakistan, for instance, to oppose TF based on national priorities, then a change in delegates should not affect their official positions. Yet this did happen at various occasions. There are in fact two possible explanations as to why members changed their positions and eventually joined consensus on the TFA. One option is that the basis for an agreement, the negotiating text, changed. If, for instance, the cost of implementing the TFA were the main concern, then the allocation of funds from developed countries would mediate that concern. This might change a member's position from scepticism to support, as this could mean the benefit of customs reform without the cost of implementation. Another option is that developments outside the WTO led to a change in position. If members changed their positions because they had undergone customs reform, then this could be a very rational move. These two options would still meet the definition of the rationality of actors as defined by RCI, but it would nonetheless create some problems for RCI scholars.

Both of these options mean that preferences are not fixed, and there is no Chinese wall between the institution and the preference formation of the actors involved. In other words, preference formation is not entirely exogenous to the institution. Although there are some revisions of the RCI perspective that seek to account for how preferences are formulated (See Dietrich & List

2012: 2), the standard version of RCI, generally posit that preferences are fixed. This is obviously not supported by the case of TFA, where numerous actors changed their position during negotiations. However, to say that RCI has no explanatory value here is somewhat unfair. RCI rests on the assumption that actors arrive at their positions based on an analysis of *fully specified outcomes* (Dietrich & List 2012: 2). When discussions started on TF in the 1990s, the available options for actors were far from being fully specified. Some RCI scholars see institutional change as quite easy; all one needs to do is to change the incentives (e.g. the pay-off matrix of the game) and behaviour will almost immediately change (Peters 1999: 6).

However, there are still some problems related to the assumptions about preference formation within the RCI perspective. Despite actors' preferences being of huge importance for RCI, there is really no explanation for how those preferences are formulated. They merely assume that those preferences are formulated exogenously to the institution, and see those preferences as an inexplicable feature of the agents' personal identity (Praça 2009: 2). In assuming that preferences are exogenous to the institution, they exclude the option of institutions affecting actor's positions. It seems quite clear that the TF negotiating dynamic did in fact affect the positions of some members. As actors changed their positions after undergoing reforms, and those reforms were directly motivated by the WTO negotiations, then this is a clear example of how an institutional arrangement (the WTO), affected national preferences for the TFA.

### **5.1.2 The relative power of actors**

The standard version of the RCI perspective is quite «voluntarist», meaning that they tend to view institutional arrangements as a quasi-contractual process marked by voluntary agreement among relatively equal and independent actors (Hall & Taylor 1996: 952). To qualitatively assess whether this assumption holds true, we must try to identify the power structures among the members. The power structures of the WTO in general and the TF negotiations in particular, is quite interesting. Decision-making in the WTO works by the principle of one member - one vote. This is actually not a hard rule in WTO law, as the only requirement is that «The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision» (WTO n.d.- e). There is however, a strong practice to follow the consensus principle. There has been some talk in and outside the WTO that the consensus



principle makes the WTO weak because it is difficult to reach consensus and thereby results. During the GATT years, it was important for developing countries that decisions be taken by consensus because the majority of the members were developed countries. Now, however, the situation is very different. Today, two thirds of the members are developing country members (Rena 2012: 80). Now it is the developed members that need the consensus principle to continue. In fact, ending the practice of consensus has been called the «nuclear option», as this would likely result in the withdrawal of the US from the WTO (Fleischer interview).

In the TF negotiations, the need for consensus played both a direct and indirect role. It played a direct role during the Doha and Cancun Ministerials, because India had included the language of «explicit consensus». More importantly, it played an indirect role during the negotiating process, because no decision could be reached without it. This meant that the proponents of TF had to give concessions for the opposing members to become supportive. In the WTO, one rarely talk about consensus, but there is a constant awareness that every member possesses a veto. It can be very useful to meet at a pizzeria to negotiate in a friendly manner, but whatever progress is made there will have to be brought back to the full membership. Thus, in the TF negotiations, consensus did afford all members an equal say in the adoption of the agreement.

However, the scholarship on negotiations in the WTO is littered with examples of the power use by the big member states, as noted in Chapter 1. Was the consensus principle in reality a smokescreen covering up the informal power use by the EU and US, in line with Steinberg's (2002) conclusions? Remembering Elsig's (2006) taxonomy of power, we should then be able to identify imbalances in the structural, procedural and ideational power held by members. The big developed members have been harshly accused of exploiting all three forms of power to obtain their goals in the larger DDA negotiations.. This analysis is not able to uncover instances where the big member states used their market size to pressure smaller members into acceptance, as have been found in other negotiations (ActionAid 2006: 3). When it came to positional strength, the developing members had the upper hand, as they could convincingly walk away from negotiations. Because the developed members were the ones pushing for TF, the developing members had structural power through their positional strength and their no-deal BATNA.

Procedural power refers to the bargaining skills of actors, and the success of the tactics they employ. This type of power has long played an important role in the GATT/WTO system, to the detriment of developing countries. This is partly due to the high barriers of participating

in deliberations (e.g. legal expertise, sufficient staff to follow all negotiations, analytical capacities etc.) (Elsig 2006: 12). An example of the procedural power used in the negotiations is the agenda-setting power of the big developed members (Bizumyremi interview). The WTO agenda-setting process has three overlapping stages: (1) carefully advancing initiatives that broadly conceptualize a new area of regulation; (2) drafting and fine-tuning proposals (namely, legal texts) that specify rules, principles, and procedures; and (3) developing a package of proposals into a «final act» for approval upon closing the round (Steinberg 2002: 354). The first two steps are an accurate description of how the EU proceeded in the TF negotiations. In 1996, the EU developed a broad concept paper on TF, and in the years that followed, they refined their proposals. However, during those same years, the power structure of the WTO had somewhat shifted, and the developing members were increasingly important. Not only did they achieve positional strength through their no-deal BATNA, they successfully counteracted the structural and procedural power held by the developed members by forming alliances. As the empirical enquiry shows, both developed and developing members formed alliances. The developing members gained more diplomatic clout (through the size and importance of a coalition) and acquired expertise through knowledge and resource sharing (Elsig 2006: 26). Although used by all members, the developing members arguably gained the most, given their weak individual positions. Thus, the EU were not able to «develop a package for approval» as a step three in the agenda-setting process. Instead, the July Package was adopted, representing a clear compromise between the developed and the developing members.

Ideational power is the most difficult form of indirect power use to detect. However, as noted in the empirical enquiry, an important feature of the July Package was the strong focus on the development aspect of TF, and the development needs of developing and LDC members. This could be seen as ideational power through framing. However, it is more difficult to assess if this was an attempt by the US and EC to «cover up» their true interest in TF, or a victory for developing members in highlighting their legitimate development needs. Elsig (2006) concludes that the development framing of the DDA has not been a success for the developing members. However, the empirical enquiry in this thesis shows that the development focus on TF in the July Package, has been an advantage to the developing members. This is also supported by Saeed (interview), in saying that «developing countries were very successful in negotiating the TFA as they were able to translate the July framework mandate in the legal language of the TFA which would suit their development needs».

In sum, we can say that the consensus principle played an important role in the negotiations, and through the conscious use of this rule by the developing members, the consensus principle did afford all members an equal say in the adoption of the agreement. Nonetheless, as numerous studies have pointed out, the informal sources of power is what really determine the outcome of negotiations. However, this notion only holds true for the very first years of discussing TF, and does not hold true for the TF negotiations at large. The analysis find that the developed members, through their agenda-setting power initially had the upper hand, but that developing members through positional strength and alliance-formation successfully counteracted the imbalance in procedural power. Furthermore, the development focus that was introduced in Doha and solidified in the July Package was an advantage to the developing members. Thus, the RCI expectation that members enter into agreements willingly and equally does hold true in analysing the power-structures in the negotiations.

### **5.1.3 The behaviour of actors**

RCI assumes that actors will behave in a strategic and calculating manner to obtain their desired goals. In chapter 2, this was operationalized as being any identifiable negotiating tactics aimed at reaching the actor's desired goals. In studying the negotiating process, it soon became clear that actors did indeed employ negotiating tactics to reach their goals. If one looks closely, an array of different approaches to the negotiations can be identified. They varied from procedural power tactics like individual negotiators pretending to have instructions from his/her government when no such instructions exist, or hiding behind issues with legal provisions when the issues really are political, to the ideational power tactic of issue framing.

However, in assessing the empirical material, two examples of negotiating tactics stand out. The first is the formation of alliances and informal groupings in the negotiations. In the beginning, there were no issue-specific coalitions regarding TF, but soon the Core- and Colorado Groups were formed. This was especially important for the developing countries during a time where developed countries held the most power. In fact, Amrita Narlikar has called such informal groups an «instrument of bargaining power for the weak» (Narlikar 2003). These groups work towards their common goals in different ways. Their members can help each other in negotiations; they can circulate common proposals, and, crucially, become more noticeable and relevant by joining forces. There were many informal groupings in the negotiations, and in fact, the WTO has a publicly available overview of many of those

groupings (WTO n.d.- d). The formation of alliances helped counteract the structural power of the EU and US by increasing the relevance of the group through increased market size and political clout, and helped counteract the procedural power held by the EU and US by reducing the information gap by pooling resources.

A second example of negotiating tactics employed is the issue-linkage that affected the TF negotiations at various times. In this context, issue-linkage means what Maggi (2016: 2) calls «negotiation linkage», where agreements in areas A and B are negotiated jointly, as opposed to separate bargains. It is here important to note that this cannot be considered as «horse-trading» in the context of the TF negotiations, because the single undertaking of the Doha Development Agenda was essentially a formal issue-linkage between areas. In fact, Maggi (2016: 19) finds that formal issue-linkage in negotiations can be positive for the negotiations. For example, if a game is essentially zero sum, there is no basis for cooperation, only rivalry. However, if two zero sum games are linked, it becomes possible to trade losses in one game for wins in the other (Duchesne 2005: 19).

However, in the WTO, issue-linkage is often discussed in a more negative tone, and is often used as a synonym to «hostage taking». In this context, issue-linkage means withholding consensus in one area, to achieve results in other areas, and can be seen as «strategic opposition». Although legitimate mentions of the single undertaking cannot be understood as «strategic and calculating» behaviour, there are other examples that might fit the description. One such example is the Indian refusal to adopt the amended protocol to achieve a permanent solution on public stockholding. When an actor uses its veto in one area to obtain a desired goal in another area, this is an example of «strategic and calculating» behaviour employed to obtain a desired end.

During the first years of negotiations, TF was negotiated as part of the DDA. However, from 2008, the DDA was essentially dead, and from 2011, members agreed to take out TF from the single undertaking, and conclude the negotiations on their own merits. One possible explanation for the shift from opposition to support for the TFA among some developing members is thus that when they gave up on achieving results in other areas of the DDA, they would rather have the TFA than nothing at all.

### **5.1.4 Conclusion of the Rational Choice Institutional analysis**

The main proponents for TF, the EU and the US, viewed the non-harmonized customs systems of the world as a sub-optimal situation, and regarded a legally binding TF agreement as the desired solution. The developing members opposed TF because they felt a legally binding agreement would be sub-optimal solution. Based on the difference in national context, it was rational both to support and oppose TF. The consensus principle afforded all members with formally equal powers. The analysis of informal power use concludes that the developing members secured a balance of power through their positional strength, alliance formation, and development framing of the negotiations. The analysis further finds that the actors behaved strategically and calculating to achieve their individual desired goals, but what was deemed desirable by some actors changed during the course of the negotiations, because of both concessions being made, but also more unexpected reasons like a change in delegates in Geneva. This points to one of the major shortcomings of the RCI perspective, namely the assumption that actors are unified entities with clear preferences (Saurugger 2014: 89). The fact that a country position changed when trade diplomats were swapped for customs officials is an indication that states are in fact made up of different institutions with different preferences. Moreover, the analysis does not find that RCI can offer an explanation for one of the most fundamental puzzles of the TF negotiations, namely why members changed their minds. Thus, RCI has strong explanatory value in predicting that the actors would be rational, behave strategically and calculating, and be on equal footing in the negotiations. It does not, however, offer a satisfactory explanation for why some members went from opposing to supporting TF.

## **5.2 Historical Institutionalism**

HI rests on the assumption that institutions develop in a path-dependent manner, where positive feedback-mechanisms reinforce the existing path. We formulated the following expectations: The initial decision was made by actors influential at this point in time. We assumed that this decision triggered positive feedback effects, and that those feedback effects caused path-dependence. Further, path-dependence eventually led to the adoption of the TF agreement in its specific form. In addition to these expectations, we assumed that larger developments in the world would affect the process of institutional change.

### **5.2.1 Path of non-harmonized customs regulation**

The decades before the 2000s were characterized by a plethora of different customs systems, serving numerous different objectives, including revenue collection; safety and security; environment and health; consumer protection; and trade policy. Although the WCO had promoted customs cooperation since 1952, in reality, there were no multilateral efforts to collectively modernize customs procedures. An important aspect of the era of non-harmonized systems was the different role that customs played in developed and developing countries. This can be seen in the amount of revenue collected by customs. In developed countries, revenue from customs make up only a small portion of the overall tax revenue for the state, while in the LDCs, this portion was 45% of overall tax revenue (UNCTAD 2016: 12). This made customs reform a highly sensitive issue for many developing countries and LDCs. The decades up to the new millennium was one of path-dependent non-harmonization. Because there were vast economic interests at stake and a costly road to customs reform, as well as no legally binding frameworks for customs harmonization, many actors had vested interests in preserving the existing path of non-harmonization. This interest clearly impacted the negotiations, as the vested interests of developing members in the WTO prevented the developed members from concluding the TF negotiations at a much earlier stage.

### **5.2.2 Influential actors**

While the developing members had an interest in preserving the path of non-harmonized customs procedures, the developed members took a different stance in the negotiations. For the EU and the US, increased harmonization was desired because this would lead to more efficient customs procedures, and thus to increased revenues for their exporters. Only two years after the Uruguay Round ended, the EU started work on TF, but the opposition of some members was strong. However, right before the Singapore Ministerial Conference came to a close, a small group of members were selected to hold informal discussions on a draft Ministerial declaration, in which the new issues were included (Khor 2007: 3). The declaration, stemming from the exclusive, green room meeting was controversial because a majority of members were left out. Still, members agreed on a Ministerial Declaration, and members got a limited mandated to continue work on TF. In line with the RCI analysis, this tells us that although the limited mandate was adopted by consensus, in reality a few members held more procedural power than

others did in the early years of discussing TF. The EU and the US took full advantage of the limited mandate and worked towards obtaining a full negotiating mandate.

However, before they achieved this goal, a second limited mandate was given in Doha in 2001. Around this time, the power dynamics within the WTO had somewhat shifted, as developing members were now coordinating their interests effectively for the first time, thus counteracting the procedural power held by developed members. This can be seen in the difference in focus between the Uruguay round and the Doha round. The Doha round was dubbed the Doha *Development Agenda*, as the developing members would not agree to new negotiations unless development was at the centre of all negotiating areas (Gallagher 2008: 62, Elsig 2006: 19). In Doha, India and other developing members were able to withhold a full negotiating mandate on TF, awaiting the «explicit consensus» to be given by members in Cancun in 2003. When the Cancun Ministerial came, they were again able to withhold the mandate, as members did not give explicit consensus. This was resolved the year later when members adopted the July Package. The most influential actors within the WTO in early years were the EU and US, as they had been throughout the history of the GATT, but increasingly in competition with large developing countries such as India, China and Brazil. The July Package represents this change in power-dynamic, as the EU and US got their full negotiating mandate, but the developing members placed development at the heart of any TF initiatives.

### **5.2.3 The July Package: A Critical Juncture**

In chapter 2, critical junctures were defined as «situations of uncertainty in which decisions of important actors are causally decisive for the selection of one path of institutional development over other possible paths». Furthermore, critical junctures can be identified by tracing the origins of different feedback mechanisms. If a critical juncture has taken place, new feedback mechanisms will have arisen. In this sub-chapter I will argue that the adoption of the July package constitutes a critical juncture in the TF negotiations. For that to be the case, the preconditions of uncertainty and actor agency will have to be met. In addition, new positive feedback mechanisms will have to be identified.

The DDA was set to be concluded by 2005. However, members were acutely aware that sufficient progress was not being made in many negotiating areas. In 2003, the Cancun Ministerial had collapsed over disagreements on the Singapore issues, and as no «explicit

consensus» was expressed, members essentially had no mandate to discuss TF. Thus, in 2004 members found themselves in a period of institutional uncertainty.

As noted, the EU, US, India and China were now the most influential actors. Between the Cancun ministerial and the adoption of the July Package, informal meetings and consultations were held about what to do with the Singapore issues. What we know about the negotiations at this time is that the EU suggested to drop two of the Singapore issues, and launch negotiations on government procurement and trade facilitation in return. China, India and 14 other developing countries suggested also dropping government procurement. The result was that TF was included in the Doha Work Programme, while the other three were dropped, in line with the proposal from the Core Group. The EU and the US were the main demandeurs for TF in 2004, and in a compromise with India, China and other developing members, a full negotiating mandate on TF was obtained, where development took centre stage. It is thus possible to say that influential actors made a decision in a time marked by institutional uncertainty. This is, however, not enough to say that a critical juncture has taken place. Developments have to be set on a new path in order for a «critical phase» to constitute a critical juncture.

#### **5.2.4 Positive feedback effects**

A critical juncture affects later developments through positive feedback mechanisms. In chapter 2, positive feedback effects were grouped into two categories: coordination effects and distributional effects. This sub-chapter will show that the July package affected both the relative power of actors and how actors adapted to the negotiations.

##### **Distributional effect: towards a balance of power**

Institutions reflect and reinforce the patterns of power among the actors in a given institution (Thelen 1999: 394). These effects are called distributional effects, and concern the relative power of actors. When the July Package was adopted, members essentially agreed on the modalities, or the «blueprint» for the negotiations. This meant that members could only negotiate matters included in the Package, and that all elements of the Package should be reflected in the Agreement. As noted, the July Package represents a clear compromise between



the developed and the developing members, as the developed members obtained a full negotiating mandate, but the developing members managed to place development at the heart of the negotiations. This affected the relative powers of the actors involved because for the first time the interests of developing members took centre stage at the WTO. As shown in the empirical enquiry, the negotiations on S&DT were of major importance to the negotiations, and the process both stalled and progressed in parallel with the S&DT negotiations. The July Package gave developing members a new negotiating card, as no agreement could be reached without agreement on the very ambitious S&DT modalities of the July Package. Thus, the developing members managed to place a development frame around the TF negotiations.

Because the TFA constitutes an institutional change, and because this happened incrementally without exogenous shocks, there must be dynamic element in the nature of the institution that allows for change. Following Mahoney and Thelen (2010), this element is the power-asymmetries stemming from the distributional effects of the institution. As players with different resources want different types of institutions, the institutions created often reflect the relative power of different actors. Because institutions can maintain and strengthen power-asymmetries among actors, institutions can be seen as «enduring legacies of political struggles» (Thelen 1999: 388), an assumption that holds true in analysing the TF negotiations. The developed members got their TF Agreement, and the developing members got an agreement with the most innovative and ambitious S&DT provisions in WTO history.

### **Coordination effects: Actor adaptation**

Coordination effects mean that actors will adapt their strategies in ways that reinforce the «logic» of the system (Thelen 1999: 392). When actors adapt their strategies to institutional incentives, this adaptation will encourage further adaptation, as actors have vested interests in the survival of the institution (Thelen 1999: 393). I argue that the July Package changed the logic of the system, and thus the strategies employed by actors to obtain their desired goals.

In studying the role of the July Package for the eventual adoption of the TFA agreement, it is natural to look at similarities between the Agreement and the July modalities. When work on TF first started, the Secretariat of the WTO highlighted the Articles of the GATT relevant to TF. These were identified as Article V, VII, VIII, IX and X (see page 34). In the July Package, it was agreed that the basis for the TFA would only be Articles V, VIII and X of the GATT. The final agreement contains 12 Articles, where articles 1-5 expand on GATT Article X, and

articles 6-12 expand on GATT Articles V and VIII (International Trade Centre 2013: 9-12). Thus, the negotiating modalities set out in the July Package limited the scope of the TF negotiations, by limiting which Articles were to be reviewed. Similarly, Section 2 of the TFA, dealing with SDT for developing members, bares strong resemblance to the July Package. This was the first time members agreed that the extent and the timing of entering into commitments should be related to the implementation capacities of developing and least-developed members. From July 2004, every proposal had to relate to the three Articles, and had to take into full account the link between implementation and capacity for developing members. Thus, by agreeing on the modalities for the negotiations, members limited the available options on the menu for the actors involved.

As has been pointed out many times, the developed countries were positive to TF from the very beginning, while developing members continued to voice concerns about TF also after adoption of the July Package. What is thus interesting to study is what happened that made opposing members support the TFA in the end. As the empirical enquiry shows, around 2004, there were rapid growth in the number of TF bodies across the world. As shown, the main task of these bodies were to facilitate trade by simplifying, standardizing and harmonizing procedures. In developing countries, the main reason for establishing such institutions was the TF negotiations in the WTO. In achieving a full negotiating mandate, it seems as though the members of the WTO thought a TF agreement was now a more likely outcome than before the July Package. This spurred a rapid increase in TF bodies that constitutes a clear example of how actors adapted to the changed negotiating environment.

### **5.2.5 Path dependence: path of harmonization**

It follows from the theoretical assumptions of HI that the positive feedback effects will reinforce the institutional development through path dependence. By affording the *demandeurs* for TF a full negotiating mandate, members removed the main obstacle standing between the developed members and their goal of a TF Agreement. At the same time, the July Package afforded the developing members a larger role, as their needs and priorities would take centre stage. This power distributional effect of the July Package was path dependent as these patterns persisted from 2004 until the adoption of the TFA in 2013. Furthermore, the July package limited the scope of the negotiations. This can be seen as formalized path dependence, whereby the July Package demands that proposals shall be limited to three of the GATT Articles, and take into

account the implementation capacities of developing members. In studying the final agreement, it is clear that the 12 Articles contained in the TFA all relates to the three GATT Articles included in the July Package.

The July Package also made it far more likely to negotiators that an agreement would result from the negotiations, which spurred countries to adapt to the provisions of a possible agreement. The new bodies established likely affected the negotiations in a least two ways: By reforming customs procedures so that that gap between existing procedures and a possible TF agreement would not be as significant, and by creating new institutions with vested interests in the success of the negotiations. A key role of TF bodies around the world is to «implement trade facilitation measures of the World Trade Organization Agreement on Trade Facilitation» (UNCTAD 2015: 31). This shows that while the main task of the bodies initially were to negotiate and coordinate TF negotiations, those same bodies were later tasked with implementing the TFA. As HI predicts, when actors adapt to an institutional arrangement, actors will develop vested interests in the continuation of those arrangements. These examples of actor adaptation to a changing institutional arrangement (post July package), created a path dependent negotiating dynamic, a path of harmonization in customs procedures. This path dependent development increased the likelihood of reaching an agreement.

### **5.2.6 Contextual change**

As path-dependence does not occur in a vacuum, it is important to place the institution of interest in a contextual setting (Thelen 1999: 396). This is important because crisis, reform or change in the institutional context can affect the feedback mechanisms within an institution and thus force actors to re-evaluate their positions in light of the contextual change.

In reviewing the available documentation and conducting interviews on the TF negotiations, it is apparent that contextual factors played an important role throughout. The optimism and global prosperity following the fall of the Berlin Wall, the technological developments made, and the inclusion of new states to the EU were important factors when the EU decided to start work on TF in the WTO. The terrorist attacks of 9/11 2001 played a role in securing the Doha mandate as calls were made to unite multilaterally and safeguard the liberal principles associated with free trade. The changing dynamic of world trade and technologies also put pressures on customs worldwide to modernize and adapt, at the same time as major developing countries such as China and India were included in the world economy and played

an ever more important role. All of these aspects are likely to have affected how actors rated their options. Today, the world is different in many respects. Multilateralism and globalization is again under criticism, and developing countries are demanding more attention be placed on development. In addition, the biggest supporter of free trade historically has chosen a new path, as the US threatens to leave the WTO. As both Neufeld and Fleischer (interviews) state, it is far from certain that a TF agreement could be reached in today's negotiating climate.

### **5.2.7 Conclusion of the historical institutionalist analysis**

The July Package of 2004 constitutes a critical juncture in the history of the TF negotiations. This Package represents a compromise between the most influential actors among the developed and developing members. The July Package affected the relative powers of the actors as the developing members were afforded a more important role in the negotiations through the development framing of the Package. It also affected the «logic of the system» by increasing the likelihood that an agreement would be adopted. This led members to initiate national and regional trade facilitation reforms. This affected the negotiations by reducing the gap between existing regulations and an agreement, and by creating new institutions with vested interest in the success of the negotiations. These feedback mechanisms led to a path dependent development in the negotiations, which eventually led to the adoption of the TF Agreement. Trade rounds often start with large packages, supposedly allowing developing countries to insert issues on an agenda at the launch more easily than they can force an agreement at the end. The fate of the Singapore issues in the July Package shows that the same is now true for rich countries (Wolfe 2009: 845).

## **5.3 Sociological Institutionalism**

The main task of the sociological institutional perspective was to explain the specific form and content of the TF agreement, as SI concerns itself with explaining the origin and spread of institutional arrangements. Based on the assumptions of SI, we were left with the following expectations: The Trade Facilitation Agreement was adopted in its specific form because this was regarded legitimate, and the shape and content of the agreement imitate theorized practices

found within the organizational field that the WTO regard itself as a member of. Furthermore, adoption of theorized practices is more likely to occur in situations of institutional uncertainty.

### **5.3.1 Annex-D organizations: The organizational field**

An institution strives to adapt to that which constitutes the appropriate within a broader organizational field. An organizational fields can develop «around central disputes and issues». In this respect, «a field is formed around issues that become important to the interests and goals of a specific group of organizations» (Scott 2008: 184-5). When analysing the definition of organizational field in light of the empirical enquiry, it is clear that the WTO did in fact look within its organizational field for inspiration in the TF negotiations. Not only were members inspired by the work of other organizations on the TF subject, they in a way formalized this organizational field in the July package. Members decided that the IMF, OECD, UNCTAD, World Bank and WCO would be invited to attend the meetings of the NGTF to ensure policy coherence. These organizations have later been dubbed the «Annex D organizations», giving due account to special relationship between the WTO and these organizations on the topic of TF. These organizations had long worked on trade facilitating measures, through either supporting such initiatives economically (IMF, UNCTAD, World Bank), developing TF indicators (OECD) or developing the actual «blueprints» for such measures (WCO). It was the WTO that was the «new kid on the block» regarding TF. However, the WTO had the enforcement mechanism of the DSB that was lacking in the organizational field at large. Blurring organizational boundaries is not new. In fact SI scholars have found that vital flows – resources, production, systems, knowledge- transcend formal boundaries, and forces a reconsideration of who are «inside» vs. «outside». On the macro level, organizations enter into cooperation, and «competitive ties are replaced with cooperative patterns» (Scott 2003: 887). From the perspective of sociological institutionalists, the «frames of meaning» guiding individual behaviour within institutions arise from concerns for legitimacy. What constitutes the appropriate is what enhances the legitimacy of an organization within the organizational field (Hall & Taylor 1996: 947). Having established what constitutes the organizational field, an analysis of the legitimacy of the TFA can be carried out and the carriers through which institutional arrangements travelled can be identified.

### **5.3.2 Diffusion and Carriers of Institutional Practices**

Analysing the legitimacy of the TFA within the organizational field, requires an analysis of how that practice «travelled» within the field. In chapter 2, we identified three different types of «vehicles» or carriers of institutional practices, symbolic systems, relational systems and routines.

#### **Symbolic systems**

Symbolic systems emphasize the interpretation, or the «theorization» of a practice. This means that actors will emphasize certain elements of a practice at the expense of others. We can say that the TFA travelled by symbolic systems if the TFA constitutes a theorized version of a practice found elsewhere in the organizational field. We thus need to assess the origin of Section 1 and 2 of the TFA. A logical point of departure is to study the Revised Kyoto Convention (RKC) of the WCO from 2008. As noted in chapter 4, this was the only convention for customs harmonization globally, prior to the TFA. In studying the RKC and TFA in parallel, it is clear that all provisions of the TFA were covered by the RKC. Due to the scope of the two agreements, including all the sub-provisions, a detailed analysis will not be presented here (For full review, see Wolfgang & Kafeero 2014). However, a few examples will be presented.

Article 1 of the TFA concerns publication and availability of information. In figure 4, the origin of a practice, as well as the theorized version and the final copy is presented.

Figure 4: Process of imitation

<b>Practice (RKC)</b>	<b>Theorized practice</b>	<b>Copy (TFA)</b>
<p><b>9.1</b> The Customs shall ensure that all relevant information of general application pertaining to Customs law is readily available to any interested person.</p>	<p>Secure easily available information on all customs-relevant information.</p>	<p><b>1.1</b> Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them:</p>
<p><b>9.3</b> The Customs shall use information technology to enhance the provision of information.</p>	<p>Use technology to make all relevant information easily accessible</p>	<p><b>2.1</b> Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:</p>
<p><b>9.4</b> At the request of the interested person, the Customs shall provide, as quickly and as accurately as possible, information relating to the specific matters raised by the interested person and pertaining to Customs law</p>	<p>Establish enquiry systems to answer questions accurately and timely</p>	<p>Each Member shall, within its available resources, establish or maintain one or more enquiry points to answer reasonable enquiries of governments, traders, and other interested parties on matters covered by paragraph 1.1 and to provide the required forms and documents referred to in subparagraph 1.1(a). The enquiry points shall answer enquiries and provide the forms and documents within a reasonable time period set by each Member, which may vary depending on the nature or complexity of the request.</p>

The figure shows that the essence of Article 1 of the TFA is covered by the 2008 RKC. By theorizing a practice, certain elements have been emphasised at the expense of others. For instance, Article 9.4 of the RKC states that Customs are obliged to provide any relevant information upon the request of an interested person. The essence, or theorization, of this principle is that information must be made readily available upon the request of an interested person. The copy of this practice is that all members of the WTO shall establish enquiry points to answer questions and provide information. SI posit that institutions will imitate practices that are deemed legitimate within the organizational field. Why some institutional arrangements are

deemed appropriate and legitimate, while others are not has to do with the origin of the practices, and the sources of cultural authority. Because the WCO was the world's foremost experts on customs harmonization, it is likely that the WCO would be perceived as an authority on the topic, and thus constitute a source of legitimacy that the WTO would want to imitate.

An interesting aspect relates to relationship between international bodies, for instance how the WCO perceived and assessed the WTO's involvement in TF. While being the leading organisation on TF and customs administrations, suddenly the WTO took centre stage in the discussions and negotiations on draft commitments in the TF field (Malone interview). This is something that the theoretical framework accounts for, as the source of an institutional practice did not necessarily wish for others to imitate their practice (DiMaggio & Powell 1983: 151).

In analysing the similarities and differences between the TFA and the RKC, it looks as though the TFA essentially adds political and legal value to the already existing provisions of the RKC. However, the South Centre, in a preliminary study, found that while the TF provisions relate to the RKC, the TFA introduces a «stronger, broader and/or more legally binding commitments» (South Centre 2013: 1). SI accounts for this, because as practices travel, innovation can be introduced because practices are 'translated' to a new context (Christensen et al. 2004: 85). Thus, there is no contradiction between imitation and innovation.

When it comes to Section 2 of the agreement, there is no clear imitation of existing practices. In fact, the S&DT chapter of the agreement is widely considered to be case of institutional innovation. None of the interviewees had a clear recollection of how the idea of having three categories of commitments came to be. In reviewing the documents from the negotiations, it seems as though the idea developed gradually. The recognition that the S&DT principles of the TFA should extend beyond the granting of traditional transition periods and that implementation should be linked to capacity can be found in the July Package. Further refinements of this principle came through proposals from both the Core and Colorado Group (see page 45). It thus seems seem as though Section 2 is in fact a case of institutional innovation, developed gradually by members during the course of the negotiations, and eventually formed a «lovely soup» of proposals (Wilson interview). The innovation of section 2 thus stands in sharp contrast to the imitated WCO practices of Section 1.



## **Relational systems**

Having established that Section 1 of the TFA largely contains imitated practices from the RKC of the WCO, and that Section 2 of the TFA is a case of institutional innovation, we can examine the ways in which the symbolic systems travelled. In Chapter 2, Relational systems were defined as instances where practices are diffused via social relations. This can be relations among «individuals, groups, and organizations» (Scott 2008: 142).

As noted in Chapter 4, the WCO and the other Annex D-organizations of the July Package were given a prominent position in the TF negotiations. This meant that the Annex D-organizations were invited to attend all the meetings of the Negotiating Group. In reviewing the Minutes, Proposals, Background Documents and Communications from the negotiations, it is clear that the WCO and other organizations participated actively in the negotiations. This arguably facilitated an understanding of similarity, in that the different organizations «were in it together» in trying to find the best solutions for TF within the WTO. Considering the similarities between the TFA and RKC, and the formalized and frequent interactions of the WTO and WCO, we can say that Section 1 of the TFA is a result of theorized practices transported by relational systems from the WCO to the WTO.

The relational systems would likely be even stronger among the individual delegates to the WTO. As these individuals attended meetings together daily in the WTO and met even more frequently in informal settings, the relational ties would be strong. Although Section 2 seems to be a case of institutional innovation, such relational ties would likely affect the negotiations by increasing the feeling of solidarity among delegates.

## **Routines**

A third type of institutional carrier are *routines*. Routines can come in the form of standard operating procedures within an organization, and in the form of «institutional scripts» guiding the actions of the actors involved (Scott 2001: 77). One such routine within the TF negotiations is the iterative and ritualized process through which members convey their positions and arguments. Through this iterative process, ideas become institutionalized. For instance, the ideas that TF is «win-win for all members» or that there are «big development benefits from TF», are messages conveyed so many times during the negotiations that it is almost impossible to detect when and where the ideas first emerged. As noted in Chapter 4, the informal negotiating sessions was where the most substantive progress was made. Still, members met in

formal negotiating settings and exchanged views and positions. This exchange is almost ritualistic in character, as everyone already knew the positions of members, and informal sessions served as the foremost important negotiating setting. However, those ritualistic exchanges of views and positions helped institutionalize the ideas contained in them, and provided the «underlying principles of order and meaning that buttress the WTO's operation» (Cho 2012: 327). As discussed above, the content of Section 2 of the TFA does not constitute imitation of theorized practices. This idea evolved gradually to the point where members lost sight of how it originally developed. Through the relational systems among negotiators and through the iterative negotiating process, a consensus emerged that implementation should be linked to capacity, a consensus that was important for reaching an agreement.

Another notable feature of the negotiations is that the negotiating structure persisted while individuals came and went. Through the iterative and ritualistic negotiating process, the negotiating dynamic replicated itself by socializing new members into the values that defined the institution. Thus, the relational systems and routines in the negotiating process facilitated the development of a “culture” within the TF field that was very different from the negotiating dynamic in the other areas (see page 51). Guided by the common goal of preserving the multilateral trading system in the face of uncertainty, a culture of cooperation, patience and constructiveness evolved, that deviated markedly from the *quid pro quo* approach in other areas.

### **5.3.3 Catalysts of isomorphism**

In Chapter 2, we highlighted two situations in which institutional and/or normative isomorphism become more likely. The first was in situations marked by uncertainty and goal ambiguity, and the second was in institutional arrangements characterized by a high degree of homogeneity among actors within an organizational field. As shown in the HI analysis, when the July Package was adopted and the organizational fields defined, the WTO was in a state of institutional uncertainty marked by goal ambiguity. Members were not certain what should be the road ahead, and members had differing opinions on what should be the goal of the TF discussions. In addition, during the course of the negotiations, members were increasingly aware that the WTO had to deliver tangible results, should it maintain its legitimacy in the future. Again, when the single undertaking was abandoned in 2011, many members focused on the uncertainty facing world trade, and the need for the WTO to deliver results to stay relevant. According to SI, this would increase the likelihood that the WTO would look for solutions

within its organizational field, to ensure the continued or increased legitimacy of the organization. Furthermore, as shown in the empirical enquiry, the TF negotiations differed from other negotiating areas in that it involved capital-based customs officials, and not just regular Geneva diplomats. This would likely increase the chance of normative isomorphism between the WTO and the WCO, as customs officials, normally dealing with the WCO, were tasked with negotiating in the WTO. The institutional uncertainty and introduction of customs officials prepared the ground for institutional change through isomorphism.

### **5.3.4 Conclusion of the Sociological institutional analysis**

The Annex D organizations of the July Package make up the TF organizational field. Section 1 of the TFA represents imitated institutional practices from the WCO's RKC. Through interpretation of the theorized practice, the TFA bears strong resemblance to the RKC, but with elements of innovation, not uncommon after interpretation. Section 2 does not resemble practices already found within the organizational field, and constitutes a case of institutional innovation emerging gradually through relational systems between actors, and perhaps more importantly, through the iterative and ritualized formal negotiating process. Because of institutional uncertainty and homogeneity of actors within the organizational field, and through the carriers of relational systems and routines, both the theorized practices of the RKC and the innovation of Section 2 could be institutionalized as norms guiding the negotiations. This was facilitated by the development of a TF "culture" of cooperation instead of competition.

## **5.4 Combining the new institutionalisms**

Before embarking on the empirical enquiry in this thesis, it seemed likely that there would be explanatory value in all three theoretical perspectives (see page 20). It was assumed that that actors would behave rationally, but that social structures and historical contexts would affect the behaviour of actors. To avoid blurring the lines between the three perspectives, three separate analyses were conducted. In the following, I will analyse whether there is in fact added value in taking a complementary approach to the new institutionalisms.

Looking first to the RCI perspective, actors did behave rationally in the beginning of the negotiations, to the extent that countries took positions according to their level of development. Relatively equal actors reached an agreement to remedy the sub-optimal situation of un-harmonized customs systems. The strengths of RCI in explaining the TFA lays is its «voluntarist» view on institutional arrangements and its focus on the behaviour of actors. As the analysis has shown, the imbalances in structural and procedural powers that has supposedly characterized the WTO, did not characterize the TF negotiations. This is not to say that there are no differences in such powers, but developing members were able to counteract this traditional imbalance by forming broad alliances and framing TF as a tool for development. Furthermore, they effectively used their indirect veto-power to keep development at the heart of the negotiations, as no agreement could be reached without consensus. The analysis further finds that the actors behaved strategically and calculating to achieve their individual desired goals, but what was deemed desirable by some actors changed during the course of the negotiations, because of both concessions being made, but also more unexpected reasons like a change in delegates in Geneva. The latter point is not accounted for by RCI, because actors are perceived as unified entities. The analysis does not find that RCI can offer an explanation for one of the most fundamental puzzles of the TF negotiations, namely why members changed their minds. Thus, RCI has strong explanatory value in predicting that the actors would be rational, behave strategically and calculating, and be on equal footing in the negotiations. It does not, however, offer a satisfactory explanation for why some members went from opposing to supporting TF. In other words, RCI lacks a credible theory of preference formation. Being that the preference of actors is the whole basis for RCI analyses, it is striking that so little attention has been devoted to this vital aspect of political life. A central feature of the TF negotiations is the initial opposition among developing members, which eventually evolved into support. Because RCI see preferences as pre-determined and fixed, it allows for no interaction between actor and institution. It seems clear that developments within the WTO did in fact affect the preference formation of actors. As shown earlier, the S&DT chapter reduced the scepticism of many members, and the July Package spurred a plethora of national TF bodies to emerge. Furthermore, because RCI does not take into account the relative power of actors, it cannot account for the specific form of the agreement, as this is seen as representing a compromise between members.

Adding to our understanding of the relative equality of the actors involved, the temporal approach in HI analysis uncovered a changing balance of power among members from circa

2001, culminating in the compromise that is the July Package. Furthermore, HI provides insights lacking from the RCI analysis on both preference formation and the content of the agreement. HI takes for granted that institutions do affect actor's positions by limiting the menu of available options. Furthermore, it explains the specific form of the agreement as being «the legacy of political struggles» between the influential actors from both sides of the divide. HI traces the origin of the TFA to the critical juncture of the July Package, where negotiating modalities were adopted. The July Package resulted in distributional- and coordination effects that affected the relative powers of the actors involved, as well as changing «the logic of the system» by increasing the likelihood that an agreement would be adopted. These feedback effects led to a path dependent development, because actors were constrained by the modalities of the July Package, and because national adaptation reduced the gap between existing regulations and an agreement, and created new institutions with vested interest in the success of the negotiations. Combining these accounts with the insights about the behaviour and balance of power among actors offered by RCI, a stronger explanation of the negotiations and the agreement is offered.

Although HI explains the TFA as the result of path dependent developments resulting from the compromise that is the July Package, it is not well situated to account for the specific form and content of the agreement. For this, we have to look to the sociological institutional perspective. By identifying the organizational field, we could trace the origin of the different sections of the Agreement. The TFA was expected to imitate theorized practices found elsewhere within the organizational field. In comparing the TFA to the RKC of the WCO, it is clear that Section 1 does imitate practices already existing under the WCO. Through symbolic systems, relational systems and routines, the practices were interpreted and institutionalized. Imitation does not adequately account for Section 2 of the TFA, as this appears to be an innovative feature of the TFA, that evolved gradually through the negotiations. Although the iterative process of repeating ideas and positions has been categorized under SI in this analysis, arguments could be made that the concept of discourse is not adequately addressed by any of the three institutionalisms. The multiple layers of negotiations, from the formal sessions to the lunches and dinners, is a noticeable feature of the TF negotiations. Through these sessions, members presented their positions, defended their interests and negotiated for nine consecutive years with individual negotiators coming and going. While SI does account for the importance of ideas in explaining institutional outcomes, they leave the interactive processes of discourse

implicit as they discuss the ‘carriers’ of ideas who «generate, deliberate, and legitimize ideas within given institutional contexts» (Schmidt 2009: 15).

Thus taking the rational and voluntarist assumptions from RCI, we can indeed see the TFA as an institutional arrangement entered into to mediate a collective action dilemma. Adding then, the historical dimension, we can see how the menu of available action alternatives were reduced during the course of negotiations, and how this affected subsequent developments. Finally, including the assumption of legitimacy from the SI perspective, we can see how members were affected by concerns for legitimacy, and searched within the organizational field for the sources of authority in the area of TF. Through imitation, theorized practices from the WCO were interpreted and institutionalized as WTO norms guiding the negotiations.

As the paragraph above shows us, taking a complementary approach to the case of the TFA provides added value to our understanding of the negotiations and the agreement. By utilizing the theories’ strengths, they can fruitfully be applied in parallel. The theories provide us with the maps needed to unveil the different facets of the negotiations. For instance, by looking for «strategic and calculating» behaviour among actors, one will often find such behaviour, which one would not necessarily detect without the lenses of a theoretical framework. Thus, there is always the risk of overestimating the importance of variables, and omit others. However, by applying all three new institutionalisms in this analysis, we have increased the variance in the dependent variable that can be explained, and at the same time reduced the risk of omitting important variables.

## 6 Concluding remarks

In this final chapter, the main findings are presented, and the strength of the theoretical approach evaluated. This is followed by a discussion on the implications of the findings for the scholarship on WTO negotiations, and for the WTO itself.

### 6.1 Main findings

This thesis was inspired by an interest in multilateral trade negotiations. The case of the Trade Facilitation Agreement was chosen because it constitutes the only multilateral trade negotiations successfully concluded in 24 years. The research questions guiding the choice of theory, the empirical enquiry and the analysis were: *why was the Trade Facilitation Agreement adopted, and why was it adopted in its specific form?* To answer these two questions, an institutional approach was employed. By establishing a detailed narrative of the negotiations, the explanatory value of each perspective was examined, before combining the insights from the three perspectives.

To answer the first research question, we can say that the Trade Facilitation Agreement was adopted because members wanted to reduce the collective action dilemma characterizing the era of un-harmonized customs systems. Through the adoption of the July Package, developments were set on a path towards reaching an agreement. Through the long-lasting and iterative negotiating process, members' views and positions were institutionalized, thus making all parties more willing to make compromises. The change in position of some members reflect these compromises and concessions. The agreement got its specific form and content from the involvement of the WCO and customs officials in the negotiations, both of which prepared the ground for institutional imitation to take place. The final agreement mirrors this isomorphism, as well as being the legacy of enduring political struggles for influence, a struggle that for once resulted in a balanced outcome.

## 6.2 Implications for institutional theory

Has the complimentary approach enabled us to account for why the TFA was adopted, and why it was adopted in its specific form? As the combined analysis shows, the institutional approach to this analysis has enabled to uncover important explanatory variables for how and why the TFA was adopted. Because of the complementary approach taken, the theoretical framework covers a wide array of explanatory factors. By directing our attention to certain elements, the theoretical framework has served as a useful map for uncovering the factors that led to the adoption of the agreement. Thus, the theories are more useful together than they are individually.

In chapter 2, we defined the adoption of the TFA as a case of institutional change. One standard critique of institutional theory has been that it is almost inherently static while the world of politics, which it seeks to explain, is almost inherently dynamic (Peters 1999: 7). This was one of the reasons that an institutional approach was chosen to shed light on the TF negotiations. Is it true that the new institutionalisms are better at explaining continuity than change?

In RCI, change is explained by *design*, in which actors specify institutional design to achieve a desired result. In HI change is explained either through changes in the political context of the institution, or through endogenous *competition* between actors within a given institution. In SI, change is explained through *imitation* in which actors interpret institutional arrangements deemed to be legitimate by other institutions. Of these three accounts for institutional change, the latter two have contributed with the most to our understanding of the TFA. This is not to say that actors did not *try* to design an institution to fit their preferences, but they were simply not able to do so. In the process of designing the TFA to fit their goals, the *demandeurs* were forced to compromise with the emerging economies of the South, thus producing an agreement reflecting this compromise. Furthermore, the TFA mirrors the imitated practices found elsewhere within the organizational field.

It is difficult to ‘falsify’ institutional theories. Deviations from the theoretical assumptions can often be explained by reference to exceptions, and various variants of each perspective exists, sometimes blurring the lines between them. However, as noted, our goal is not to test or falsify any theory, but to take advantage of the strengths of each perspective. Baring this in mind, this analysis can point to some possible shortcomings in explaining *this particular case*. Thus, although RCI contributes with insights into the cost-benefit approach taken by actors, as well as accurately predicting the balance of power that this thesis has found



to be the case, RCI still has some ways to go in analysing institutional development and change. RCI needs to take into account the fact that actors are not unified entities, but represent different institutions with different preferences. It further needs to better account for how structures limit the scope for agency among those actors, how preferences are formulated and changed, and how institutions affect those preferences.

### **6.3 Implications for the literature on WTO negotiations**

Although the research design in this thesis does not allow us to make even contingent generalizations, this does not affect the value of the findings in relation to other scholarly contributions. Because the universe of multilateral trade negotiations is small, case studies remain an important source of knowledge about the dynamics of such negotiations. As reviewed in chapter 1, the literature on GATT/WTO negotiations is unanimous in its interpretation of the WTO as an organization where the power of the developed members decide the outcome of negotiations. This thesis shows that this can no longer be taken as a given. This is not to say, of course, that the findings in the literature are wrong. Most of the existing literature focus on either the GATT years or the early Doha years. This was a period characterized by the imbalances in structural and procedural power among members, a finding also supported by this analysis.

However, during the years that followed, there were structural changes happening in the WTO, with many new developing and LDC members acceding to the WTO. Although often referred to, the implications of this change for negotiations in the WTO has not previously been discussed. I find that this change has had massive impacts on the negotiating dynamic of the WTO. The efficient coordination of the interests among developing members has changed the power structures of the organization, and the TF negotiations constitute a clear example in this regard.

In addition to the emerging balance of power in the WTO, an important finding in this thesis is the mode through which negotiations took place. The iterative, almost ritualistic process of negotiating within the WTO is an element that deserves more attention in future scholarly contributions. Studying the process of institutionalizing ideas through repeated actions and routines could bring forth new knowledge about how negotiations progress, and provide more depth to analyses of ideational power and issue framing in the WTO. Perhaps it

is time that scholars reorient themselves from a logic of calculation, to the logic of discourse. The power of discourse and communication can close the gaps between trade norms and trade realities (Cho 2012: 354).

Although the TFA is the only multilateral trade deal concluded thus far, it would be interesting to embark on a comparative study of the TFA vis-à-vis the failed negotiating areas of the DDA. Although this has been touched upon in this thesis, a more systematic comparison of the different negotiating dynamics could prove useful to our understanding of why negotiations fail or succeed. Perhaps even more fruitful, future research should try to compare the TF negotiations and outcome to similar areas of negotiations, like e-commerce and fisheries subsidies, areas that have been highlighted by several of the informants in this thesis. As these areas concern the “hardware” of trade infrastructure and regulations, and not the “software” of trade policy, they bare strong resemblances to the TFA, a point that will be further discussed below.

## **6.4 Implications for WTO negotiations**

*«When this world gets back to normal, we will look at what was done in the trade facilitation negotiations as an excellent template to move forward» (Wilson interview).*

Concluding this thesis is a discussion on the lessons to be learned from the TFA. First, the history of the negotiations has showed us that the negotiations stalled and progressed at various times. A notable feature is how those periods align with the increase or decrease in the focus on developments in other negotiating areas. The TF negotiations suffered from two dimensions of issue-linkage. The first is TF’s relationship to the other, more contentious, Singapore issues, and the second is TF as a part of the Doha single undertaking. As the analysis shows, issue-linkage can be useful when linking two zero-sum games to enable a trade-off between wins and losses (see page 67). However, in the case of TF, these informal and formal instances of issue-linkage served as an anchor dragging TF down with the rest of the DDA. As shown, members were not able to agree on a full negotiating mandate before abandoning the other Singapore issues, and not able to reach a TF agreement before abandoning the single undertaking. This leads us to a second lesson learned, and that is that all negotiations in the WTO, no matter how technical or bureaucratic, is at the end of the day all about politics. Members hid behind the single undertaking in periods where they were unhappy with the TF negotiations, and

completely «forgot» about it during periods where good progress was being made. These two lessons lead us to identify a problem with the single undertaking as negotiating form, and that is that it does not in any way set out provisions for defining what constitutes a «balanced outcome». This essentially means that no progress can be made in area A before members are «happy» with the result in area B. Such a vague approach could, as shown, have detrimental effects on the negotiations. If the single undertaking is to be useful, it should go hand in hand with clear modalities in all linked negotiating areas so that negotiations are less vulnerable to the changing preferences and national political contexts of members.

Second, the success of the TF negotiations provides perhaps the most important lesson to be learned, and that is that development has come to stay in the WTO. The era where developed members can impose commitments on developing members is officially over. The negotiations stalled and progressed in line with developments in the S&DT negotiations, and the final agreement represents a definitive break with the traditional take on such provisions. Implementation can no longer be an afterthought, but must be addressed in the process of determining the level of commitment among members. This lesson should be fairly easy to adopt in other negotiating areas. Similarly, the developing members now account for more than two thirds of the membership of the WTO and have for more than a decade successfully coordinated their interests. Empowering the developing members in the WTO through support for their procedural capacities (i.e. support for participation of capital-based officials from LDCs), has been important for showing good faith and reduce the highly unconstructive north-south divide characterizing other negotiating areas.

Third, the TF negotiations shows us the importance of individual actors and their relationships in determining the failure or success of negotiations. All interviewees have highlighted the fact that the TF negotiations differed remarkably in this regard. The delegates were able to not let their differing substantive opinions result in a competitive, unpleasant negotiating environment. The technical nature of the negotiations helped break down traditional coalitions of members, which again reduced the political suspicion among some members. Although members had differing preferences, the interviewees all highlight that there was a sense of teamwork in trying to reduce the number of brackets/disagreements, and work slowly towards an outcome acceptable and desirable by all members.

The third point, however, does lead us to an important feature of the TF negotiations that puts into question the relevance and usefulness of these lessons for other negotiating areas. TF is the only area thus far that does not involve negotiating actual trade in goods or services.

In other areas, members must give and take in the negotiations in a different way that they had to in the TF negotiations. In the highly contentious agriculture negotiations for instance, developing members are demanding that developed countries substantially reduce their national farm subsidies. Reaching an agreement here is difficult because an agreement will inevitably involve wins and losses, and members have not yet been able to find the Pareto frontier in the negotiations. In TF on the other hand, what is there not to like about getting good across borders faster and cheaper? Although some lessons from the TFA can fruitfully be applied in other areas like e-commerce and fisheries, the Trade Facilitation Agreement is unique because it regulates *how* to trade, not *what* to trade.

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# Appendix 1: List of informants

*Disclaimer: The views and opinions expressed by informants in this thesis are those of the informants alone and do not necessarily reflect the official policy or position of their former or current employers.*

<b>Name</b>	<b>Representative of</b>	<b>Position</b>
Benedicte Fleischer	Norway	Lead negotiator from 2007 until adoption in 2013
Edouard Bizumuremyi	Rwanda	Negotiator and focal point for the African Group from 2008 until 2014
Bruce Hirsh	United States	Lead negotiator from 2009 until 2011
Matthew Wilson	Barbados	Lead negotiator and «friend of the chair» for the discussions on S&DT. Part of Director General Pascal Lamy's cabinet in the final year of negotiations
John Malone	European Union	Part of EU negotiating team from 2001 until adoption. Represented the Directorate General for Customs and taxation
Mohammad Saeed	Pakistan	Lead negotiator from 2004 until 2010
Nora Neufeld	WTO Secretariat	In charge of overseeing the negotiations as secretary to the WTO Negotiating Group from 2001 until adoption

## Appendix 2: Interview guide

Information about the thesis, questions before we begin?

Could you briefly state your involvement in the process?

Could you say something about how the topic of Trade Facilitation entered the realm of the WTO?

- *Follow-up:* By whom?
- *Follow-up:* What were the initial reactions of the membership?
- *Follow-up:* Would you say that there was a large degree of initial agreement on what changes should be made, or were there differing opinions?

Were there any external events/developments that affected the initial work on TF?

- *Follow-up:* Why did this impact the TF work in the WTO?
- *Follow-up:* Who were affected? (What members, branch of Secretariat etc.)
- *Follow-up:* Did this change the initial positions of any actors? Who?

Did members prepare for a possible adoption of a TF agreement during the course of the negotiations?

- *Follow-up:* how did they adapt?
- *Follow-up:* How did this affect the negotiations?

Who, in your opinion, were the key actors at different stages of the negotiations?

Looking back, would you describe the negotiations as a linear process, or were there ups and downs?

- *Follow-up:* At what times and why did the negotiations advance/come to a halt?

How important were the informal gatherings/meetings between negotiators?

- *Follow-up:* Was this unique to the TF negotiations?

What was the difference between the formal and informal negotiating sessions?

What role did the capital-based officials play in the negotiations?



How were members able to remove TF from the single undertaking?

- *Follow-up:* How/why did developing members agree to this?

Did the fact that the WTO did not seem to be able to advance in other areas of the Doha negotiations affect the TF negotiations?

- *Follow-up:* In what way?

What impact did other international organizations have on the TF work within the WTO?

- *Follow-up:* Which organizations?
- *Follow-up:* In what way did they effect the TF work within the WTO?

What role did the draft negotiating text play?

How were members able to reduce the number of brackets in the draft negotiating text?

What impact did other international organizations have on the outcome/particular form of the agreement?

- *Follow-up:* Which organizations?
- *Follow-up:* In what way did they effect the particular form of the agreement?

Why was the agreement shaped the way it is? Were comparisons drawn with other policy areas? Were there any role models that was important for how to shape the agreement? Why and who?

- *Follow-up:* Section 2: Is this a completely new innovation?
- *Follow-up:* Who came up with the idea for Section 2? When?

Is it your impression that the negotiations and the agreement represented a balance between the interests of developed/developing members?

The EU and US are often criticized for using their informal power and influence to achieve results. Does TF constitute an example of this? Or is TF an example of the opposite? Or neither.

Did the increase in membership affect the negotiations?

- In what way?

Are there lessons to be learned from the TFA for other negotiating areas?

What was the relationship between the WTO and the WCO?

How important were the coalitions between members in the negotiations?

Is there anything you would like to tell me about which I have not thought to ask you?

Is there anybody else that you come to think of that might be useful for me to talk to?

Can I contact you later if I have further questions or issues?