

**WTO AGREEMENT ON TRADE FACILITATION  
- Analysis of Technical Measures -**

**Rev. 3, September 2016**

The Analysis of Technical Measures of the WTO Trade Facilitation Agreement (TFA) was submitted for the first time in March 2014 to the Working Group on the TFA (TFAWG). It was originally developed to:

- provide relevant information and guidance in terms of preparing Members for the implementation of the TFA provisions by using WCO instruments and tools;
- ensure a harmonized approach by Customs administrations; and
- present the basis for the TFA Implementation Guidance web tool, which was launched in May 2014 and is available on the WCO web site.

The Analysis now complements the Implementation Guidance which is meant as a user-friendly tool, while the Analysis provides more detailed technical information.

Another important objective of the Analysis was to identify any relevant implications particularly in terms of whether there was a need to update existing or develop new WCO tools to fully support implementation of the TFA provisions.

The Analysis was always considered to be a living document, to be updated as new instruments were being developed, existing ones updated and as Members' experiences were being explored.

The initial Analysis showed a high level of consistency between the TFA provisions and WCO instruments and tools. The Analysis also showed that the WCO standards and tools to a large extent address the TFA requirements in terms of cooperation and coordination with other border agencies.

The Analysis was updated in November 2014 to reflect the latest developments and to include IT implications, links to other WTO agreements and more detailed information regarding how WCO instruments and tools directly support implementation of each of the provisions.

Rev. 3 is the latest version of the Analysis. It includes more detailed information on the requirements and benefits of each of the provisions. It also explains the linkages between TFA provisions and over 50 WCO instruments and tools.

The Analysis brings together relevant TFA-related discussions which took place in various WCO working bodies, primarily the TFAWG and the PTC. It also takes into consideration the requirements of other stakeholders, and identifies the authorities concerned for each of the provisions. Having in mind the important role that the sanitary and phytosanitary agencies will play in the implementation of the TFA, the Analysis incorporates information on the links between the TFA and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), based on an Information Note prepared by the WTO Secretariat ("The Relationship Between the Trade Facilitation Agreement and the

Agreement on the Application of Sanitary and Phytosanitary Measures”<sup>1</sup>). It also incorporates information on the links between the TFA and the WTO Agreement on Technical Barriers to Trade (TBT Agreement). This information is important for raising awareness of the WTO commitments where the different government authorities have similar responsibilities. Both the TBT and the SPS Agreements are specifically mentioned in Paragraph 6 of Article 24 of the TFA.

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## ARTICLE 1: PUBLICATION AND AVAILABILITY OF INFORMATION

### Article 1.1. Publication

#### TFA provisions

##### 1. Publication

1.1 *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:*

- (a) *procedures for importation, exportation, and transit (including port, airport, and other entry-point procedures), and required forms and documents;*
- (b) *applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation;*
- (c) *fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;*
- (d) *rules for the classification or valuation of products for customs purposes;*
- (e) *laws, regulations, and administrative rulings of general application relating to rules of origin;*
- (f) *import, export or transit restrictions or prohibitions;*
- (g) *penalty provisions for breaches of import, export, or transit formalities;*
- (h) *procedures for appeal or review;*
- (i) *agreements or parts thereof with any country or countries relating to importation, exportation, or transit; and*
- (j) *procedures relating to the administration of tariff quotas.*

1.2 *Nothing in these provisions shall be construed as requiring the publication or provision of information other than in the language of the Member except as stated in paragraph 2.2.*

#### Requirements and benefits

The lack of easy access to information about import and export requirements increases costs for businesses, who incur time searching (or pay others to search) for the information. Also, where information concerning requirements is not easily accessible, there is a higher likelihood that businesses will make mistakes due to misunderstanding or omissions, and therefore be subject to delays in clearance and penalties.

From the government’s perspective, a better-informed trade community can increase level of compliance, reducing potential errors leading to loss of revenue, as well as allowing Customs and border agency resources to be better focused.

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<sup>1</sup> The Information Note “The Relationship Between the Trade Facilitation Agreement and the Agreement on the Application of Sanitary and Phytosanitary Measures” can be found at the following link on the WTO web site: [http://www.wto.org/english/tratop\\_e/sps\\_e/tf\\_sps\\_e.pdf](http://www.wto.org/english/tratop_e/sps_e/tf_sps_e.pdf)

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Article 1.1 addresses publication of trade-related information (listed under Paragraph 1.1) which should be published promptly and in a non-discriminatory and easily accessible manner that will allow other governments, traders and interested persons to become acquainted with them.

The TFA does not specify a particular medium of publication that must be used. This could be done through official print journals or gazettes, by means of general circulation newspapers and/or through publication on the internet. However, the essential requirement of the TFA is that the publication will be easily accessible, and in that context it has been suggested that the objective of this measure may be best achieved through publication on official national websites. This is why Article 1.1 is closely linked to Article 1.2.

WTO Members are not required to publish the information in a language other than their national language, but do need to notify the WTO Committee on Trade Facilitation of the official place(s) where the required information is published.

Therefore, Article 1.1 is cross-cutting with Article 1.2, 1.3 and 1.4, but should be also looked at together with Articles 6.1, 10.6, 11.14 and 11.15 which foresee publication of certain types of information.

### Authorities concerned

It is necessary to have an arrangement in place to identify the agencies responsible for publication of trade information, to define the scope of their responsibilities and the mechanism to co-ordinate publication activities so that traders and other interested parties can get coherent and contextualized information.

Therefore the provisions of this article are not limited to Customs, but would require a whole of government approach:

- Customs
- Other border and regulatory agencies
- Trade authority
- Revenue authority

### Links with WTO agreements

The transparency provisions of the **WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)**, which relate closely to TFA Articles 1 and 2, can be found in Article 7 and Annex B. **In addition**, the SPS Committee has developed recommended procedures for implementing the transparency obligations of the SPS Agreement to assist Members in fulfilling their transparency obligations (G/SPS/7/Rev.3).

With respect to "publication", the SPS Agreement also includes a requirement to publish promptly SPS regulations such as laws, decrees or ordinances (Annex B.1)., It is especially relevant in terms of publishing information on import, export or transit restrictions or prohibitions (TFA Paragraph 1.1 (f)). However, the SPS Agreement does not require publishing forms and documents, or fees and charges.

Similarly, the **Agreement on Technical Barriers to Trade (TBT Agreement)** also requires that technical regulations and conformity assessment procedures which have been adopted are published promptly. (Articles 2.11 and 5.8). In addition, the Code of Good Practice for the Preparation, Adoption and Application of Standards, which is open to acceptance by standardizing bodies, requires the prompt publication of standards, which are voluntary. However, the TBT Agreement does not specifically require the publication of forms and documents or fees and charges.

As regards language versions, there is no obligation SPS or TBT measures in languages other than that of the Member, but developed countries shall, upon request, provide document translations related to a

specific notification in English, French or Spanish (SPS Agreement Annex B, paragraph 8 and G/SPS/7/Rev.3, paragraph 26; TBT Agreement Article 10.5).

There is also a requirement in the **WTO Valuation Agreement** (Article 12) to publish valuation legislation.

WCO instruments, tools and guidance (not exhaustive)

- Revised Kyoto Convention<sup>2</sup> (RKC), General Annex (GA) Chapter (§) 4 (4.4), § 9 (9.1, 9.2, 9.3);
- Transparency and Predictability Guidelines;
- Recommendation (1999) on the Use of World Wide Web sites by Customs administrations;
- Revised Arusha Declaration;
- Recommendation (2001) on the application of HS Committee Decisions;
- Customs Valuation Compendium;
- Single Window Compendium (Chapter 2 in Volume 2)
- IT Guide for Executives

The TFA provisions are compatible with WCO instruments, which cover most of the points raised in Article 1.1.

Standard 9.1 of the **Revised Kyoto Convention** General Annex (RKC GA) foresees Customs to ensure that all relevant information of general application pertaining to Customs law is readily available to any interested person and is therefore broader in scope than TFA Article 1.1. However, Standard 4.4 specifies that rates of duties and taxes shall be set out in official publications.

Transitional Standard 9.3 envisages use of information technology to enhance the provision of information which therefore provides more specificity than the TFA text in terms of the manner in which the information should be published. Guidelines to Chapter (§) 9 of the RKC General Annex (GA) contain sufficient information to support implementation of Article 1.1, such as guidance on where the information should be published and made available, on quality and clarity of information, update and dissemination of information etc.

**Transparency and Predictability Guidelines** aim to provide Customs administrations with comprehensive and practical guidance on how to enhance and commit to their transparency and predictability, with a view to trade facilitation and integrity. The Guidelines are based on existing international standards introduced in the WTO TFA, the WCO RKC and other international agreements, and the operational practices and experiences of WCO Members. For instance, the Guidelines require Members to ensure that all relevant information of general application pertaining to Customs law is readily available to any interested person.

**Recommendation on the use of the World Wide Web** encourages Customs administrations to make information available on their web sites. The Recommendation sets out basic information to be made available, including information for travelers and traders. It also recommends that contact information of Customs, including email addresses should be made available to the public, which is in line with Article 1.3 on Enquiry Points.

The **Revised Arusha Declaration** states that a national Customs integrity programme must take into account, among other factors, having easily accessible customs procedures.

Chapter 2 of Volume 2 of the **WCO Single Window Compendium** contains an approach for Initial Functional Assessment to systematically collect information about different government agencies dealing with cross-border regulation of trade. Templates contained in this chapter may be used in collating the required procedural, regulatory and compliance information.

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<sup>2</sup> Wherever a reference is made to the Revised Kyoto Convention (RKC), this refers to both the Standards in the General Annex or a Specific Annex, as well as to the accompanying RKC Guidelines.

**IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information and Communication Technologies in Customs. This can be very useful in particular when it comes to enhancing the websites to comply with the necessary requirements in terms of transparency and predictability of border procedures.

### ICT Considerations<sup>3</sup>

There are IT-based tools (called Document Management Systems) that can help the management of the documents through their entire life-cycle, namely assignment of ownership, drafting-reviewing-publishing and archiving phases.

Customs administrations should publish information such as rates of duties, taxes, fees, charges, exemptions, quotas, restrictions, prohibitions etc in formats that are accessible to the traders and their automated information systems.

### WCO Bodies Concerned

- TFAWG
- PTC<sup>4</sup>
- RKC/MC<sup>5</sup>
- SAFE WG<sup>6</sup>
- HSC<sup>7</sup>
- TCCV<sup>8</sup>
- IMSC

## **Article 1.2. Information Available Through Internet**

### TFA provisions

2.1 *Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:*

- (a) *a description<sup>9</sup> of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit;*
- (b) *the forms and documents required for importation into, exportation from, or transit through the territory of that Member;*
- (c) *contact information on its enquiry point(s).*

2.2 *Whenever practicable, the description referred to in subparagraph 2.1(a) shall also be made available in one of the official languages of the WTO.*

2.3 *Members are encouraged to make available further trade-related information through the internet, including relevant trade-related legislation and other items referred to in paragraph 1.1.*

### Requirements and benefits

The transparency benefits to the trade and government of internet publication are generally the same as those described in Article 1.1. Publication of legal text of the Customs laws and regulations on the internet is not sufficient. WTO Members are required by Article 1.2 to develop and publish on the internet explanatory or descriptive information and this information regarding import, export and transit which must

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<sup>3</sup> At its 67<sup>th</sup> Meeting, the Information Management Sub-Committee (IMSC) discussed ICT implications for each of the provisions of the TFA (for more information see document PM0358).

<sup>4</sup> Permanent Technical Committee

<sup>5</sup> Revised Kyoto Convention Management Committee

<sup>6</sup> SAFE Working Group

<sup>7</sup> Harmonized System Committee

<sup>8</sup> Technical Committee on Customs Valuation

<sup>9</sup> Each Member has the discretion to state on its website the legal limitations of this description.

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be presented in such a way that informs governments, traders and other interested parties of the practical steps required for import, export and transit.

This measure is intended to particularly benefit small and medium businesses (SMEs). SMEs typically have greater difficulty and fewer resources compared to larger firms to access information and to analyze technical Customs rules and procedures. Practical “plain language” step-by-step guides to procedures may thus be of great value to such firms.

According to Article 1.2, Members are encouraged to publish other trade-related information on the internet included under Article 1.1 and should notify the WTO accordingly. Therefore, Article 1.2 is cross-cutting with Article 1.1, 1.3 and 1.4.

WTO Members are further required, to the extent possible and where appropriate, to keep this information published on the internet up to date.

The consumers of the information that WTO Members are required to publish on the internet include other governments and businesses located in other countries. For that reason, the measure requires WTO Members, “whenever practicable,” to also publish the practical descriptions to their procedures in one of the WTO official languages. The official WTO languages are English, French, and Spanish.

### Authorities concerned

The provisions of this article are not limited to Customs, but would require a whole of government approach:

- Customs
- Other border and regulatory agencies
- Trade Authority
- Revenue Authority

### Links with WTO agreements

The **SPS and TBT Agreements** does not require Members to make their measures available on the internet, but this is encouraged through decisions taken in the SPS and TBT Committees (G/SPS/7/Rev.3, paragraph 62 and G/TBT/1, paragraph 4.4.2).

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 7 and 9 (9.1, 9.2, 9.3);
- Recommendation (1999) on the Use of World Wide Web sites by Customs administrations;
- Recommendation (2001) on the application of HS Committee Decisions;
- Single Window Compendium (Chapter 2 in Volume 2);
- Transparency and Predictability Guidelines;
- IT Guide for Executives.

These provisions are compatible with WCO instruments, and most of the elements required in the Customs area are dealt with therein.

Standard 9.1 of the **RKC General Annex (RKC GA)** foresees Customs to ensure that all relevant information of general application pertaining to Customs law is readily available to any interested while Transitional Standard 9.3 envisages use of information technology to enhance the provision of information. Guidelines to Chapter 7 also deal with the use of Customs web sites for publishing information.

As regards organizing the content of the web site, the **WCO Recommendation on the use of World Wide Web** provides comprehensive information. This WCO Recommendation exceeds the provisions of Article 1.2 of the TFA in its level of coverage in all, but 1 area: the online availability of forms required for import, export and transit.

Considering that it is desirable to achieve greater transparency and uniformity regarding the application of classification decisions, the **WCO Recommendation on the application of HS Committee Decisions** encourages Member administrations and Contracting Parties to the Harmonized System Convention to publish their classification decisions on the Internet so as to make them easily available. This exceeds the requirements of the TFA.

Chapter 2 of Volume 2 of the **WCO Single Window Compendium** contains an approach for Initial Functional Assessment to systematically collect information about different government agencies dealing with cross-border regulation of trade. Templates contained in this chapter may be used in collating the required procedural, regulatory and compliance information.

**Transparency and Predictability Guidelines** aim to provide Customs administrations with comprehensive and practical guidance on how to enhance and commit to their transparency and predictability, with a view to trade facilitation and integrity. The Guidelines are based on existing international standards introduced in the WTO TFA, the WCO RKC and other international agreements, and the operational practices and experiences of WCO Members. The Guidelines includes standards that may enhance the accessibility to information and introduce good practices on Member in this respect.

**IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information and Communication Technologies in Customs. This can be very useful in particular when it comes to enhancing the websites to comply with the necessary requirements in terms of transparency and predictability of border procedures.

#### ICT Considerations

Customs and border agencies should organize information in such a way that it is available and easily navigable from the user's context. This can be facilitated through by using Content Management Systems.

Trade Hubs are information web portals that represent a government-wide effort to provide regulatory information from a trader's perspective, and may include procedural information, tariff and non-tariff restrictions, commodity classification, valuation and the determination of landed costs.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- HSC
- IMSC<sup>10</sup>

#### **Article 1.3. Enquiry Points**

##### TFA provisions

3.1 *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).*

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<sup>10</sup> Information Management Sub-Committee

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3.2 *Members of a customs union or involved in regional integration may establish or maintain common enquiry points at the regional level to satisfy the requirement of paragraph 3.1 for common procedures.*

3.3 *Members are encouraged not to require the payment of a fee for answering enquiries and providing required forms and documents. If any, Members shall limit the amount of their fees and charges to the approximate cost of services rendered.*

3.4 *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.*

### Requirements and benefits

Article 1.3 specifies the means by which a Member shall, within its available resources, answer reasonable enquiries about import, export or transit requirements and provide copies of relevant forms and documents. The additional value of enquiry points is that it provides a mechanism for traders to get reliable information within a “reasonable” period of time on questions of specific importance to them, the answers to which may not be evident in the trade information or guides published by the WTO Member.

The matters for which the enquiry point or points shall be responsible are those that are listed in Article

1.1. Namely, the enquiry point shall respond to questions about:-

- Customs and other border authorities’ (including the port authority) procedures and required forms for import, export and transit
- applied rates of duties and taxes
- fees and charges on imports or exports of Customs and other authorities
- rules for classification and valuation of goods for customs purposes
- laws, regulations and rulings on rules of origin
- import, export and/or transit prohibitions and restrictions
- appeal procedures
- penalty provisions for breach of import, export or transit formalities

As is clear from the range of questions that can be raised with an enquiry point, it is not likely that one border authority will have expertise to respond to all questions. The TFA measure would thus allow, for example, each relevant border authority to establish an enquiry point, which would take responsibility for answering questions concerning matters under that particular border authority’s jurisdiction.

Alternatively, the TFA measure would allow establishment of a single national enquiry point competent to respond (or coordinate responses) to all questions concerning all border procedures, duties, taxes fees and charges. A single national enquiry point was a preference of certain WTO Members in negotiations, and is often a preference of the private sector (who may or may not know which authority is responsible for which procedure or fee) as it simplifies their access to border related information.

The enquiry point is required to respond to requests within a “reasonable” time period as set by each WTO Member.

The WTO text further mentions that Members of Customs unions or involved in regional integration may establish common enquiry points.

In addition, the TFA discourages, but does not prohibit, Members from charging fees for answering enquiries and providing required forms and documents. However, if the Member chooses to impose fees for these activities, the amount of the fee must be limited to the approximate cost of the service that is provided.

WTO Members are required to publish on the internet the contact information of their enquiry points (Article 1.3), as well as notify the WTO Committee on Trade Facilitation with these contact details (Article 1.4).

### Authorities concerned

The provisions of this article are not limited to Customs, but would require a whole of government approach.

They would require governments to designate the authority responsible for setting-up and operating enquiry points. Different models are possible: one where each border agency has its own enquiry point and another where there is a centralized agency that handles all enquiries or acts as a “switchboard” to the individual enquiry points. It would be an act of ‘non-facilitation’ if a trader’s question is repeatedly re-directed to different enquiry points.

Authorities concerned include:

- Customs
- Other border and regulatory agencies
- Trade Authority
- Revenue Authority

#### Links with WTO agreements

The **SPS Agreement** requires Members to establish an SPS enquiry point to answer reasonable questions from Members and provide relevant documents regarding SPS measures, control and inspection procedures, pesticide tolerance, etc. The SPS Agreement refers only to Members and not specifically to “traders or other interested parties” (Annex B.3).

The **TBT Agreement** requires Members to establish TBT enquiry points to answer reasonable enquiries from Members and interested parties and provide relevant documents regarding technical regulations, standards, and conformity assessment procedures adopted by governmental or non-governmental bodies (Article 10).

#### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 7 (Guidelines) and 9 (9.4, 9.5, 9.6, 9.7, 9.8);
- Transparency and Predictability Guidelines;
- Recommendation (1999) on the Use of World Wide Web sites by Customs administrations;
- SAFE

TFA provisions are compatible with WCO instruments. Guidelines to Chapter 9 of the **RKC GA** provide sufficient guidance on enquiry points/offices. However, there is no specific guidance in the RKC on how to establish enquiry points in Customs unions or regional economic communities (RECs), as mentioned under Paragraph 3.2. RKC Guidelines for Chapter 7 also include guidance on how to set up a Help Desk (which is equivalent to an enquiry point) and its components.

**Transparency and Predictability Guidelines** aim to provide Customs administrations with comprehensive and practical guidance on how to enhance and commit to their transparency and predictability, with a view to trade facilitation and integrity. The Guidelines introduce practical guidance on the management of enquiry points including practice of members.

**WCO Recommendation on the use of the World Wide Web** recommends that contact information of Customs, including email addresses should be made available to the public through the Customs web site.

The Standard 5 of the Pillar 3 of the **SAFE** and the AEO Implementation Guidance do foresee the establishment of a nodal contact point or a service centre with telephone numbers, where appropriate Customs officials can be contacted by the AEO or its agent, in the event of queries or suspected offences.

### ICT considerations

The officials operating the 'enquiry points' should have access to online information sources in order to support all types of calls. Such solutions can become potential 'self-service' facilities, allowing a trader access to same information as that of an official manning the enquiry point.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- IMSC
- Integrity Sub-Committee

### **Article 1.4. Notification**

#### TFA provisions

Each Member shall notify the Committee on Trade Facilitation established under paragraph 1.1 of Article 23 (referred to in this Agreement as the "Committee") of:

- (a) the official place(s) where the items in subparagraphs 1.1(a) to (j) have been published;
- (b) the Uniform Resource Locators of website(s) referred to in paragraph 2.1; and
- (c) the contact information of the enquiry points referred to in paragraph 3.1.

#### Requirements

Article 1.4 stipulates an obligation to notify the WTO Committee on Trade Facilitation information relating to requirements under Articles 1.1, 1.2 and 1.3 (places where information has been published, web sites containing relevant information and contact details of enquiry points).

#### Authorities concerned

The government usually designates one authority with the responsibility to communicate WTO notifications. However, the authorities responsible for providing information to be notified to the WTO would include:

- Customs
- Other border and regulatory agencies
- Trade Authority
- Revenue Authority

#### Links with WTO agreements

The **SPS Agreement** does not require Members to provide the official places or URLs of websites where it has made available SPS-related information, but they are encouraged in the recommended procedures on transparency to provide URLs of websites or hyperlinks to documents related to a notification that have been made available on the internet (G/SPS/7/Rev.3, paragraph 18).

As per Article 15.2 of the **TBT Agreement**, Members are required to inform the Committee of the measures they have taken to ensure the implementation and administration of the Agreement. The TBT Committee has agreed that this one-time statement of implementation should among others specify the names of publications where texts of technical regulations, conformity assessment procedures and standards are published and provide the names and addresses of the enquiry point(s) (G/TBT/1/Rev.11, paragraph 4.2).

The TBT Agreement does not require Members to provide the URLs of websites where they have made available TBT-related information, but the TBT Committee has agreed to encourage Members to provide website addresses where Members can download the full text of a notified measure (G(TBT/1/Rev.11,paragraph 4.4.2).

The WTO Secretariat compiles and posts the updated lists of SPS and TBT Enquiry Points as notified to the SPS and TBT Committees on the publicly available SPS and TBT Information Management Systems ([www.spsims.org](http://www.spsims.org) and [www.tbtime.org](http://www.tbtime.org)). The TBT IMS also provides a list of Members' relevant publications.

#### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 9 (9.1, 9.2, 9.3);
- Recommendation (1999) on the Use of World Wide Web sites by Customs administrations;

These provisions are compatible with WCO instruments, although the WCO instruments do not require such a notification.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- HSC
- SAFE WG

## **ARTICLE 2: OPPORTUNITY TO COMMENT, INFORMATION BEFORE ENTRY INTO FORCE AND CONSULTATIONS**

### **Article 2.1. Opportunity to Comment and Information before Entry into Force**

#### TFA provisions

*1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit.*

*1.2 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit, are published or information on them made otherwise publicly available, as early as possible before their entry into force, in order to enable traders and other interested parties to become acquainted with them.*

*1.3 Changes to duty rates or tariff rates, measures that have a relieving effect, measures the effectiveness of which would be undermined as a result of compliance with paragraphs 1.1 or 1.2, measures applied in urgent circumstances, or minor changes to domestic law and legal system are each excluded from paragraphs 1.1 and 1.2.*

#### Requirements and benefits

If provided a reasonable opportunity to comment on proposed laws and regulations, businesses can advise the government as to the practical impact the proposals might have on their operations and costs of compliance, which the government may not have foreseen or fully appreciated. Moreover, the business community may be a source of information on new trade and logistic practices, techniques and technology. These inputs can contribute to more effective and efficient regulation.

Article 2.1 envisages an obligation (to the extent practicable and in a manner consistent with domestic law and legal system) to provide an opportunity to traders and other interested parties to comment on

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proposed introduction or amendment of laws and regulations related to movement, release and clearance of goods, including goods in transit.

The measure would thus apply to the Customs or any other border/regulatory agency whenever it intends to issue a new regulation, or amend an existing regulation, concerning the “movement, release and clearance of goods.” For example, Customs proposals for new rules concerning data or documents required for clearance or rules concerning obligations of transit principals would be subject to stakeholder comment, but proposals for rules concerning Customs staff or similar administrative matters, which are not related to the movement, release or clearance matters, may not.

Because the measure also applies to “laws,” primary legislation enacted by the legislative body on such border matters, such as changes to the Customs Code, would be subject to the requirements of stakeholder comment and publication prior to entry into force.

However, there are exceptions to the rule. Namely, WTO Members are not required to provide traders and other interested parties with an opportunity to comment on proposed laws and regulations, or to publish laws and regulations prior to entry into force in a number of cases. For example, for proposed changes to duty or tariff rates, certain WTO Members considered that advance notification would influence timing of import transactions and thereby distort revenue collections. Furthermore, measures that will have a relieving effect, it is assumed that the stakeholders would not object if the measure immediately entered into force and without prior discussion.

The “opportunity to comment” can be provided in different forms, such as general public meetings; “notice and comment” (e.g., publishing a notice in official journal, newspaper or on-line informing people of the proposal and inviting their comments); circulation of proposals for comment to selected group of stakeholders; participation in trade or industry associations; use of trade advisory groups, etc.

Existing national legislation, such as a general administrative law, may set out procedures for the enactment of administrative regulations, applicable to Customs and other governmental bodies. These may, for example, define what legal acts are subject to public comment, how stakeholders shall be notified, what time period shall be allowed for comment, and what opportunities or forms of public participation shall be allowed.

It also envisages making available such laws and regulations or related information as early as possible before entry into force. The purpose of advance notification of changes in legislation is to provide affected persons time to “become acquainted” with the new requirements and make the necessary adjustments. Where the changes are complex or extensive, more advance notice may be required; where changes are minor or with a limited impact, less advance warning may be needed.

By providing advance notification of changes in laws and regulations, businesses will have time to better understand impacts and prepare before the final rule takes effect. This can be important to businesses, as legal changes may require traders to adjust their internal procedures and systems. There will be greater likelihood of smoother transition, and less violations, where sufficient advance notice is provided.

### ICT considerations

There are several channels that could be used to inform traders of introduction and/or changes to legislation such as publication on the internet, holding of public hearing, news papers, office journals and registries etc. Mailing lists and social media may also be used for reaching out to the stakeholders.

Formal consultation on proposed legal changes would involve maintaining an official window for receiving comments, keeping accessible records of public hearings and comment logs. This can be facilitated through known ICT tools such as online discussion forums, social media web sites, mailing lists etc.

This also ties with the Document Life-cycle Management Systems mentioned in the context of Article 1. Documents that are under active public consultation can also be maintained as part of such systems.

Authorities concerned

- Customs
- Other border agencies
- Trade Authority
- Revenue Authority
- Legislative Authority

Links with WTO agreements

The **SPS and TBT Agreements** oblige Members to establish SPS and TBT national notification authorities, notify other Members at an early stage about proposed SPS and TBT measures by using pre-set notification formats, and allow "a reasonable time" for comments (SPS Agreement Annex B.5 and TBT Agreement Articles 2.9 and 5.6). As per the recommendations of the SPS and TBT Committees, such reasonable period of time should normally be at least sixty calendar days (G/SPS/7/Rev.3, paragraph 13 and G/TBT/1/Rev.11, paragraph 4.3.1.5 ).

There is also a requirement in the SPS and TBT Agreements to grant a "reasonable interval" between the publication of an SPS or TBT measure and its entry into force. Of relevance here is the Doha Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17), according to which this periods means at least six months.

Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 1 (1.3) and 9 (9.2);
- SAFE;
- Customs-Business Partnership Guidance;
- Model Business Lens Checklist for Small and Medium Sized Enterprises.

These provisions are compatible with WCO instruments. The **RKC** envisages consultation with the trade (Standard 1.3 of General Annex) and informing them of changes in laws and regulations well in advance of entry into force, "unless advance notice is precluded" (Standard 9.2 of GA), but the standards don't specifically mention the need to allow the trade to comment on the proposed introduction or amendment. However, RKC Guidelines to Chapter 1 of the General Annex suggest that Customs should, before implementing changes or introducing new procedures or automated systems, consult with appropriate representatives of the trade so that both can gear their activities in consideration of each other's needs. Members examples provided in the Appendix to these Guidelines, indicate the areas where joint decision making and/or guidance is foreseen, including changes to the Customs legislation.

Additionally, the RKC also provides for following provisions for co-operation and consultation with trade:

- Standard 6.8 (GA) – "The Customs shall seek to co-operate with the trade and seek to conclude Memoranda of Understanding to enhance Customs control."
- Standard 8.5 (GA) – "The Customs shall provide for third parties to participate in their formal consultations with the trade."
- Standard 9.1 (GA) – "The Customs shall ensure that all relevant information of general application pertaining to Customs law is readily available to any interested person."

Technical specifications to Standard 6 of Pillar 2 (Facilitation) of the **SAFE**, foresee that Customs administrations should establish mechanisms to allow for business partners to comment on proposed amendments and modifications that significantly affect their role in securing the supply chain.

Customs-Business engagement is a core element of good governance that helps to ensure legislation, regulations and policies are informed by a diversity of viewpoints and respond, to the greatest extent possible, to the needs identified. **The Customs-Business Partnership Guidance** provides a detailed guidance for developing a robust and sustained engagement/partnership mechanism, as well as enhancing such partnerships with Business.

Regulatory and procedural burdens are serious problems in particular for SMEs. Because of their limited resources and experience, SMEs are very vulnerable to regulatory burdens. When a new complicated regulation is introduced, they may struggle to understand it. Furthermore, SMEs have limited capabilities to influence the development of new regulations and procedures. The development of a **Model Business Lens Checklist for SMEs** is one effective way of reducing such regulatory burdens on SMEs and encouraging them to internationalize. The Checklist assists governments in designing, modifying and reviewing policies and procedures from the perspective of SMEs.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- HSC
- IMSC

### **Article 2.2. Consultations**

#### TFA provisions

*Each Member shall, as appropriate, provide for regular consultations between its border agencies and traders or other stakeholders located within its territory.*

#### Requirements and benefits

From the perspective of business, a regular consultative mechanism provides an opportunity to meet and discuss with relevant border authorities and each other operational or other concerns related to border processing, as well as possible solutions. It is also important for many traders simply as a means to stay informed about, and better understand the impact of, Customs and other border authorities' activities and initiatives that might affect their businesses.

From Customs and other border agencies perspective, regular exchange with the business community provides a source of information concerning modern working methods and technologies, which authorities might adopt to improve their operations, as well as insights as improvements to create greater efficacy and efficiency in administration of the law.

Article 2.2 envisages a process by which border agencies obtain the views of traders and other stakeholders on matters affecting them. Border agencies must hold regular consultations with traders and other stakeholders, as appropriate.

The TFA allows WTO Members to implement the obligation to hold regular consultations "as appropriate." This allows WTO Member flexibility to determine, with respect to each border authority, such matters as -

- the appropriate forms of consultation;
- the appropriate group or groups of stakeholders to be consulted;
- the appropriate frequency of consultation; and
- the appropriate subjects of consultation, etc.

## Analysis of TFA Section I, September 2016

However, the obligation to hold consultations would apply to Customs, and other authorities such as plant and animal inspection and quarantine services, and food safety authorities, depending on their responsibilities under national law.

There is no required minimum frequency of consultation defined in the TFA. For example, such consultations may take place weekly, monthly, quarterly, etc. The essential obligation is that the consultations take place at uniform regular intervals of time, rather than on an occasional or *ad hoc* basis.

### Authorities concerned

- Customs and other border agencies

### Links with WTO agreements

The **SPS and TBT Agreements** do not include an obligation for regular consultations between border agencies, traders and other stakeholders which could be classified as an SPS/TBT-plus provision.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 1 (1.3), 6 (Guidelines), 7 (Guidelines) and 9 (9.4, 9.5, 9.6, 9.7);
- SAFE;
- Revised Arusha Declaration;
- Customs-Business Partnership Guidance;
- Model Business Lens Checklist for Small and Medium Sized Enterprises.

This provision is compatible with WCO instruments.

The **RKC** Guidelines to Chapter 1 of the General Annex indicate that in order to develop instruments for co-operation and consultation, Customs has to establish formal consultative relationships with the different national trade associations. Co-operation between Customs and the trade can result in formal Memoranda of Understanding which serve to benefit the accomplishment of both parties' objectives and responsibilities. Further information on such Memoranda of Understanding can be found in the Guidelines to Chapter 6 of the General Annex on Customs control.

Members' examples in the Appendix to the RKC Guidelines to Chapter 1 of the General Annex provide guidance on the areas where joint decision making and/or guidance is foreseen, such as border sector strategy and planning, performance, information system projects, changes to Customs legislation, trade facilitation and security matters, harmonization of customs practices and procedures etc. These Guidelines also provide information on important elements of such consultative bodies/mechanisms, including: objectives, scope, membership and criteria for membership, operating mechanisms and format of meetings, establishment of sub-groups to discuss in-depth technical issues and other information.

Standard 7.2 (GA) of the RKC stipulates that the introduction of information technology shall be carried out in consultation with all relevant parties directly affected, to the greatest extent possible."

The **SAFE** sets out one of the core objectives and principles – to strengthen Customs/Business co-operation. The Pillar 2 of the SAFE specifically delves into the Customs-business partnership. It provides that *"Each Customs administration will establish a partnership with the private sector in order to involve it in ensuring the safety and security of the international trade supply chain.. ..."*

Pillar 2 of the WCO SAFE Framework of Standards provides global standards for launching an Authorized Economic Operator (AEO) programme.

Standard 5 of Pillar 2 (Communication) in particular provides that the Customs administration will regularly update Customs-Business partnership programmes to promote minimum security standards and supply chain security best practices.

## Analysis of Technical Measures of the TFA, September 2016

Technical specifications to Standard 5 specifies that Customs should engage in regular consultation, at both the national and local level, with all parties involved in the international supply chain to discuss matters of mutual interest including Customs regulations, and procedures and requirements for premises and consignment security.

The AEO conditions, requirements and benefits as contained in the SAFE Framework of Standards clearly provides that Customs, when appropriate and practical, engage in regular consultation at both the national and local level with all parties involved in the international supply chain to discuss matters of mutual interest, including Customs regulations, procedures and requirements for premises and cargo security.

The **Arusha Declaration** of the Customs Co-operation Council concerning Good Governance and Integrity in Customs states - "Customs administrations should foster an open, transparent and productive relationship with the private sector. Client groups should be encouraged to accept an appropriate level of responsibility and accountability for the problem and the identification and implementation of practical solutions. The establishment of Memoranda of Understanding between Customs and industry bodies can be useful in this regard...."

Recognizing the need for, and significance of a sustained Customs-Business partnership, the WCO has developed a **Customs-Business Partnership Guidance** to assist Members with the development of a process for regular consultation and a robust partnership with business.

The purpose of the **Model Business Lens Checklist for SMEs** is to assist Customs staff with the task of designing, modifying and reviewing Customs policies and programmes. The checklist will enable employees to look at policies and programmes from the perspective of the business community, that is, through a "Business Lens." One part of the Model Business Lens Checklist is dedicated to Consultation and supports members in identifying a number of important prerequisites for a robust consultation process: whether a consultation plan has been developed; whether all key representatives of the supply chain have been consulted; whether the relevant stakeholders have been invited to comment on drafts of proposed policies and programmes etc.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- HSC

## **ARTICLE 3: ADVANCE RULINGS**

### TFA provisions

1. *Each Member shall issue an advance ruling in a reasonable, time-bound manner to the applicant that has submitted a written request containing all necessary information. If a Member declines to issue an advance ruling, it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision.*
2. *A Member may decline to issue an advance ruling to the applicant where the question raised in the application:*
  - (a) *is already pending in the applicant's case before any governmental agency, appellate tribunal, or court; or*
  - (b) *has already been decided by any appellate tribunal or court.*
3. *The advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts, or circumstances supporting that ruling have changed.*
4. *Where the Member revokes, modifies, or invalidates the advance ruling, it shall provide written notice to the applicant setting out the relevant facts and the basis for its decision. Where a Member revokes, modifies, or invalidates advance rulings with retroactive effect, it may only do so where the ruling was based on incomplete, incorrect, false, or misleading information.*

## Analysis of TFA Section I, September 2016

5. *An advance ruling issued by a Member shall be binding on that Member in respect of the applicant that sought it. The Member may provide that the advance ruling is binding on the applicant.*
6. *Each Member shall publish, at a minimum:*
  - (a) *the requirements for the application for an advance ruling, including the information to be provided and the format;*
  - (b) *the time period by which it will issue an advance ruling; and*
  - (c) *the length of time for which the advance ruling is valid.*
7. *Each Member shall provide, upon written request of an applicant, a review of the advance ruling or the decision to revoke, modify, or invalidate the advance ruling.<sup>11</sup>*
8. *Each Member shall endeavour to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.*
9. *Definitions and scope:*
  - (a) *An advance ruling is a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to:*
    - (i) *the good's tariff classification; and*
    - (ii) *the origin of the good.<sup>12</sup>*
  - (b) *In addition to the advance rulings defined in subparagraph (a), Members are encouraged to provide advance rulings on:*
    - (i) *the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts;*
    - (ii) *the applicability of the Member's requirements for relief or exemption from customs duties;*
    - (iii) *the application of the Member's requirements for quotas, including tariff quotas; and*
    - (iv) *any additional matters for which a Member considers it appropriate to issue an advance ruling.*
  - (c) *An applicant is an exporter, importer or any person with a justifiable cause or a representative thereof.*
  - (d) *A Member may require that the applicant have legal representation or registration in its territory. To the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium-sized enterprises. These requirements shall be clear and transparent and not constitute a means of arbitrary or unjustifiable discrimination.*

### Requirements and benefits

An advance ruling is “a written decision provided by a WTO Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation.”

Advance rulings are provided for under the RKC standard on “binding rulings” (General Annex/Standard 9.9). Some Customs administrations may refer to advance rulings as “preliminary decisions;” “binding tariff information” or “binding origin information.”

By providing traders with information concerning Customs treatment of the goods before the goods are shipped, the trader is better able to determine and plan for the costs of the transaction. And, because this information is “binding” on Customs, the trader is able to rely upon it with certainty in his planning.

Advance rulings programmes also have benefits for the government. By providing information that Customs requires for tariff classification, origin or other decisions related to Customs treatment prior to the arrival of the imported goods, Customs has additional time to consider, consult, and decide questions without the pressure to release goods held at the place of entrance. Moreover, because the decisions are binding on all Customs officers throughout the Customs territory, an advance ruling programme promotes uniformity in application of the law by ensuring that different offices consistently apply the same Customs treatment to the same goods.

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<sup>11</sup> Under this paragraph: (a) a review may, either before or after the ruling has been acted upon, be provided by the official, office, or authority that issued the ruling, a higher or independent administrative authority, or a judicial authority; and (b) a Member is not required to provide the applicant with recourse to paragraph 1 of Article 4.

<sup>12</sup> It is understood that an advance ruling on the origin of a good may be an assessment of origin for the purposes of the Agreement on Rules of Origin where the ruling meets the requirements of this Agreement and the Agreement on Rules of Origin. Likewise, an assessment of origin under the Agreement on Rules of Origin may be an advance ruling on the origin of a good for the purposes of this Agreement where the ruling meets the requirements of both agreements. Members are not required to establish separate arrangements under this provision in addition to those established pursuant to the Agreement on Rules of Origin in relation to the assessment of origin provided that the requirements of this Article are fulfilled.

## Analysis of Technical Measures of the TFA, September 2016

Article 3 places an obligation on WTO members to provide advance rulings in the areas of tariff classification and origin (which is also required by the WTO Rules of Origin Agreement). It also encourages members to provide advance rulings in respect of customs valuation and certain other requirements (relief/exemption, quotas etc). This article also sets out the conditions and considerations for advance rulings.

The essential legal feature of an advance ruling is that it is “binding” on the government that issues it. A Member may provide that the ruling shall also be binding on the applicant who requested it.

The measure provides a liberal definition of an applicant: it may be an exporter, an importer, or “any person with a justifiable cause” (for example, the ultimate consignee of the goods), or a representative thereof.

However, the TFA further allows WTO Members to require the applicant to have legal representation or registration in its territory. Such a requirement may discourage exporters in other countries, particularly small and medium enterprises who may not have a presence in the country of import or the resources to obtain local representation, to apply for rulings.

WTO Members shall provide that their rulings remain valid for a “reasonable” period of time, and these validity periods shall be published. (For example, under the WTO Agreement on Rules of Origin, the minimum validity period for advance rulings on questions of the origin of goods is three years.)

Where the law, facts or circumstances supporting the ruling change before the expiration date, the TFA provides that the ruling may no longer be considered valid (for example, a change in the relevant tariff nomenclature, in the case of an advance ruling on tariff classification of goods).

Also, rulings may be revoked, modified or invalidated. Although the TFA does not define the circumstances under which these actions may be taken, it does require that the Member notifies the applicant in writing with reasons when taking these kinds of decisions, and it prohibits retroactive application of any such decision unless the ruling was issued on the basis of “incomplete, incorrect, false or misleading information.”

The measure requires WTO Members to provide for review of an advance ruling, or the decision to revoke, modify, or invalidate the advance ruling, upon written request of an applicant. Under legislation of certain WTO Members, a request for review can be made only when the goods have been imported and the ruling applied; other WTO Member’s legislation would allow the applicant to make the appeal directly upon issuance of the ruling, regardless of whether the goods have yet been imported or not. The TFA allows both such practices concerning review against rulings to continue.

It should also be noted that, in contrast to the TFA measure on appeals (Article 4), which require appeals to be heard by a higher or independent authority, the TFA measure on advance rulings allows review to be made by the same official, office or authority that issued the original ruling.

The TFA measure provides that WTO Members shall “endeavor” to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, subject to measures to ensure that commercially confidential information provided by the applicant is protected. Certain WTO Members make advance rulings or extracts thereof publically available, through printed and/or electronic publication. These may include all issued rulings, or only those rulings that the Member considers “precedential” or otherwise of particular importance. Such publication can provide traders such as importers of same or similar products with useful guidance concerning potential Customs treatment of their goods.

### Authorities concerned

- Customs

Links with WTO agreements

The **SPS and TBT Agreements** do not address the issue of advance rulings. Therefore, the TF encouragement to provide advance rulings besides tariff classification and origin on "additional matters for which a Member considers it appropriate" (Paragraph 3.9 (b) iv) could be classified as an SPS/TBT-plus provision.

Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 9 (9.9);
- Technical Guidelines on Advance Rulings for Classification, Origin and Valuation;
- Guidelines on Customs Infrastructure for Tariff Classification, Valuation and Origin;
- Diagnostic Tool on Tariff Classification, Valuation and Origin Work and Related Infrastructure/Guidelines on Customs Infrastructure for Tariff Classification, Valuation and Origin;
- Practical Guidelines for Valuation Control;
- Data Model;
- Comparison of the provisions of Article 3 of the WTO TFA with relevant WCO tools.

These provisions are compatible with WCO instruments and tools.

The WCO instruments/tools provide ample guidance on advance rulings, or "binding rulings"/"binding information" as indicated in the WCO instruments and tools, on classification, origin and valuation.

Standard 9.9 of the General Annex to the **RKC** states that binding rulings shall be issued at the request of the interested person, whereas in the WTO TFA, the applicant is an exporter, importer or any person with justifiable cause or a representative thereof.

The RKC Guidelines to this standard cover many aspects of binding rulings, including their scope, notification, time-limits and use.

The **Technical Guidelines on Advance Rulings for Classification, Origin and Valuation** are aimed at providing assistance to the relevant bodies in the practical implementation and application of advance ruling programmes. The guidelines are not binding and do not seek to challenge procedures already established or to be established.

The **Diagnostic Tool Tariff Classification, Valuation and Origin Work** has been designed to assist managers and senior officials in Customs administrations, as well as external diagnosticians, in respect of the identification, design, implementation and evaluation of capacity building projects with the aim of improving their performance in these areas. This Tool should be used together with the accompanying **Guidelines on Customs Infrastructure for Tariff Classification, Valuation and Origin**, as well as other relevant WCO materials.

**Practical Guidelines for Valuation Control** have general recommended procedures on advance rulings regarding Customs valuation.

TFA provisions on advance rulings provide reasonable specificity. However, more guidance is required, for instance, in regard to the validity period where the WCO tools relating to pre-binding classification information recommend at least one year from the date of issue, while in the area of origin, WCO recommends three years from the date of issue, which is in line with the WTO Agreement on Rules of Origin.

Furthermore, the WCO instruments and tools provide more guidance in regard to the time in which the binding rulings for origin should be issued: as soon as possible but no later than 150 days from submission of request. This has been taken from the WTO Agreement on Rules of Origin which is binding on WTO Members.

## Analysis of Technical Measures of the TFA, September 2016

Concerning the scope, the TFA provisions cover only importation, while WCO instruments for classification and origin apply to exportation as well.

On the other hand, WCO instruments and tools do not provide provisions on issuing notice of declination nor the reasons for declination (except for Guidelines on Binding Origin Information).

The **Data Model** contains elements that allow traders to submit specific advance ruling information as part of goods declarations.

### ICT considerations

The benefit of obtaining an advance binding ruling would be somewhat diminished if for each consignment, the trader must approach Customs with a hardcopy of the ruling and to convince officers each time of the applicability of the ruling. There may be a way of inputting information contained in a binding ruling into electronic goods declarations in order to enable its automatic application on eligible consignments. The WCO Data Model contains elements that allow traders to submit specific advance ruling information as part of goods declarations.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- HSC
- TCCV
- TCRO<sup>13</sup>

## ARTICLE 4: PROCEDURES FOR APPEAL OR REVIEW

### TFA provisions

1. *Each Member shall provide that any person to whom customs issues an administrative decision<sup>14</sup> has the right, within its territory, to:*
  - (a) *an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;*  
*and/or*
  - (b) *a judicial appeal or review of the decision.*
2. *The legislation of a Member may require that an administrative appeal or review be initiated prior to a judicial appeal or review.*
3. *Each Member shall ensure that its procedures for appeal or review are carried out in a non-discriminatory manner.*
4. *Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1(a) is not given either:*
  - (a) *within set periods as specified in its laws or regulations; or*
  - (b) *without undue delay*

*the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.<sup>15</sup>*

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<sup>13</sup> Technical Committee on Rules of Origin

<sup>14</sup> An administrative decision in this Article means a decision with a legal effect that affects the rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1(a).

## Analysis of TFA Section I, September 2016

5. *Each Member shall ensure that the person referred to in paragraph 1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to procedures for appeal or review where necessary.*

6. *Each Member is encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs.*

### Requirements and benefits

Article 4.1 obliges Members to provide traders with the right to appeal decisions made by Customs in an administrative and/or judicial proceeding. WTO Members are encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than Customs.

The notion of administrative decisions subject to appeal includes Customs “actions” as well as failures or refusal to act. Depending on terms of national legislation, these actions or refusals to act might include, for example, Customs detention of imported goods or failure to release goods within prescribed time periods.

In cases of such failures or refusals to act as required by law, the TFA allows that a WTO Member might provide an alternative mechanism to allow a trader to obtain a court or administrative order to Customs to promptly make a decision (which would then be subject to appeal, if adverse to the trader).

The TFA measure requires that a person who receives a Customs decision shall have the right to judicial review. However, the TFA measure further provides that a WTO Member may provide for administrative review – an appeal to an administrative authority (whether within the Customs administration or outside the organization, such as administrative tribunal) that is higher than or independent of the person or office that made the disputed decision – and it can require that the person initiate this administrative appeal process before going to court. This is the principle of “exhaustion” of administrative remedies, whereby a court, for purposes of economy and efficiency, will not hear a case unless and until the persons have completed all administrative review processes.

As just noted, WTO Members may require the initial appeal to be made to a higher level authority within Customs or an independent administrative authority. However, it may be that a decision on the appeal is delayed due to, for example, the volume or complexity of appeals previously filed. National Customs legislation may place a time limit on issuance of decisions requested from Customs authorities. The TFA measure thus provides that WTO Members shall ensure that where an administrative appeal is not decided within such a time period or, if no such period has been specified in law, without “undue delay”, the person shall have the right to access a higher level of review, which may be a court.

Persons who are issued an administrative decision by Customs are required to be provided with the reasons for the administrative decision “so as to enable such a person to have recourse to procedures for appeal or review where necessary.” That is, an understanding of the reasons for Customs decision is essential for the trader to determine whether he or she has a basis for appeal and to enable an effective argument to be made on appeal.

This TFA measure is mandatory with respect to administrative decisions issued by Customs. WTO Members are not strictly required to apply such disciplines with respect to disputes between traders and border authorities other than Customs. However, the TFA encourages the other border authorities to adopt these requirements as well.

### Authorities concerned

- Customs

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<sup>15</sup> Nothing in this paragraph shall prevent a Member from recognizing administrative silence on appeal or review as a decision in favor of the petitioner in accordance with its laws and regulations.

## Analysis of Technical Measures of the TFA, September 2016

- Other border agencies are encourage to comply

### Links with WTO agreements

Annex C, paragraph 1(i) of the **SPS Agreement** and Article 5.2.8 of the **TBT Agreement** address the question of appeal and review requiring Members to adopt procedures to review complaints concerning the operation of control, inspection and approval procedures/conformity assessment procedures, and to take corrective action when a complaint is justified. Accordingly, as regards review procedures, the TF Agreement does not seem to add to the obligations already existing in the SPS and TBT Agreements, which are in line with the TFA which encourages Members to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs (Paragraph 6).

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 10;
- Revised Arusha Declaration

These provisions are in line with the WCO instruments.

Chapter 10 of the General Annex of the **RKC** covers Appeals in Customs Matters (Right of Appeal, Form and Grounds of Appeal and Consideration of Appeal).

Article 4.1 of the WTO text ensures that any person to whom Customs issues an administrative decision has the right to administrative appeal to or review and/or judicial appeal or review of the decision.

The WTO text also ensures the right to further appeal/review/any other recourse in a case where the Customs decision on appeal/review is not given.

Article 4.1 refers primarily to Customs decisions (paragraph 1.1). According to paragraph 1.6, Members are also encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than Customs.

The **Revised Arusha Declaration** states that Customs procedures should include a procedure for appealing against decisions of the Customs, with the possibility of recourse to independent adjudication of the final instance.

### ICT considerations

While there are no obligations arising from this article to put in place an ICT-based solution, Customs administrations will benefit from using purpose-built systems or off-the-shelf packages for management of disputes.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC

## **ARTICLE 5: OTHER MEASURES TO ENHANCE IMPARTIALITY, NON-DISCRIMINATION AND TRANSPARENCY**

### **Article 5.1. Notification for enhanced controls or inspections**

## Analysis of TFA Section I, September 2016

### TFA provisions

*Where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages, or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination, or suspension:*

- (a) the Member may, as appropriate, issue the notification or guidance based on risk;*
- (b) the Member may issue the notification or guidance so that it applies uniformly only to those points of entry where the sanitary and phytosanitary conditions on which the notification or guidance are based apply;*
- (c) the Member shall promptly terminate or suspend the notification or guidance when circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade-restrictive manner; and*
- (d) when the Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.*

### Benefits and requirements

Certain WTO Members use automated or manual systems to generate notifications or guidance to alert their border offices that an importation of food or animal feed has been found to be contaminated or otherwise presents some threat to human, animal or plant health. Typically, the notification will trigger increased controls or examinations by border offices of goods from the same exporter and country.

Import alerts are typically published or made publicly available, putting business' customers and consumers on notice of a problem. This public notification can create a "chilling effect" on the business's future sales, even if the problem has been resolved, which can cause losses for the exporters and importers involved. The TFA measure will ensure that when authorities determine that the risk is no longer present, an announcement of the termination of the import alert shall be promptly published in order to minimize the losses for businesses.

Article 5.1 addresses risk based notifications or guidance for enhanced controls or inspections at the border in respect of foods, beverages or foodstuff in order to protect human, animal or plant life or health. The provisions address the manner of the issuance, termination and suspension of notifications/guidance where such a system is in place. Therefore, the TFA measure applies if a WTO Member country adopts or maintains a system of issuing such notifications. Typically, if such systems are used, they are operated by the food safety, plant and/or animal health authorities, rather than the Customs. The TFA measure does not require that WTO Members implement such systems.

The TFA measure provides that WTO Members may, as appropriate, issue notifications or guidance based on risk. The concept of risk management is well known to Customs administrations, and is the subject of a separate TFA technical measure (Article 7.4). In the context of border measures conducted for food safety, plant or animal health purposes, the WTO Sanitary and Phytosanitary Agreement (SPS) requires each Member to ensure that its SPS measures are based on an assessment, as appropriate to the circumstances, of the risk that a particular substance or product, including a process or production method, poses to human, animal, or plant life or health.

Once the notification or guidance is terminated or suspended, the WTO Member shall promptly publish an announcement in an easily accessible manner or inform the exporting Member or importer.

### Authorities concerned

- Customs
- Other border agencies (particularly those responsible for food safety, plant and animal health)

### Links with WTO agreements

An alert system providing "guidance for enhancing controls and inspections to protect human, animal or plant life or health" (paragraph 1) could, by definition, fall under the **SPS Agreement** whose requirements for SPS measures (to base measures on scientific evidence, among others) vary considerably from TF

## Analysis of Technical Measures of the TFA, September 2016

Article 5. Any possible contradictions between the TF and SPS Agreements are nevertheless avoided by paragraph 6 of the Final Provisions of the TFA (Article 24), which stipulates that the TFA does not diminish Members' rights and obligations under the SPS Agreement. Another interpretation of TFA Article 5, paragraph 1 would be to interpret any guidance envisaged in the provision as an additional information requirement regarding already existing SPS measures: in this case, TFA Article 5, paragraph 1 could be seen as an SPS-plus provision.

(Further inputs could be sought from the three standard-setting bodies referenced in the SPS Agreement, i.e. Codex, IPPC and OIE, regarding their standards, guidelines and recommendations which relate to Article 5).

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 6 (6.3, 6.4, 6.7);
- SAFE;
- Risk Management Compendium;
- Single Window Compendium.

These provisions are not explicitly covered by WCO tools and instruments since these WTO TFA provisions concern very specific goods for which usually other government agencies have specific responsibilities. However, the WCO does encourage the use of risk management and a compliance (measurement) strategy, as well as sharing information on high risks to reduce the burden on legitimate, low risk trade. Such is the case with the RKC, SAFE and the Risk Management Compendium.

**RKC** standards 6.3, 6.4 and 6.7 of the General Annex oblige Customs to use risk management in application of Customs Controls. They also require Customs to seek to cooperate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs control.

The TFA provisions correspond to the **SAFE** principles which envisage that Governments should consider alignment of functions and authorities amongst agencies in order to operate in a more efficient manner, avoid duplication, secure and facilitate trade, and engage in effective risk management. Furthermore, the SAFE recommends that Customs administrations along the supply chain should agree to use an electronic messaging system to exchange Customs data, control results and arrival notifications, in particular for high-risk consignments.

According to the **Risk Management Compendium** (Volume 1, Annex 4), Joint Targeting Centers could be considered as an effective tool to enhance information exchange and inter-agency cooperation in this regard.

**Single Window Compendium** provides more information on the advantages and solutions for sharing regulatory facilities as part of the Coordinated Border Management approach which: fosters inter-agency cooperation, speeds-up communication, enables shared risk management and promotes unified operational controls by sharing of operational information.

### ICT considerations

In a dynamic global environment, threats and alerts can originate from many sources. To deal with them, there may be a need to build a globally accessible, instantaneous, ICT based communication system. The dissemination of information on alerts through an accessible platform helps in building confidence among the stakeholders that the system is transparent and non-discriminatory.

### WCO Bodies Concerned

- TFAWG

- PTC
- RKC/MC
- SAFE WG
- IMSC
- EC<sup>16</sup>

## Article 5.2. Detention

### TFA provisions

*A Member shall promptly inform the carrier or importer in case of detention of goods declared for importation, for inspection by customs or any other competent authority.*

### Requirements and benefits

Article 5.2 addresses the detention of goods declared for importation for inspection by Customs or any other competent authority (e.g. food safety or plant or animal health authorities). The carrier or importer should be promptly informed about the detention. Notification of intended inspection allows the importer to exercise his rights to be present and assist at the examination

The term “detention” might seem to have connotations related to offences. However, in this article it means not releasing goods until an inspection has been performed.

The TFA measure requires that the notification of detention be made “promptly” and that it be given to the importer or carrier of the imported goods.

The form of the notification (electronic, paper, oral) or its content is not specified in the TFA measure, and therefore is a matter of national implementation.

Moreover, the authority that is required to provide the notification to the importer or carrier is not specified in the TFA measure. Depending on the requirements of national legislation and procedures, the notification may be given by the particular border authority that intends to inspect the goods; by Customs on behalf of itself and all such other authorities; or by the Single Window system, if such exists.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

**SPS Agreement** is silent on this provision which can therefore be considered as an SPS-plus provision.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.36), 6 (6.1)
- Risk Management Compendium;
- Customs Compendium on Operational Practices and Seizures (COPES).

The term “detention” might seem to have connotations related to offences. However, in this article it means not releasing goods until an inspection has been performed. Although the **RKC** does not have a provision that explicitly states that Customs has to inform the carrier or importer, it does contain a Standard 3.36 in the General Annex that says that Customs shall consider requests by the declarant to

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<sup>16</sup> Enforcement Committee

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be present or to be represented at the examination of the goods. Such requests shall be granted unless exceptional circumstances exist.

The **Risk Management Compendium** is prescriptive in this regard. The Risk Management framework, which is outlined in Volume 1 of the RMC, stresses communication with relevant stakeholders, including private sector partners, at all stages of the risk management process. When possible, this shall be interpreted to also include decisions regarding detention.

The **Customs Compendium on Operational Practices and Seizures (COPES)** is designed to highlight useful Customs operational practices in the area of enforcement and seizures, given their important role as tools for Customs administrations as governments strive to ensure the safety and security of their citizens, as well as to preserve the legitimate global trading system. It deals with detention under Section 10.3.

### ICT considerations

Response messages to electronically submitted declarations, must build an option to indicate detention. Customs declaration processing systems may have status indicators called “Detained for further information” or “Detained for intervention by ‘Other Government Agency’”. Such status-notifications indicate that goods have been facilitated for release but the declarant is informed that the subject goods will undergo further intervention from a designated government agency.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- EC

## Article 5.3. Test Procedures

### TFA provisions

3.1 *A Member may, upon request, grant an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding.*

3.2 *A Member shall either publish, in a non-discriminatory and easily accessible manner, the name and address of any laboratory where the test can be carried out or provide this information to the importer when it is granted the opportunity provided under paragraph 3.1.*

3.3 *A Member shall consider the result of the second test, if any, conducted under paragraph 3.1, for the release and clearance of goods and, if appropriate, may accept the results of such test.*

### Requirements and benefits

Errors in initial test results can and do occur due to sensitivity of the equipment used, incorrect procedures, sampling size or human error, among other reasons. Providing importers with the opportunity to request a second test gives traders an additional measure of assurance that a rejection, which can have significant cost to the importer, is not unwarranted and it provides the trade community with greater confidence in the integrity of the government’s controls. Where second test confirms the first, it may also be useful to the importer as additional support in claims against the exporter or seller of the non-conforming goods.

Article 5.3 addresses the opportunity (but not an obligation) for a Member to provide for a second test if the first test result shows an adverse finding for goods declared for importation and the obligation to take

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the results of this test into consideration. The Member shall also publish the contact information of laboratories where confirmatory tests can be carried out.

A WTO Member may have designated or accredited independent third-party laboratories, within the national territory or abroad, or other national government laboratories that can carry out product testing for particular purposes. Note that the TFA measure does not require WTO Members to accredit or designate third party laboratories, and would not preclude the second test from being carried out by the same laboratory that conducted the initial test.

The TFA measure requires the relevant authority to consider the results of the second test and, if appropriate, “may” accept the results. National implementation measures will be required to provide necessary procedures for resolution of discrepancy between the initial and second test results.

### Authorities concerned

- Customs – Customs laboratories
- Other border agencies

### Links with WTO agreements

**SPS Agreement** is silent on these provisions which can therefore be considered as SPS-plus provisions.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.38);
- Customs Laboratory Guide.

Standard 3.38 of the **RKC GA** deals with the taking of samples, but this TFA provision is not covered by WCO instruments. WCO instruments do not address the question of second confirmatory tests.

The **Customs Laboratory Guide** provides extensive guidance on sampling of goods which precedes a second test. In addition, in early 2016, the Guide was supplemented with a diagram to provide Members with a clear idea and guidance as to how the TFA provisions on test procedures could work in administrations. The Secretariat will also work on collection of national practices relating to both first and second tests, including the sampling procedures applied by WCO Member administrations. These will then be included in the Guide.

### ICT considerations

Efficient management of information regarding authorized laboratories, samples, testing and test-results is an important part of Customs clearance systems. To maintain the integrity of the process of drawing (multiple) samples, officers ideally should have access to information regarding the safe and reliable methods of drawing, securing, sealing and assigning identification numbers to samples. In binning and sending the samples for testing, the chain of custody information may also be captured. It also helps to have the results of testing, along with observations associated with tests. Such information should be available on automated systems, to be used for providing release and clearance, and for subsequent analysis. The transaction cycle for managing samples ends when the tested samples are returned to the trader or otherwise duly disposed off.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

- SSC<sup>17</sup>
- HSC<sup>18</sup>

## ARTICLE 6: DISCIPLINES ON FEES AND CHARGES IMPOSED ON OR IN CONNECTION WITH IMPORTATION AND EXPORTATION AND PENALTIES

### Article 6.1. General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation

#### TFA provisions

1.1 *The provisions of paragraph 1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with the importation or exportation of goods.*

1.2 *Information on fees and charges shall be published in accordance with Article 1. This information shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made.*

1.3 *An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force, except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published.*

1.4 *Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.*

#### Requirements and benefits

Article 6.1 foresees that information on fees and charges imposed on or in connection with importation and exportation (type of fees/charges, the reason for such fees/charges, responsible authority and when and how a payment is to be made) shall be published in accordance with Article 1.1 (Publication). It also foresees an obligation to periodically review fees and charges in order to reduce the number and diversity “where practicable”.

This measure should also be considered in the framework of Article 2.1 (Opportunity to Comment and Information Before Entry into Force), as it requires the fees to enter into force only after an adequate period has passed from date of publication, except in urgent cases. Publication before entry into force of new measures – such as a new or changed fee – better enables traders to adjust and comply from the date of implementation of the new measure. Moreover, where a government publishes changes to legal measures in advance, including fees and charges, traders can rely on existing rules in planning transactions and estimating their costs.

This TFA measure applies to all fees and charges that a WTO Member may impose on or in connection with imports and exports, other than duties and taxes. These fees and charges might include, for example,–

- Port fees (e.g., demurrage, weighing, haulage, etc.)
- Customs, standards, plant and animal quarantine authorities fees for sampling, examination or laboratory analysis of imported goods
- Plant quarantine fees for fumigation
- Customs fees for overtime services
- Border agency fees for issuance or certification of documents
- Fees for issuance of import or export licenses

It is also important to bear in mind that there are other provisions in the TFA which relate to fees and charges, i.e. Article 1.2.2 where Members are encouraged not to require the payment of a fee for

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<sup>17</sup> Scientific Sub-Committee

<sup>18</sup> Harmonized System Committee

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answering enquiries and Article 11.2 which stipulates that traffic in transit shall not be conditioned upon collection of any fees or charges in respect of transit.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

Border charges such as those levied in connection with SPS control, inspection and approval procedures and TBT conformity assessment procedures would seem to fall within the scope of this Article.

The **SPS Agreement** regulates fees levied for control, inspection and approval procedures in its Annex C, paragraph 1(f). Such fees must be equitable to those charged on like domestic products or products originating in any other Member, and should not be higher than the actual cost of the service. Annex C, paragraph 1(f) is less detailed than the TFA provisions on fees and charges. However, Annex C is to be read together with Article 8 of the SPS Agreement, which stipulates that control, inspection and approval procedures must not be "inconsistent with the provisions of the Agreement". Thus, it would seem that at least some control, inspection and approval procedures would be subject to the entire SPS Agreement, not just Annex C.

The **TBT Agreement** requires that any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account some costs that may vary (Article 5.2.5). Advance notification and publication requirements also apply to conformity assessment procedures (Article 5) but there is no explicit requirement to include information on fees and charges in these.

In adding more specificity on transparency and requiring periodic review of fees and charges, TFA Article 6.1 goes beyond the SPS and TBT Agreements and as such, could be classified as an SPS-plus provision.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3 (3.2) and 9 (9.1); SA A § 1 (19);
- Revised Arusha Declaration.

**RKC Standard 9.1** states that Customs shall ensure all relevant information of general application pertaining to Customs law is readily available to any interested person, which is in line with the publication requirements under Paragraph 1.2 in this Article. Guidelines to Chapter 9 of the RKC GA contain sufficient information to support implementation of Article 1.1, Publication, and in support to implementation of Article 6.1, such as guidance on where the information should be published and made available, on quality and clarity of information, update and dissemination of information etc.

However, the RKC does not provide for the periodic review of fees and charges, as envisaged under Paragraph 1.4.

The RKC envisages consultation with the trade and informing them of changes in laws and regulations well in advance of entry into force, "unless advance notice is precluded" (Standard 9.2 of GA).

A number of RKC provisions indicate the types of expenses which could potentially be charged by customs, i.e. carrying out customs formalities outside designated business hours, unloading goods at a place other than the one approved for unloading, unloading goods outside designated business hours

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(Standard 19 in Chapter 1 of Specific Annex A), or providing information relating to specific matters raised by the interested person and pertaining to Customs law (Standard 9.4 and 9.7 in General Annex).

The **Revised Arusha Declaration** states that a national Customs integrity programme must take into account, among other factors, having easily accessible customs procedures, which would include access to information on any fees and charges.

### ICT considerations

ICT considerations for provision under Paragraph 1.2 on publication should be viewed in the framework of Article 1.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC

## **Article 6.2. Specific Disciplines on Fees and Charges for Customs Processing Imposed on or in Connection with Importation and Exportation**

### TFA provisions

*Fees and charges for customs processing:*

- shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and*
- are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.*

### Requirements and benefits

Article 6.2 foresees that the amount of fees and charges for customs processing shall be limited in amount to the approximate cost of the services rendered. Therefore, this measure is limited to the amount of Customs processing fee or charge.

Under the TFA measure, the amount of any such Customs processing fee shall not exceed the approximate cost of the services rendered. In determining the “approximate cost of the services rendered,” the TFA measure requires that Customs take into account only the costs of services that were rendered on or in connection with specific import or export operation in question, which may include services “closely connected to the customs processing of goods,” even if not linked to the specific import or export operation (e.g. inspecting and release of cargo, post-clearance audit, provision of technical laboratory services, commercial fraud investigations, investigation of counterfeit goods, issuance of advance rulings, etc).

This measure ensures that the government will be able to recover its costs incurred in Customs processing, but that traders will not be subject to excessive fees or Customs processing fees and charges used as a disguised tax for fiscal purposes.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

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- RKC, GA §§ 3 (3.2) and 9 (9.7); SA A § 1 (19);
- Revised Arusha Declaration.

These provisions are in line with the **RKC**. A number of its provisions refer to the limitation of the amount of fees and charges. Standard 3.2 of the General Annex specifies that when Customs performs functions outside the designated business hours, any expenses chargeable by the Customs shall be limited to the approximate cost of the services rendered.

Similarly, Standard 9.7 mentions that the charges by Customs for providing information on specific matters should be limited to the approximate costs of the services rendered.

Standard 19 in Chapter 1 of Specific Annex A mentions a number of cases where the charges by Customs should be limited to the approximate cost of the services rendered.

The **Revised Arusha Declaration** requires administrative regulation of trade to be reduced to the absolute minimum.

### ICT considerations

A logical, non-discretionary and reasonable method of calculation renders itself to automated computation of duties, fees and charges. If calculation of fees and charges is based only on information contained in goods declarations, then it would be possible to adopt automated methods of calculation. This provides transparency and predictability for the traders, helps them in their estimation of landed costs, and enables them to pay all charges prior to the arrival of goods at the place of importation and exportation and facilitate release on arrival.

It would be convenient for traders if the facility of electronic payment of duties and taxes is also extended to the payment of fees, charges, fines and penalties.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

## Article 6.3. Penalty Disciplines

### TFA provisions

*3.1 For the purpose of paragraph 3, the term "penalties" shall mean those imposed by a Member's customs administration for a breach of the Member's customs laws, regulations, or procedural requirements.*

*3.2 Each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws.*

*3.3 The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.*

*3.4 Each Member shall ensure that it maintains measures to avoid:*

- (a) conflicts of interest in the assessment and collection of penalties and duties; and*
- (b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.*

*3.5 Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying the nature of the breach and the applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed.*

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3.6 *When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.*

3.7 *The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1.*

### Requirements and benefits

Article 6.3 foresees that Members who apply civil or administrative customs penalties shall impose penalties only to persons responsible for the violation; ensure that the amount of such penalties are proportionate to the degree and severity of the violation; avoid conflicts of interest; avoid creating an incentive for the assessment of a penalty that is not commensurate with the circumstances of the case; provide the person with a written explanation and consider a prior voluntary disclosure as a potential factor to mitigate the penalty amount.

The measure is intended to provide transparency, predictability and impartiality of Customs penalty regimes. Traders should not be subject to excessive penalties for minor breaches and will have a written explanation of the offense they are alleged to have committed, as well as the legal basis for the amount of the penalty imposed. Apart from providing the trader with basis to make an effective appeal or a mitigation claim, disclosure of this information creates confidence in the fairness and regularity of the Customs penalty procedures.

From the government perspective, the measure is intended to encourage greater voluntary compliance by the trading community. In the words of the WTO Member that was the initial proponent of this measure, "it is to the benefit of Customs authorities to encourage traders who discover that they have made an error or mistake to come forward and disclose that error to Customs. Excessive and non-transparent penalties can discourage such disclosure and inhibit trade."<sup>19</sup>

As set out in the relevant RKC standards, when determining the appropriate penalty amount to be imposed, Customs should consider:

- the seriousness or importance of the Customs offense committed;
- the record of the person concerned in his dealings with the Customs;
- where the offense concerns untrue particulars in a Customs declaration, whether the declarant can show that all reasonable steps had been taken to provide accurate and correct information;
- whether the offense occurred as the result of force majeure or other circumstances beyond the control of the person concerned;
- whether the errors are the result of inadvertence or due to fraudulent intent or gross negligence;
- the need to discourage repetition of errors of the same kind.

The measure requires WTO Members to ensure that it maintains measures to prevent "conflicts of interest" or improper incentives in connection with Customs penalty regimes. Of particular concern of WTO Members in negotiations were reward schemes whereby, for example, Customs officers who assess penalties on importers receive a percentage of the penalty or additional duties recovered. Reward schemes, if used, must be designed to ensure that Customs penalty amounts are determined consistently with the TFA "proportionality" principle discussed above, and not influenced by personal gain of individual officers.

### Authorities concerned

- Customs

### Links with WTO agreements

These provisions are compatible with WCO instruments and tools.

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<sup>19</sup> TN/TF/W/169, 5 February 2010 (Communication by the United States).

**RKC** standard 3.39 requires Customs not to impose substantial penalties for errors where they are satisfied that such errors are inadvertent and that there has been no fraudulent intent or gross negligence. It further mentions that the penalty shall not be greater than is necessary for a certain purpose.

This language is similar to GATT Article VIII, which is one of the GATT Articles that the TFA is intended to clarify and improve.

Standards and recommended practices 19 to 25 in Chapter 1 of SA H, and Guidelines to these standards and recommended practices, provide more detail on the administrative settlement of Customs offences, including compromise and administrative settlements where penalties are used, regulation of penalties applicable to a category of a Customs offence, commonly applicable penalties, assessing the severity or amount of penalties, regulating minimum and maximum penalty which can be imposed, etc.

#### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.39, 3.43), SA H §1 (19, 20, 21, 22, 23, 24, 25)
- Voluntary Compliance Framework.

These provisions are compatible with WCO instruments and tools.

**RKC** standard 3.39 requires Customs not to impose substantial penalties for errors where they are satisfied that such errors are inadvertent and that there has been no fraudulent intent or gross negligence. It further mentions that the penalty shall not be greater than is necessary for a certain purpose.

This language is similar to GATT Article VIII, which is one of the GATT Articles that the TFA is intended to clarify and improve.

Standards and recommended practices 19 to 25 in Chapter 1 of SA H, and Guidelines to these standards and recommended practices, provide more detail on the administrative settlement of Customs offences, including compromise and administrative settlements where penalties are used, regulation of penalties applicable to a category of a Customs offence, commonly applicable penalties, assessing the severity or amount of penalties, regulating minimum and maximum penalty which can be imposed, etc.

**Voluntary Compliance Framework** provides guidance on Voluntary Disclosure Programmes which give clients a chance to correct inaccurate or incomplete information or to disclose information that clients have not reported during previous dealings with Customs authorities, without penalties in the appropriate circumstances. The Voluntary Compliance Framework help traders comply voluntarily and correctly with Customs law, regulations or requirements.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC

## **ARTICLE 7: RELEASE AND CLEARANCE OF GOODS**

### **Article 7.1. Pre-arrival Processing**

#### TFA provisions

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1.1 *Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival.*

1.2 *Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.*

### Requirements and benefits

Article 7.1 requires Members to have in place procedures to allow submission of import documentation or other required information, in order to begin processing prior to the arrival of the goods and expedite the release of goods. Because Customs processing and documentary controls can be done in advance and release thereby accelerated, traders will be able to deliver or dispose of the goods more quickly. Unless there is a need for physical examination, the importer can obtain release of his goods immediately on arrival, thus avoiding potential demurrage or storage charges.

For Customs, the procedure reduces congestion by enabling documentary controls to be staggered and the examination of the goods, if any, to be better organized. The lead time provided for by this procedure also allows Customs to examine the documents more thoroughly. As containers can be released more quickly if Customs and other border authorities are able to process (and potentially clear goods) prior to arrival, there may be less demand on port storage facilities and higher rate of port throughput.

Article 7.1 can, to a certain extent, be viewed together with Article 7.3 (Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges), as pre-arrival processing may, in some countries, allow for release of goods prior to their arrival, with the final determination of customs duties, taxes, fees and charges to be carried out at a later stage.

The TFA measure requires WTO Members to allow pre-arrival submission of “import documentation and other required information, including manifests.” The scope of the measure thus extends to:

- (i) all border authorities whose approval is required for release of the goods, and
- (ii) both the cargo manifest and supporting documents, which are typically submitted by or on behalf of the carrier, and the goods declaration and supporting documents, which are submitted by or on behalf of the declarant.

As noted in the RKC Guidelines, the extent to which Customs will process a declaration that is submitted prior to arrival of the goods varies among countries:

“In some countries this procedure allows for the clearance of goods prior to their arrival (pre-clearance), while others allow the advance lodgment of the Goods declaration but not prior release or clearance. This is to avoid any changes being made to the consignment during its transportation. The pre-release or pre-clearance facility is most practical for air and sea modes of transport where switching of consignments is almost impossible.”<sup>20</sup>

The TFA measure requires WTO Members to allow pre-arrival submission of the import documentation “in order to begin processing...with a view to expediting the release of the goods upon arrival.” The TFA measure thus does not strictly require or provide for Customs clearance or release of the goods prior to arrival as described by the RKC Guidelines, although such actions by Customs would be fully consistent with the purposes of the measure.

The TFA measure requires WTO Members, as appropriate, to provide for electronic submission of the documents required for pre-arrival processing. Such documents would include the cargo declaration, the goods declaration and the supporting documents.

### Authorities concerned

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<sup>20</sup> RKC, General Annex Guidelines, Chapter 3, Clearance and Other Customs Formalities

- Customs
- Other border agencies

Links with WTO agreements

**SPS and TBT Agreements** are silent on these provisions which can therefore be considered as SPS/TBT-plus provisions.

Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3 (3.25) and 7 (Section 6.4 of the ICT Guidelines);
- SAFE;
- Data Model;
- Immediate Release Guidelines.

These provisions are compatible with WCO instruments and tools.

The WTO text is very scarce on this matter merely indicating that there shall be a procedure in place to allow for advance submission of import documentation etc.

It can be viewed as a base provision which relates to Articles 7.3 (separation of release from final determination), 7.4 (risk management), 7.7 (authorized operators), 7.8 (expedited shipments) and 7.9 (perishable goods).

**RKC** Standard 3.25 stipulates that “national legislation shall make provision for the lodging and registering or checking of the Goods declaration and supporting documents prior to the arrival of the goods”. This will allow Customs to make a decision on whether they need to examine the goods or not. If not, goods can be released upon arrival.

In some countries this procedure allows for the clearance of goods prior to their arrival (pre-clearance), while others allow the advance lodgment of the Goods declaration but not prior release or clearance. This is to avoid any changes being made to the consignment during its transportation.

RKC Guidelines to Standard 3.25 provide more detailed information on prior submission of declarations.

Regarding electronic submission of documents for pre-arrival processing, WCO instruments and tools provide extensive guidance on this matter.

Section 6.4 of the ICT Guidelines (Guidelines to Chapter 7 of the RKC General Annex) provides more detailed information on goods declaration processing (import and export) including pre-arrival/pre-departure processing.

Process and data requirements have been covered in the SAFE and the **Data Model**.

In the **SAFE**, technical specifications to Standard 1 of Pillar 1 (Integrated Supply Chain Management) provide for submission of advance electronic export/import goods declaration and cargo declaration within clearly defined timelines for each mode of transport. Standard 6 of Pillar 1, in particular, specifies that Customs administrations should require advance electronic information in time for adequate risk assessments to take place.

Additionally, the Standard 4 of Pillar 1 foresees establishment of a risk-management system based on advance information and strategic intelligence, to identify potentially high-risk shipments and automate that system. This will obviously expedite the release of low risk goods upon arrival.

Section 9 in the WCO **Immediate Release Guidelines (IRG)** is in line with this provision. The aim of this Section 9 of the IRG is to encourage operators to pre-advise Customs of the shipment or arrival of consignments. The provision of such information in advance may enable Customs to:

- (a) ascertain the category of consignments, prior to arrival, so that the appropriate release/clearance procedures can be applied at the time goods actually arrive;
- (b) apply risk management techniques to identify high-risk consignments requiring more scrutiny and;
- (c) release immediately correspondence and documents and no value or low value non-dutiable and/or non-taxable consignments which contain goods on which there are no restrictions and prohibitions.

#### ICT considerations

Explained as part of Revenue Accounting in Chapter 6 of the Kyoto ICT Guidelines.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- IMSC

### **Article 7.2. Electronic Payment**

#### TFA provisions

*Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.*

#### Requirements and benefits

Article 7.2 requires Members to adopt or maintain, to the extent practicable, procedures allowing the option of electronic payment for duties, taxes, fees and charges collected by customs incurred upon importation and exportation. The measure would thus extend to duty, tax and fees that are assessed by Customs as well as the fees or charges of other authorities that may be collected by Customs in connection with an importation or exportation (e.g., port fees collected on behalf of the port authority, quarantine fees collected on behalf of the plant or animal health authorities).

On the other hand, it would not extend to fees and charges collected by Customs but unrelated to importation or exportation (e.g., warehouse or broker licensing fees), the payment of which generally does not affect the speed of release and clearance of the goods, which is the theme of this agreement.

The TFA measure does not prescribe the form of electronic payment that should be offered. It may take the form of payment over the internet using a credit card; electronic fund transfers; or automated debit or credit of a bank account.

An electronic payment option has benefits for both the government and traders. By eliminating paper and manual processes, it enables payments to be made more quickly and, where payment of duty, taxes, fees and charges is a condition of release of the goods, thereby speeds up release times. An automated payment system will normally include validations that reduce the possibility of payment errors. Moreover, by eliminating personal contact and money handling between the payer and payee, an electronic payment system reduces opportunities for dishonest or fraudulent conduct.

#### Authorities concerned

## Analysis of TFA Section I, September 2016

- Customs
- Other border agencies
- Revenue Authority

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 7 (7.1, Section 6.10 of the ICT Guidelines);
- Single Window Compendium.

Kyoto ICT Guidelines and SW Compendium mention e-payment.

Section 6.10 in the **RKC** ICT Guidelines deals with revenue accounting and covers electronic payment and electronic funds transfer. Refunds and drawbacks should also be paid by customs to traders electronically.

The **Single Window Compendium** in its last revision makes reference to the TFA Article 7.2 stressing that in order to meet the obligations under the TFA, it is prudent to consider a Single Window approach as electronic payment here refers to all duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.

### ICT considerations

Implementing this measure could potentially require a multi-year programme, with deep implication also for business processes and human resources management.

Given the needs of the individual programmes for each of the measures under Article 7, it could be necessary to develop a comprehensive ICT strategic plan.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC
- DMPT<sup>21</sup>

## **Article 7.3. Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges**

### TFA provisions

3.1 *Each Member shall adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees, and charges, if such a determination is not done prior to, or upon arrival, or as rapidly as possible after arrival and provided that all other regulatory requirements have been met.*

3.2 *As a condition for such release, a Member may require:*

- payment of customs duties, taxes, fees, and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations; or*
- a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations.*

3.3 *Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee.*

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<sup>21</sup> Data Model Project Team

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3.4 *In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.*

3.5 *The guarantee as set out in paragraphs 3.2 and 3.4 shall be discharged when it is no longer required.*

3.6 *Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.*

### Requirements and benefits

Article 7.3 requires Members to adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees and charges. It also determines possible requirements as a condition for such a release (payment or guarantee).

This measure is triggered when there is a delay in Customs assessment of imported goods. Specifically, the TFA measure provides that WTO Members shall have procedures to allow release of imported goods where a final determination of duty, taxes, fees and charges is not done “as rapidly as possible after arrival” of the goods, if not before arrival.

The measure thus applies in those cases where Customs is unable to complete assessment “rapidly” because, for example, information or documents required by Customs for valuation, tariff classification or preferential origin of goods are not immediately available or Customs requires time to test the goods to determine their appropriate classification, to verify the authenticity of a preferential origin certificate, or to verify the declared transaction value.

The TFA measure provides that release shall be conditioned on compliance with “all other regulatory requirements.” That is, release requires a determination that the goods are not subject to prohibitions and that any restrictions of Customs or other border authorities, such as license or approvals or packaging or marking requirements, have been complied with.

The TFA measure recognizes that Customs may require a guarantee to ensure payment, once duty, taxes, fees and charges are finally determined. The guarantee may be in the form of a surety, deposit or other appropriate instrument as provided by the laws and regulations of the particular WTO Member. It further allows WTO Members the option of requiring a guarantee for the full amount owed on the goods or requiring the declarant to pay a portion that can be determined immediately, and provide a guarantee for the balance.

The TFA measure imposes certain disciplines on WTO Members’ use of guarantees for these purposes. In particular:

- the amount of the guarantee shall not exceed the amount the Member requires to ensure payment of Customs duties, taxes, fees and charges ultimately due;
- a guarantee may be required for payment of penalties and fines, where an offense is detected;
- the guarantee shall be discharged when it is no longer required.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3 (3.13, 3.14, 3.17, 3.40), 4 (4.9) and 5 (5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7), 7 (Section 6.10 of the ICT Guidelines);
- SAFE;
- Immediate Release Guidelines.

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This measure can be viewed together with Article 7.1 (pre-arrival processing), as pre-arrival processing may, in some countries, allow for release of goods prior to their arrival, with the final determination of customs duties, taxes, fees and charges to be carried out at a later stage.

These provisions are compatible with WCO instruments.

According to Standards 3.3 and 3.40 of the General Annex to the **RKC**, goods shall be released as soon as Customs have examined them or decided not to examine them, with examinations to take place as soon as possible after the goods Declaration has been registered.

Transitional Standard 3.32 of the General Annex to the RKC provides the possibility that for authorized traders who met criteria specified by the Customs, including having an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records, the Customs shall provide for release of the goods on the provision of the minimum information necessary to identify the goods and permit the subsequent completion of the final goods declaration enabling among others the calculation of duties and taxes and the collection of trade statistics.

RKC Chapter 5 provides standards and guidance on the use of guarantees which may be required in cases of separation of release from determination.

Section 6.10 of the ICT Guidelines covers details regarding deferred payment and guarantee management.

Standard 1 (Integrated Supply Chain Management) of the **SAFE** and Customs Guidelines on Integrated Supply Chain Management foresee that Customs administrations should generally grant rapid release to all consignments, which have met the conditions laid down by Customs and for which the necessary information required by national legislation is communicated, preferably by electronic means, at a stipulated time prior to arrival. It further provides that AEOs who meet criteria specified by the Customs should reasonably expect to participate in simplified and rapid release procedures on the provision of minimum information.

**The WCO Immediate Release Guidelines (IRG)** provide that the Customs will generally grant immediate release/clearance to all consignments, provided that the conditions laid down by Customs are met and that the necessary information required by national legislation is communicated at a stipulated time before the consignments arrive. The advance communication of that information is facilitated, in particular, through exchange of data electronically.

The IRG provide specific conditions for each of the 4 categories of shipments identified by the Guidelines.

### ICT Considerations

Implementing this measure could potentially require a multi-year programme, with deep implication also for business processes and human resources management.

Given the needs of the individual programmes for each of the measures under Article 7, it could be necessary to develop a comprehensive ICT strategic plan.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

### Article 7.4. Risk Management

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### TFA provisions

- 4.1 *Each Member shall, to the extent possible, adopt or maintain a risk management system for customs control.*
- 4.2 *Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.*
- 4.3 *Each Member shall concentrate customs control and, to the extent possible other relevant border controls, on high-risk consignments and expedite the release of low-risk consignments. A Member also may select, on a random basis, consignments for such controls as part of its risk management.*
- 4.4 *Each Member shall base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, inter alia, the Harmonized System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.*

### Requirements and benefits

Article 7.4 foresees that Members will, to the extent possible, adopt or maintain a risk management system for customs controls. It further foresees that Members shall concentrate customs control and, to the extent possible other relevant border controls, on high risk consignments and expedite the release of low-risk goods. Members shall use appropriate selectivity criteria in applying risk management.

The key trade facilitation requirement of the measure is that, through use of risk management and analysis, WTO Members shall expedite the release of low-risk consignments. The measure thus requires that Members concentrate their Customs controls on high-risk consignments, without prejudice to use of a random selection for control as part of risk management.

The measure requires each WTO Member to assess risk through appropriate selectivity criteria, and provides specific examples of such criteria (HS Code, nature and description of the goods, countries of origin and shipment, value of the goods, trader's compliance record and type of means of transport).

From a trade facilitation perspective, Customs proper use of risk management should result in controls concentrated on high risk goods and transactions, and allow others to pass with limited or no intervention and potentially simplified processing, thus minimizing time of clearance and lowering trade costs.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

(Further inputs could be sought from the three standard-setting bodies referenced in the SPS Agreement, i.e. Codex, IPPC and OIE, regarding their work which relates to risk-based border controls.)

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 6 (6.3, 6.4, 6.5) and 7 (Section 6.8 of the ICT Guidelines);
- SAFE;
- Risk Management Compendium;
- Customs Enforcement Network

These provisions are compatible with WCO instruments and tools.

Paragraphs 4.1, 4.2 and 4.3 are compatible with **RKC** GA standards 6.1, 6.2, 6.3 and 6.4.

Guidelines to Chapter 6 of the RKC GA imply that customs controls should be kept to the minimum necessary to meet the main objectives and should be carried out on a selective basis using risk management techniques to the greatest extent possible. The Guidelines provide technical details about risk management in Customs, including the basic control philosophy, selectivity, profiling and targeting, evaluation and review, compliance measurement, use of information technology for effective implementation or risk management, joint targeting and screening programmes, definitions etc.

Section 6.8 of the ICT Guidelines to RKC Chapter 7 also covers selectivity and risk management from an information management perspective.

The **SAFE** Standard 4 in Pillar 1 indicates that a Customs administration should establish a risk-management system to identify potentially high-risk shipments and automate that system. Standard 5 to Pillar 1 further indicates that selectivity, profiling and targeting should be used to identify potentially high-risk cargo. Technical specifications to these standards provide more detail on this and how advance cargo information can be used for effective risk management.

Paragraph 4.4 of the TFA text aims to set up a risk management system based on appropriate selectivity criteria. As the criteria cited are not prescriptive, they do not conflict with WCO's approach in the **Risk Management Compendium (RMC)**, which advocates a continuous review for identification and treatment of risks in customs processes.

Also, apart from selectivity criteria, RMC promotes receiving the pre-arrival data (RMC, Volume 2). The RMC is comprised of two separate but interlinked volumes. Volume 1 sets out the organizational framework for risk management and outlines the risk management process. Volume 2 deals with risk assessment, profiling and targeting tools that inform selection criteria for identifying high-risk consignments, passengers and conveyances for Customs intervention.

The **Customs Enforcement Network (CEN)** is a global depository of non-nominal enforcement-related information with, at its core, a database of seizures and offences covering various areas of Customs' competence. The CEN is essentially an analytical tool enabling users to analyze data on a global level in order to identify trends, prepare risk indicators, and conduct wider risk management (7.4.1). For example the selectivity criteria which should form the basis of risk management mentioned in paragraph 7.4.4 can be found in the CEN in each seizure case.

The national Customs Enforcement Network (**nCEN**) is a tool for the collection of nominal data on seizures and offences, suspected persons, and business entities on a national level. Much like the CEN, it permits the analysis of seizure data on the national level in order to enable more effective risk management (7.4.1) and targeted controls (7.4.3) based on specific selectivity criteria (7.4.4).

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- EC
- GIIS PG<sup>22</sup>
- IMSC

### **Article 7.5. Post-clearance Audit**

#### TFA provisions

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<sup>22</sup> Global Information and Intelligence Strategy Project Group

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5.1 *With a view to expediting the release of goods, each Member shall adopt or maintain post-clearance audit to ensure compliance with customs and other related laws and regulations.*

5.2 *Each Member shall select a person or a consignment for post-clearance audit in a risk-based manner, which may include appropriate selectivity criteria. Each Member shall conduct post-clearance audits in a transparent manner. Where the person is involved in the audit process and conclusive results have been achieved the Member shall, without delay, notify the person whose record is audited of the results, the person's rights and obligations, and the reasons for the results.*

5.3 *The information obtained in post-clearance audit may be used in further administrative or judicial proceedings.*

5.4 *Members shall, wherever practicable, use the result of post-clearance audit in applying risk management.*

### Requirements and benefits

This TFA measure requires WTO Members to implement “post-clearance audit” to ensure compliance with Customs and other related laws. Although the TFA does not define “post-clearance audit” it is clear from the proposals put forward by members that it can be understood in the same sense as “audit-based controls” defined in the RKC, which were referenced by WTO Members<sup>23</sup>

Article 7.5 indicates that Members shall conduct post-clearance audit, with a view to expediting the release of goods. Members shall select a person or a consignment for post-clearance audit in a risk-based manner and a transparent manner. Members shall notify the person without delay about the results of the audit, the person’s rights and obligations, and the reasons for the results. Information obtained in post-clearance audit may be used in further administrative or judicial proceedings. Members shall, wherever practicable, use the result of post-clearance audit in applying risk management.

The TFA measure acknowledges that information that Customs obtains during the course of a PCA, such as evidence of a Customs or tax offense, may be used by the government in administrative or judicial proceeding.

Moreover, the TFA measure provides that Customs should, wherever practicable, use the PCA results in risk management. This, again, emphasizes the link between post clearance audit and trade facilitation; by feeding back audit results to the risk management system, audit may be used as a tool to create greater efficiency in Customs control in connection with clearance and release of goods at the border.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 6 (6.6);
- SAFE;
- Risk Management Compendium;
- Post Clearance Audit Guidelines;
- Diagnostic Tool on Post Clearance Audit (PCA) and Infrastructure;
- Implementation Guidance on PCA.

Paragraph 5.1 is consistent with **RKC** GA Standard 6.6 on Audit-based controls.

Paragraph 5.2 aims to be prescriptive in the manner post-clearance audit is conducted. The first part relating to utilizing risk-based manner for audit selection is consistent with RKC GA Standard 6.5.

But the subsequent point in the same paragraph on audit transparency and notification “without delay of the results, their rights and obligations and the reasons for the results” are not explicitly covered in the

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<sup>23</sup> For example, TF/TF/W/134 (14 July 2006)(proposal of People’s Republic of China and Korea on PCA)

RKC. The PCA Guidelines draws reference to national legislations on follow-up actions by both auditor and auditee and provides practical procedural guidelines in its Volume II instead.

While allowing expedited release of the low risk consignments, the **SAFE** foresees the significance of post clearance audit by prescribing that AEOs should maintain the records specified in the applicable national Customs laws and regulations concerning commercial transactions relating to goods being traded in the international trade supply chain and agrees to make these available to the Customs administration for the purpose of validation and periodic audit.

**Post-Clearance Audit Guidelines** are presented in two volumes. Volume 1 is primarily targeted at management level to assist with the development and administration of a PCA programme (this volume is freely available). Volume 2 focuses on the operational aspects of PCA, with practical guidance and checklists for auditing officials (restricted to Customs administrations). Further information on the technical Customs topics related to the subject of a Customs audit (e.g. Customs valuation, classification and origin) are available in other guidance material produced by the WCO and mainly grouped under the Revenue Package.

This **Diagnostic Tool on Post Clearance Audit and Infrastructure** has been designed to assist managers and senior officials in Customs administrations, as well as external diagnosticians, in respect of the identification, design, implementation and evaluation of appropriate capacity building projects on Post Clearance Audit.

The main objective of the **Implementation Guidance on PCA** provides step-by-step guidance to achieve the goal, the concepts of the PCA Guidelines. This Guidance gives examples of legislation and operations, which have been provided by Members.

A dynamic risk management programme is indispensable for PCA. The **RM Compendium** provides information on how results of audit can be used in applying risk management, as well as risk indicators which can help in selecting persons or consignments for post-clearance audit.

### WCO Bodies Concerned

- TFAWG
- PTC
- WGRCF<sup>24</sup>
- RKC/MC
- SAFE WG
- EC
- IMSC

## **Article 7.6. Establishment and Publication of Average Release Times**

### TFA provisions

6.1 *Members are encouraged to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, inter alia, the Time Release Study of the World Customs Organization (referred to in this Agreement as the "WCO").*<sup>25</sup>

6.2 *Members are encouraged to share with the Committee their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency.*

### Requirements and benefits

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<sup>24</sup> Working Group on Revenue Compliance and Fraud

<sup>25</sup> Each Member may determine the scope and methodology of such average release time measurement in accordance with its needs and capacity.

Article 7.6 encourages Members to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as the WCO Time Release Study (TRS). The Members are further encouraged to share within the Trade Facilitation Committee their experiences on average release times, methodologies used, bottlenecks identified and any resulting effects on efficiency.

The aim of this provision is to measure time required for the release of goods. It serves to assist to identify the bottlenecks or problem areas in import, export and/or transit processing and the potential corrective actions needed to increase efficiency. For this purpose, it encourages the use of tools such as the WCO Time Release Study, which provides guidance to support implementation of this provision.

The TFA does not prescribe a particular scope or design for the time release study. It is left to the individual WTO Member to determine, for example, the border authorities, the entry or exit points, the types of goods and traffic, and the Customs procedures to be included in its study. However, the TFA does encourage WTO Members to conduct the study periodically and in a consistent manner. A periodic and consistent manner of measurement is important to allow the WTO Member to measure its progress in reducing release times and effect of reforms, as well as to find opportunities for further improvements.

WTO Members are encouraged to publish the results of their time release studies. The method of publication (e.g., website) and the frequency of publication are to be determined by each WTO Member. Publication of average time required to release goods increases predictability of Customs procedures and is therefore useful to importers and exporters in planning delivery times and clearance costs. There also may be provisions in national legislation which give rise to certain rights where release or clearance is unreasonably delayed, such as a right to a written explanation or right of appeal. Publication of time release study results may provide the importer with a basis to determine whether the extent of delay in release is usual.

Finally, making results public establishes a benchmark in the first place and creates an incentive and potential pressure for reform to reduce processing times.

The measure encourages WTO Members to share experiences with the WTO Trade Facilitation Committee, including methodologies used, bottlenecks identified, and any resulting effects in efficiency.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

**SPS Agreement** is silent on these provisions which can therefore be considered as SPS-plus provisions.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Guide to Measure the Time Required for the Release of Goods (TRS Guide);
- TRS Online Software;
- The Customs International Benchmarking Manual.

These provisions are compatible with WCO tools.

The **TRS Guide** is a tool used by Customs administrations to develop procedures for periodic measuring of time required for release of goods. The tool was initially designed for inbound goods, but has been updated in 2011 to respond to the current realities and demands (measuring efficiency of export procedures, coordinated border management, customs-business partnership programmes, customs-to-customs cooperation, regional integration, etc). The WCO TRS Version 2 also includes a model press

release, as well as a number of national practices, guide for the TRS on-line software and other practical guidance.

**TRS online software** for conducting a TRS was developed by the WCO and the World Bank, and made available to Members. The software is intended to serve as a tool for use in developing a survey questionnaire, completing an analysis and producing a report on a TRS.

**The Customs International Benchmarking Manual** was developed to provide guidance to administrations for improving their efficiency and effectiveness by comparing procedures or processes with the same or similar procedures or processes carried out by others. This process would then assist administrations in identifying and implementing best practice.

#### ICT considerations

Guide to Measure the Time Required for the Release of Goods (TRS) Version 2 recommends a 3 phase approach:

- I. Preparation of the Study
- II. Collection and Recording of Data
- III. Analysis of Data and Conclusions

In all three phases, it helps to use ICT. Having in mind the third phase requires analysis of data, it is recommended to use ICT.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

### **Article 7.7. Trade Facilitation Measures for Authorized Operators**

#### TFA provisions

7.1 *Each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.*

7.2 *The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures.*

(a) *Such criteria, which shall be published, may include:*

- (i) *an appropriate record of compliance with customs and other related laws and regulations;*
- (ii) *a system of managing records to allow for necessary internal controls;*
- (iii) *financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and*
- (iv) *supply chain security.*

(b) *Such criteria shall not:*

- (i) *be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and*
- (ii) *to the extent possible, restrict the participation of small and medium-sized enterprises.*

7.3 *The trade facilitation measures provided pursuant to paragraph 7.1 shall include at least three of the following measures:*<sup>26</sup>

- (a) *low documentary and data requirements, as appropriate;*
- (b) *low rate of physical inspections and examinations, as appropriate;*
- (c) *rapid release time, as appropriate;*

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<sup>26</sup> A measure listed in subparagraphs 7.3 (a) to (g) will be deemed to be provided to authorized operators if it is generally available to all operators.

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- (d) *deferred payment of duties, taxes, fees, and charges;*
- (e) *use of comprehensive guarantees or reduced guarantees;*
- (f) *a single customs declaration for all imports or exports in a given period; and*
- (g) *clearance of goods at the premises of the authorized operator or another place authorized by customs.*

7.4 *Members are encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfilment of the legitimate objectives pursued.*

7.5 *In order to enhance the trade facilitation measures provided to operators, Members shall afford to other Members the possibility of negotiating mutual recognition of authorized operator schemes.*

7.6 *Members shall exchange relevant information within the Committee about authorized operator schemes in force.*

### Requirements and benefits

Article 7.7 foresees that Members shall provide additional trade facilitation measures to operators who meet specified criteria, although they may, alternatively, offer such trade facilitation measures through customs procedures generally available to all operators and are not required to establish a separate scheme.

Authorized operator or “trusted trader” schemes generally permit those businesses that, by meeting specified criteria, provide Customs with the necessary assurances of compliance with Customs requirements, and therefore may be treated as lower risk. As such, an authorized operator’s transactions require less intervention, which allows Customs to concentrate its control resources on transactions of higher risk or unknown operators.

The TFA measure encourages WTO Members to base their authorized operator schemes on international standards, if consistent with their particular objectives. The RKC and its guidelines and SAFE Framework of Standards provide international standards.

An Authorized Operator scheme may include only some of the specified criteria. For example, it may or may not have ‘supply chain security’ as one of the specified criteria. If the security component is not included, it is more akin to a compliance programme like the RKC’s ‘Authorized Person’ (RKC Transitional Standard 3.32). If it includes a security component, it would be more akin to the SAFE Authorized Economic Operator (AEO) programme.

Under the TFA measure, an authorized operator programme is voluntary. In order to qualify for the programme, a trader is typically required to demonstrate that he meets certain criteria. The TFA measure provides that any such criteria must be published and must be “related to compliance with laws, regulations or procedures, or the risk of non compliance,” such as the following:

- an appropriate record of compliance with Customs and other related laws and regulations;
- a system of managing records to allow for necessary internal controls;
- financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and
- supply chain security.

Qualification criteria cannot be designed or applied in a way that creates arbitrary or unjustifiable discrimination between operators where the same conditions prevail. Any company capable of demonstrating its ability to comply with those objective criteria should be eligible, regardless of its size or origin.

Those traders that qualify for authorized operator status are required to be given additional trade facilitation benefits. The TFA measure includes a list or “menu” of such additional trade facilitation benefits, which was largely drawn from existing authorized operator schemes.

The TFA measure thus requires WTO Members to offer authorized operators at least 3 benefits from the list. Of course, this is the minimum and a WTO Member can offer all benefits from the menu as well as other benefits in addition to these.

It is important to note that a WTO Member country is not obligated to implement an authorized operator programme if it already offers these benefits to all traders generally. For example, the TFA authorized operator benefits include deferral of payment, use of comprehensive guarantees, and rapid release time, as appropriate. However, it may be that, under its legislation, a WTO Member allows any trader with a good payment record to use deferral, upon presentation of an appropriate guarantee; allows any trader involved in multiple/repetitive Customs operations to use a comprehensive guarantee; and generally clears goods of all operators in less than one working day. In such cases, all traders can receive these “benefits” without the need to enroll in a specially-created authorized operator programme.

The TFA measure encourages WTO Members to negotiate mutual recognition of authorized operator schemes, in order to enhance the trade facilitation benefits of the programme for the operator (and thereby encourage their use and growth). Under a mutual recognition agreement, one country recognizes another country’s system granting authorized operator status as being equivalent to its own. Mutual recognition affords an authorized trader the same benefits and therefore improves predictability and efficiency of operation in all countries applying the standards.

Authorized Operator schemes could vary from one Member to another depending upon the criteria and the thrust specified by them for their Authorized Operators. Like-minded Members could establish agreements on the mutual recognition of Authorized Operators set up under Article 7.7 , but would have to clearly distinguish between these and SAFE AEO mutual recognition arrangements. Mutual recognition agreements may be at the bilateral level or, possibly, at the sub-regional or regional level. They are of particular importance for an efficient transit system where one operator crosses multiple borders in the course of one transit operation.

Authorized trader programmes, by providing for faster release of goods, reduced levels of physical inspection by the Customs or perhaps the right to pay Customs duties periodically rather than on a consignment-by-consignment basis, have obvious benefits for trade for honest compliant traders. Authorized trader systems are also a value to Customs administrations because they reduced the need for physical intervention by Customs on individual shipments and allow Customs to concentrate its usually limited resources on controlling high risk shipments within the framework of an overall risk management strategy.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3 (3.32) and 7 (Sections 6.15 and 9.3 of the ICT Guidelines);
- SAFE;
- SAFE Package.

The WTO TFA takes into consideration different models of the WCO: both Special Procedures for Authorized Persons (**RKC** - Transitional Standard 3.32 and the Authorized Economic Operator (AEO) in the **SAFE**). For example, in the WTO text, the specified criteria for Authorized Operators (AO) are very similar to a number of criteria specified in the SAFE text (i.e. an appropriate record of compliance, a system of managing records, financial solvency, supply chain security).

However, none of these requirements are mandatory. AO programme may include only few of the specified criteria.

Fundamental difference between AEO and AO is that in AEO there is thrust on supply chain security with consequent facilitation, whereas in AO the main thrust is on compliance or the risk of non – compliance

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with laws. Even if supply chain security is one of the specified criteria, the security standards may not be at par with SAFE Framework of Standards.

Basically, the SAFE AEO is a very comprehensive concept compared to what is included in the WTO text

On the other hand, the trade facilitation measures (i.e. benefits) include some from the RKC (clearance of goods at the premises of the authorized operator, a single customs declaration for all imports or exports), some from the SAFE or the PSCG benefits paper (fewer physical inspections, rapid release time), and for instance reduced documentary and data requirements is in both the RKC and the SAFE..

The Members shall provide additional trade facilitation measures to Authorized Operators who meet specified criteria. Alternatively, Members may offer such facilitation measures through customs procedures generally available to all operators and not be required to establish a separate scheme.

WTO TFA text stipulates that the Members are encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist.

RKC (including Guidelines) and SAFE Framework of Standards (especially Pillar 2 on Customs-Business partnership) and the SAFE Package provide such standards and guidance.

The text also refers to mutual recognition of authorized operator schemes. However, clear distinction between mutual recognition arrangements (MRAs) on SAFE AEO and AO MRAs (between willing administrations) needs to be maintained.

The **SAFE package** contains a variety of tools with useful information on AEO and compliance programmes (similar to AOs, without security requirements). For example, the AEO Compendium provides information on the Compliance and AEO programmes currently in place around the world. The AEO Implementation Guidance explains how Members can develop AEO programmes through a ten-step process. Other useful tools are: FAQ for AEOs and SMEs, Model AEO appeal procedures, AEO benefits, Guidelines for Developing MRAs, AEO Template etc.

Development of the AO scheme, based on SAFE AEO standards would assist in ensuring a harmonized approach and enable countries/administrations to achieve mutual recognition on the basis of a shared understanding.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- SAFE review sub-group
- IMSC

### **Article 7.8. Expedited Shipments**

#### TFA provisions

8.1 *Each Member shall adopt or maintain procedures allowing for the expedited release of at least those goods entered through air cargo facilities to persons who apply for such treatment, while maintaining customs control.<sup>27</sup> If a Member employs criteria<sup>28</sup>*

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<sup>27</sup> In cases where a Member has an existing procedure that provides the treatment in paragraph 8.2, this provision does not require that Member to introduce separate expedited release procedures.

<sup>28</sup> Such application criteria, if any, shall be in addition to the Member's requirements for operating with respect to all goods or shipments entered through air cargo facilities.

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limiting who may apply, the Member may, in published criteria, require that the applicant shall, as conditions for qualifying for the application of the treatment described in paragraph 8.2 to its expedited shipments:

- (a) provide adequate infrastructure and payment of customs expenses related to processing of expedited shipments in cases where the applicant fulfils the Member's requirements for such processing to be performed at a dedicated facility;
- (b) submit in advance of the arrival of an expedited shipment the information necessary for the release;
- (c) be assessed fees limited in amount to the approximate cost of services rendered in providing the treatment described in paragraph 8.2;
- (d) maintain a high degree of control over expedited shipments through the use of internal security, logistics, and tracking technology from pick-up to delivery;
- (e) provide expedited shipment from pick-up to delivery;
- (f) assume liability for payment of all customs duties, taxes, fees, and charges to the customs authority for the goods;
- (g) have a good record of compliance with customs and other related laws and regulations;
- (h) comply with other conditions directly related to the effective enforcement of the Member's laws, regulations, and procedural requirements, that specifically relate to providing the treatment described in paragraph 8.2.

8.2 Subject to paragraphs 8.1 and 8.3, Members shall:

- (a) minimize the documentation required for the release of expedited shipments in accordance with paragraph 1 of Article 10 and, to the extent possible, provide for release based on a single submission of information on certain shipments;
- (b) provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;
- (c) endeavour to apply the treatment in subparagraphs (a) and (b) to shipments of any weight or value recognizing that a Member is permitted to require additional entry procedures, including declarations and supporting documentation and payment of duties and taxes, and to limit such treatment based on the type of good, provided the treatment is not limited to low value goods such as documents; and
- (d) provide, to the extent possible, for a *de minimis* shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods. Internal taxes, such as value added taxes and excise taxes, applied to imports consistently with Article III of the GATT 1994 are not subject to this provision.

8.3 Nothing in paragraphs 8.1 and 8.2 shall affect the right of a Member to examine, detain, seize, confiscate or refuse entry of goods, or to carry out post-clearance audits, including in connection with the use of risk management systems. Further, nothing in paragraphs 8.1 and 8.2 shall prevent a Member from requiring, as a condition for release, the submission of additional information and the fulfilment of non-automatic licensing requirements.

### Requirements and benefits

Article 7.8 foresees that Members shall establish special facilitative procedures (as described in paragraph 8.2) to allow expedited release of at least those goods entered through air cargo facilities.

The TFA measure was aimed originally for air "express shipments." Express shipments represent an increasingly important element of every Members logistical and supply-chain infrastructure, a key element to economic output in today's global just-in-time business environment. Given the time sensitive nature of the express shipment business, speed of Customs clearance is particularly critical for these operators.

Although aimed at air express shipment ("at least those goods that are entered through air cargo facilities"), it is important to note that the terms of the TFA measure can be applied by WTO Members more generally, to operators other than express consignment companies and/or to goods entering by modes other than air.

The traditional business of express consignment operators was letters and documents and small packages. However, with growth in just-in-time inventory and manufacturing practices and rise of internet sales, among other factors, the express shipment business can now include freight of all kinds, regardless of weight, size, or value.

This TFA principle encourages WTO Members to apply the express delivery procedures to such goods, rather than limit the facilitative benefits to only low value goods and documents carried by express operators.

Where the shipment value or dutiable amount on the goods is *de minimis*, the administrative costs of assessment, collection and payment can exceed the amount of revenue collected. A *de minimis* waiver allows such goods to be considered for immediate release on the basis of a single submission, and therefore reduces delays and costs in Customs clearance for traders and Customs.

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*De minimis* waivers are provided for under the RKC transitional standard 4.13. Under the terms of the TFA measure, expedited release treatment is available upon application of persons who request it, and WTO Members may require applicants meet certain conditions specified in paragraph 8.1. These criteria are required to be published.

### Authorities concerned

- Customs
- Airport operator

### Links with WTO agreements

Expediting the release and clearance of goods in compliance with the TFA could potentially undermine Members' rights to implement SPS or TBT-related controls in accordance with the **SPS and TBT Agreements**. However, TFA Article 7 qualifies the obligation by the phrase "nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations" (TFA Article 7.3.6, see also TFA Article 7.8.3). Furthermore, any potential problem is also avoided by paragraph 6 of the Final Provisions of the TFA (Article 24), which stipulates that the TFA does not diminish Member's rights and obligations under the SPS and TBT Agreements.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3, 4 (4.13, 4.14);
- Immediate Release Guidelines;
- Data Model (Information Package)

These provisions are compatible with WCO instruments.

The text is more or less in line with the **Immediate Release Guidelines** (IRG) which provides much more information and guidance. The IRG provide that the Customs will generally grant immediate release/clearance for all consignments, provided that the appropriate conditions are met and the necessary information is communicated in a certain time before arrival of goods.

In the TFA Members shall adopt or maintain procedures for expedited shipments. It also states that the procedures should allow expedited release of at least those goods entered through air cargo facilities. However, according to footnote 8 to Article 7.8, in cases where a Member has an existing procedure that provides the treatment in paragraph 8.2, this provision would not require that Member to introduce separate expedited release procedures.

The difference to WCO is that the WTO Text provides a possibility of limiting who may apply for expedited shipments (expedited shipment carrier), indicating specific criteria, which are not contained in the IRG, while the IRG indicates criteria for the 4 categories of goods to which this procedure applies. The IRG is specific on which data elements need to be submitted to the Customs in advance, which is not included in the WTO text.

The WTO text talks only about expedited release and not of expedited clearance (which is covered in the IRG).

The data requirements for certain categories of goods under the IRG were mapped to the **Data Model**, The results of this mapping have been included in the updated version of the IRG adopted by the PTC in November 2013.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

### Article 7.9. Perishable goods<sup>29</sup>

#### TFA provisions

9.1 *With a view to preventing avoidable loss or deterioration of perishable goods, and provided that all regulatory requirements have been met, each Member shall provide for the release of perishable goods:*

- (a) *under normal circumstances within the shortest possible time; and*
- (b) *in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.*

9.2 *Each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required.*

9.3 *Each Member shall either arrange or allow an importer to arrange for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorizations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities.*

9.4 *In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay.*

#### Requirements and benefits

Quick release of perishable goods, and ensuring their proper storage while waiting clearance, has clear importance to traders of these goods, many of whom are small and medium enterprises.

Article 7.9 foresees that Members shall adopt or maintain procedures for the importation of perishable goods that: allow release within the shortest possible time; provide for release, where appropriate, outside Customs normal business hours; give priority to such goods when scheduling examinations; allow such goods to be stored in appropriate conditions for their conservation, where facilities approved by the relevant authorities are available; where practicable and upon request, allow release to occur at these storage facilities; and require Customs to give a written explanation to the importer, on request, when there is a significant delay in the release of the goods.

The TFA defines “perishable goods” as “goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions.” Such goods, due to their nature, must be cleared through Customs and other relevant border agencies as fast as possible. Delays in the release and clearance can reduce the shelf life of such goods and may affect their quality in an irreversible manner.

Perishable goods typically include fresh fruits and vegetables, chilled or frozen foods, cut flowers, etc. A WTO Member might also extend the facilitative measures for perishable goods to live animals, perishable medical research materials, medicaments and vaccines, etc. that require special storage conditions. If there is a significant delay in the release of the goods, the WTO Member shall “to the extent practicable” communicate the reasons for the delay, on written request.

With respect to storage of perishable goods pending their release, each WTO Member shall:

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<sup>29</sup> For the purposes of this provision, perishable goods are goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions.

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- arrange appropriate storage conditions for such goods (e.g., by maintaining a warehouse with appropriate conditions for conservation of the particular perishable goods) or allow the importer to make such arrangements (e.g., placement in the importer's warehouse or a third-party facility); and,
- "where practicable and consistent with domestic legislation," release goods at those storage facilities arranged by the importer.

The TFA expressly provides that such facilities for storage may be designated or approved by Customs or other relevant authority, and that an authorization may be required to move goods to such facilities, which may be located outside the area of the Customs office.

### Authorities concerned

- Customs
- Other border agencies

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.34)

The WTO text is consistent with the **RKC** which also indicates that when scheduling examinations, priority shall be given to the examination of live animals and perishable goods (Standard 3.34 of the General Annex) which pre-supposes release with priority. However, the WTO text provides more specificity in terms of storage of perishable goods.

The WTO text indicates a requirement for a Member to provide a communication on the reasons for the delay of release.

### ICT considerations

Separate treatment on perishable goods is based on simplified procedures adopted for a number of commodities. It is possible to make such service requests in goods declarations for import and export using elements in the WCO Data Model.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

## **ARTICLE 8: BORDER AGENCY COOPERATION**

### TFA provisions

1. *Each Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.*

2. *Each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include:*

*(a) alignment of working days and hours;*

*(b) alignment of procedures and formalities;*

*(c) development and sharing of common facilities;*

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*(d) joint controls;*

*(e) establishment of one stop border post control.*

### Requirements and benefits

Article 8 requires the Members to ensure that national authorities and agencies responsible for border controls and dealing with the importation, exportation and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade. It also specifies that Members shall, to the extent possible and practicable, cooperate with other Members with whom they share a common border with a view to coordinating procedures at border crossings, which may include alignment of working days and hours, alignment of procedures and formalities, development and sharing of common facilities, joint controls and establishment of one stop border post controls.

Thus, the TFA focuses both on national and international border agency cooperation.

At national level, authorities and agencies responsible for border controls and procedures related to imports, exports and transit of goods are required to cooperate and coordinate their activities, with the goal of facilitating trade.

The measure thus covers all border authorities that are involved in processing goods moving across the border (e.g., Customs, veterinary, phytosanitary inspection, etc.), and require cooperation and coordination of activities across such authorities (“inter-agency”) and within a given authority (“intra-agency”).

In the negotiations, examples of coordination and cooperation among national border authorities included the harmonization of import and export data and documentation requirements and establishment of a single location for one-time documentary and physical verification of consignments. Other, more advanced forms of cooperation might include integration of business processes, common risk management systems, use of joint ICT systems and/or implementation of a Single Window.

However, the text of TFA measure does not prescribe specific forms of national border agency cooperation and coordination that must be implemented by a Member, other than such forms should facilitate trade. As noted in the WCO Compendium on Coordinated Border Management (CBM Compendium), there is not one implementation that will be appropriate for all countries; it will be responsibility of each WTO Member government to determine what system is the most appropriate for its nation:

In contrast to coordination among national authorities, the principle on coordination and cooperation at border crossing points is stated in non-mandatory terms. It is a “best-endeavor” commitment because, in part, implementation of cross-border cooperation will require bilateral agreement, and therefore the obligation is thus not fully within the individual Member’s power to execute. Moreover the situation between WTO Members, and even at specific border crossing points, can vary due to economic, social and political factors.

The measure includes an illustrative, non-exhaustive list of the examples of cross-border cooperation, which are set out in a kind of incremental order (from low to high):

- (a) alignment of working days and hours;
- (b) alignment of procedures and formalities;
- (c) development and sharing of common facilities;
- (d) joint controls;
- (e) establishment of one stop border post control.

This list of possible forms of cooperation and coordination was included in the legal text, particularly at the request of developing countries, to clarify the intention of this measure.

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By implementing border agency cooperation, a number of benefits for the government and the business could be achieved, including reducing delays and costs in release of goods, greater efficiency, shared resources, improved compliance and others.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

A positive encouragement for cooperation between the different border agencies is not contained in the **SPS Agreement**, and as such, could be qualified as an SPS-plus provision. In some cases, such increased cooperation between SPS and other border controls may improve the efficiency of SPS measures. Further, as the list of cooperation forms (for example the establishment of a one-stop border post control) is merely illustrative, TFA Article 8 does not create any new obligations and hence no contradiction with the SPS Agreement.

The **TBT Agreement** does not include references to border agency co-operation either.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.3, 3.4, 3.5, 3.35);
- SAFE;
- Coordinated Border Management Compendium;
- Data Model;
- Single Window Compendium;
- CBM e-learning course
- Guidelines for strengthening cooperation and the exchange of information between Customs and Tax authorities at the national level;
- Guidance on National Committees on Trade Facilitation.

The **RKC** contains relevant standards in relation to border agency cooperation: Transitional Standard 3.35 which deals with the coordination of inspections in the national context and, for common borders, Standard 3.3 about the correlation of business hours and competences, Standard 3.4 that calls for joint controls and standard 3.5 concerning juxtaposed offices.

In article 8.2, the WTO TFA text deals with cross border CBM. The list of possible cooperation and coordination areas is more or less the same as in the WCO instruments and tools although the wording is sometimes slightly different. E.g. the TFA text speaks of one stop border post controls whereas the WCO instruments and tools talk of juxtaposed Customs offices to facilitate joint controls (although One Stop Border Posts is also mentioned in SAFE). The TFA provisions seem compatible with WCO instruments, although the difference in terminology may also indicate a difference in interpretation.

The **CBM Compendium** addresses the issues of bringing diverse parties together into a well organized and effective structure to bring about Coordinated Border Management at both national and international level and addresses the provisions of Article 8 of the TFA.

The **SAFE** always contained provisions on CBM, and in the 2015 edition CBM has been elevated to one of the now three pillars of the SAFE. Chapter 5 deals with CBM including government agency coordination, cross-border management and Single Window.

The WCO views the Single Window concept as part of Coordinated Border Management. The **Single Window Compendium** provides more information on how Single Window supports CBM.

**Guidelines for strengthening cooperation and the exchange of information between Customs and Tax authorities at the national level** are expected to serve as reference guidance to Customs administrations in developing a cooperation framework and/or strengthening the existing cooperation based on their national requirements, operating environment and operational resources, which may include a formal agreement/arrangement, where appropriate.

The **Guidance on National Committees on Trade Facilitation** share relevant information on WCO Members' experiences and their roles in the National Committees on Trade Facilitation (NCTFs) for the implementation of the WTO Trade Facilitation Agreement (TFA). NCTFs are main body for coordination among different border agencies.

#### ICT Considerations

Coordinated Border Management requires coordinated flows of information within and between organizations. Border Agencies need maintain and share up-to-date compliance information. Decisions to align working days and hours, and procedures and formalities should be reflected in the practical operations supported by ICT solutions. This would imply the movement towards Single Window solutions, which is a logical outcome of aligned procedures, coordinated and joint controls and one stop border facilities.

Border agencies use a number of equipment types for enforcing controls at the border. There are many categories of equipment that can capture data. Therefore, links to electronic border protection equipment wherever feasible should be considered.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- SAFE WG
- IMSC
- DMPT
- EC

### **ARTICLE 9: MOVEMENT OF GOODS INTENDED FOR IMPORT UNDER CUSTOMS CONTROL**

#### TFA provisions

*Each Member shall, to the extent practicable, and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.*

#### Requirements and benefits

The importer or consignee's principal place of business may be located far from the seaport or airport where the goods first arrive to the country. Allowing clearance operations to be undertaken at a Customs office convenient to the trader business operations, where the competent staff and required information are located, can reduce costs and delays than if clearance is required to be completed remotely. This flexibility may also provide traders with more competitive distribution warehousing options than those available at the port or provide facilities for storage of goods requiring special conditions (e.g., perishable goods) that are not available at the port.

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Delays in Customs clearance can be a factor in creating congestion at the seaports, particularly in times of surges or peak cargo volumes. Allowing traders to move containers out of the port for clearance at inland offices frees up space at the port and reduces the pressure on port Customs officers.

Article 9 foresees that Members shall, to the extent practicable and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.

The measure requires that WTO Members – “to the extent practicable” – allow imported goods to be moved from the Customs port of arrival (e.g., a seaport) to another Customs office (e.g., a Customs office located in an inland city) where the goods will be declared and released for home use or other import procedure.

The measure is intended to allow for such movements where the goods are imported by one carrier or mode of transport (e.g., ship or air) and transferred to another (e.g., truck), as well as where the goods are delivered to the final destination by the same mode of transport.

In terms of the Revised Kyoto Convention, this TFA measure is implemented by means of a “national customs transit” operation.

The TFA measure does not prescribe any particular formalities required for use of the procedure. The measure might be implemented on the basis of a goods declaration for transit made at the Customs office of entry or, as suggested in the negotiations, on the basis of an indication in the import manifest/report of an inland destination for the goods. The formalities to be applied shall be determined by the WTO Member.

The TFA measure provides that movement of the goods shall be (i) subject to compliance with all “regulatory requirements,” and (ii) under “customs control.” The reference to “regulatory requirements” would include, for example, sanitary/phytosanitary requirements relating to the entry, establishment or spread of pests or diseases. Consistent with RKC definitions, goods shall remain subject to Customs control when moved from the office of entry to the inland destination.

In contrast to the specificity of the RKC, the TFA measure does not prescribe or refer to any particular requirements as to how Customs control shall be exercised with respect to such movements, such as requirements concerning Customs seals, time limits for the movement, or the provision of security, or use of escort, etc. Accordingly, the exercise of Customs control on such movements is to be determined by the individual WTO Member consistent, of course, with other relevant TFA obligations such as those concerning risk management, use of international standards (including the Revised Kyoto Convention standards on Customs transit), and formalities and documentation requirements.

### Authorities concerned

- Customs

### Links with WTO agreements

Allowing goods to be moved between customs offices could potentially raise some SPS or TBT concerns relating to the entry, establishment or spread of pests or diseases or other health risks. However, TFA Article 9 qualifies the obligation by the phrase “shall [allow for movement of goods], to the extent practicable, and provided all regulatory requirements have been met”. Furthermore, any potential problem is also avoided by paragraph 6 of the Final Provisions of the TFA (Article 24), which stipulates that the TF Agreement does not diminish Member's rights and obligations under the **SPS or TBT Agreement**.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, SA E §§ 1 and 2;
- Transit Handbook.

This provision is compatible with WCO instruments.

Article 9 corresponds to paragraph (b) under Standard 2 in Chapter 1, Specific Annex E of the **RKC**, as one of the four types of transit. It stipulates that Customs shall allow goods to be transported under Customs transit in their “territory from an office of entry to an inland Customs office”. This type of transit is referred in the RKC as “transit at importation”. It also falls under national customs transit as it applies to one country/Customs territory only, where the office of departure and the office of destination are in the same territory. Any security required relates only to the transit movements in the Customs territory concerned.

Standard 3 of Chapter 1 in SA E specifies that goods carried under Customs transit shall not be subject to the payment of duties and taxes, provided the conditions laid down by the Customs are complied with and that any security required has been furnished.

The **Transit Handbook** deals with various aspects of the operation of Customs transit procedures, and is accordingly intended to serve as a practical guide to assist WCO Members to develop a functional and effective transit system. In particular, this Handbook helps developing and least-developed Members to assess the effectiveness of their transit schemes and identify any further improvements needed

#### ICT considerations

This Article seeks to facilitate the transportation of goods for import within the Customs territory. The broad principles are covered under Special Annex E and the Customs Compendium on a Secure and Efficient transit system. Such movements are sometimes referred as internal transit. Information technology may be used to facilitate such movements by (i) re-using manifest and declaration information at the gateway Customs office. With such data, the need for a separate declaration for movement of goods in transit can be avoided and the accounting of imported cargo is facilitated. (ii) Managing security and surety in an automated environment. (iii) Cargo tracking devices may be used to monitor the secure and timely movement of goods within the Customs territory.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

## **ARTICLE 10: FORMALITIES CONNECTED WITH IMPORTATION, EXPORTATION AND TRANSIT**

### **Article 10.1. Formalities and Documentation Requirements**

#### TFA provisions

*1.1 With a view to minimizing the incidence and complexity of import, export, and transit formalities and to decreasing and simplifying import, export, and transit documentation requirements and taking into account the legitimate policy objectives and other factors such as changed circumstances, relevant new information, business practices, availability of techniques and technology, international best practices, and inputs from interested parties, each Member shall review such formalities and documentation requirements and, based on the results of the review, ensure, as appropriate, that such formalities and documentation requirements are:*

- (a) adopted and/or applied with a view to a rapid release and clearance of goods, particularly perishable goods;*
- (b) adopted and/or applied in a manner that aims at reducing the time and cost of compliance for traders and operators;*
- (c) the least trade restrictive measure chosen where two or more alternative measures are reasonably available for fulfilling the policy objective or objectives in question; and*

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*(d) not maintained, including parts thereof, if no longer required.*

1.2 *The Committee shall develop procedures for the sharing by Members of relevant information and best practices, as appropriate.*

### Requirements and benefits

Documentation and formalities for border crossing trade are, according to representatives of the trade community, a significant obstacle to trade. Smaller traders, typically in developing countries, may be particularly affected by unduly burdensome procedures, since they both drain manpower and resources which SMEs can ill afford, and they also act as a fixed cost regardless of the size of the consignment. Evidence suggests that excessive export procedures are as troublesome and costly as excessive import bureaucracy.

Article 10.1 foresees that Members must periodically review formalities and documentation requirements with a view towards simplifying or reducing them. Documentation requirements or formalities should be as fast and efficient as possible and aimed at reducing the time and cost of compliance. They should not be adopted if a less trade-restrictive solution is available. They should be eliminated or modified if no longer necessary.

The TFA measure requires WTO Member to minimize the incidence and complexity of “formalities.” The term “formalities” is not defined in the TFA or the GATT. However, it might be understood in the broad sense defined in the RKC as all operations which must be carried out by the persons concerned and by the Customs in order to comply with the Customs law.

Such formalities and documents requirements may be adopted or applied by regulation, administrative instruction or guidance, or customary practice, depending on national legislation and practice. In terms of scope of the measure, it should also be noted that it applies to the import, export and transit formalities and documentation requirements of Customs and all other border authorities.

Finally, the terms of the measure imply that WTO Members should undertake an assessment of their formalities and documentation requirements both (i) before introduction of new requirements and (ii) on a periodic or ad hoc basis with respect to existing measures. That is, formalities should not be introduced and should not be continued if they do not comply with the objectives set out in the TFA measure.

The WCO’s Recommendation on Dematerialization of Supporting Documents generally recommends that countries reduce or discontinue their requirements for submission of hard copies of supporting Customs documents in favor of electronic processing.

The WTO TF Committee shall develop procedures for sharing relevant information and best practices, as appropriate.

### Authorities concerned

- Customs
- Other border agencies

### Links with WTO agreements

**SPS Agreement** is silent on these provisions which can therefore be considered as SPS-plus provisions although paragraph 1 of Annex C does include requirements towards simplifying and expediting control, inspection, and approval procedures. Minimizing formalities connected with importation and exportation and transit in compliance with the TFA could undermine Members' right to implement SPS controls in accordance with the SPS Agreement. However, TF Article 10 includes qualifiers that explicitly allow for pre-shipment inspections for SPS purposes (footnote 12 to TFA Article 10.5.2), and that allow Members to apply different procedures and documentation requirements in a manner consistent with the

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SPS Agreement (TFA Article 10.7.2.e). Any possible problem is also avoided by paragraph 6 of the Final Provisions of the TF Agreement (Article 24), which stipulates that the TFA does not diminish Member's rights and obligations under the SPS Agreement.

Under the **TBT Agreement**, conformity assessment procedures, which can involve documentation requirements, shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking into account of the risks non-conformity would create (Article 5.1.2). Further requirements regarding the implementation of conformity assessment procedures are provided in Article 5.2, for example that information requirements be limited to what is necessary. TFA provides more detailed guidance on minimizing formalities and documentation requirements. Any possible problem is also avoided by paragraph 6 of the Final Provisions of the TF Agreement (Article 24), which stipulates that the TFA does not diminish Member's rights and obligations under the TBT Agreement.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18, 3.19);
- Recommendation (2012) on Dematerialization of Supporting Documents;
- Data Model;
- IT Guide for Executives.

These provisions are compatible with WCO instruments and tools.

The **RKC** preamble recognizes that simplification and harmonization can be achieved through the implementation of programmes aimed at continuously modernizing Customs procedures and practices and thus enhancing efficiency and effectiveness.

However, Article 1.1c and 1.1d have no equivalent provisions in the RKC, which would impose as a criterion “the least trade restrictive” measure to be applied, or the doing away of formalities and requirements no longer required.

Standards 3.11 to 3.19 of the RKC GA and the accompanying Guidelines provide abundant information on goods declaration format and contents, and documents supporting the Goods declaration including standards and format for the paper and electronically lodged goods declarations, minimum data requirements, provisional or incomplete declarations, tariff treatment, copies of declarations, supporting documents, subsequent presentation of supporting documents, lodgment of supporting documents by electronic means and translation of supporting documents.

**Recommendation on Dematerialization of Supporting Documents** recommends: reducing the number of documents accompanying customs declarations: discontinuing the requirement of presenting them in hard copy, processing the release and clearance of cargo based only on electronic declaration and automated verification: and enabling automated Customs clearance systems to automatically verify information contained in dematerialized supporting documents where such information is accessible electronically in other government agencies databases, single window environments (and Cargo Community Systems) and/or private repositories.

The **IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information & Communication Technologies (ICT) in Customs. The Guide covers the establishment of electronic declaration system.

### ICT considerations

To implement Article 10.1, 10.2 and 10.3, Members must pursue the path of simplification of business processes, reduced requirements for information and documentation, and standardization of data elements. The WCO **Data Model** was developed precisely for this purpose, and during the

implementation of this Agreement, Members have an opportunity to take measures to adopt this WCO instrument.

From the perspective of developing the ICT architecture and strategic ICT planning, this is a significant Article. Members must carefully consider the development of multiannual programmes to implement the provisions of this Article.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

### **Article 10.2. Acceptance of Copies**

#### TFA provisions

2.1 *Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities.*

2.2 *Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document.*

2.3 *A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.<sup>30</sup>*

#### Requirements and benefits

Allowing use of copies of required documents reduces time and cost of clearance for businesses, especially in cases where multiple authorities are involved or where documents are required to conduct other procedures. It may also be a useful facilitation to support and extend the benefit of other TFA measures, such as pre-arrival processing (Article 7.1), where a declaration and supporting documents may be submitted prior to arrival of the goods and, possibly, before the broker has received the original commercial and/or transport documents.

Article 10.2 foresees that Members shall endeavor to accept copies of supporting documents that may be required for import, export or transit formalities. If the original document has been provided to one government authority, other government authorities shall accept a paper or electronic copy from the agency holding the original.

This TFA measure permits traders to submit paper or electronic copies (e.g., scanned or faxed copies) of supporting documents required for formalities in place of the originals. With respect to Customs formalities, these supporting documents might include the commercial and transport documents required to be submitted with the goods declaration, such as invoices, bills of lading, packing lists, etc.

This particular obligation is qualified: a WTO Member is required only to “endeavor” to accept copies and “where appropriate.” Given such qualifications, the measure would not preclude Customs, for example, from requiring originals of certain documents where necessary to prevent fraud or from allowing clearance and release of the goods on the basis of a copy of a required supporting document, subject to subsequent presentation of the original, if required.

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<sup>30</sup> Nothing in this paragraph precludes a Member from requiring documents such as certificates, permits or licenses as a requirement for the importation of controlled or regulated goods.

## Analysis of TFA Section I, September 2016

This measure operates with respect to those administrations that require submission of paper documents for import, export or transit formalities. Of course, the concept of “original” and “copy” is not relevant where import or export formalities are conducted on the basis of electronic data submission (e.g., a fully electronic environment where the data required for clearance and release of goods is lodged electronically and authenticated by electronic signatures or electronic procedures and received by Customs and other border agencies).

Where an original document is required by two or more government authorities (for example, the commercial invoice, which may be required for control purposes by the food safety or other border authorities in addition to Customs), the trader shall be required to present it one time. In such cases, the measure requires the government authority holding the document to provide an electronic or paper copy to the other authority in place of the original.

For purposes of verifying the transaction value of goods declared for importation, certain Customs administrations require, as a matter of law or practice, that the declarant provides a copy of the Customs declaration made for the goods in the country of export. Such a requirement will now be prohibited by this TFA measure.

Where Customs has doubts about the truth or accuracy of a declared price or value of imported goods, and requires export documentation from the exporting Customs administration for verification purposes, the TFA measure on Customs cooperation (Article 12) may be applied.

### Authorities concerned

- Customs
- Other border agencies

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.11, 3.12, 3.13, 3.14, 3.15, 3.16, 3.17, 3.18, 3.19) and § 7 (7.1, 7.2);
- Recommendation (2012) on Dematerialization of Supporting Documents;
- Data Model;
- IT Guide for Executives.

These provisions are compatible with WCO instruments and tools.

Paragraph 2.1 puts the acceptance of paper copies (which is not mentioned under the RKC as such) at par with electronic copies (instead of giving primacy to electronic copies).

Standards 3.11 to 3.19 of the **RKC** GA and the accompanying Guidelines provide abundant information on goods declaration format and contents, and documents supporting the Goods declaration including standards and format for the paper and electronically lodged goods declarations, minimum data requirements, provisional or incomplete declarations, tariff treatment, copies of declarations, supporting documents, subsequent presentation of supporting documents, lodgment of supporting documents by electronic means and translation of supporting documents.

RKC GA Transitional Standard 3.18 stipulates that Customs shall permit the lodgment of supporting documents by electronic means, which is in line with Paragraph 2.1 of the TFA Article 10.2.

In line with Standard 7.2 of Chapter 7 of the RKC General Annex on the Application of information technology, the format for electronic lodgment of supporting documents must be based on the same international standards for electronic information exchange as that for the Goods declaration. Customs must apply information technology where this is helpful and cost-effective for both Customs and trade. The Guidelines to Chapter 7 address the use of EDI by Customs in detail.

**Recommendation on Dematerialization of Supporting Documents** recommends: reducing the number of documents accompanying customs declarations: discontinuing the requirement of presenting them in hard copy, processing the release and clearance of cargo based only on electronic declaration and automated verification: and enabling automated Customs clearance systems to automatically verify information contained in dematerialized supporting documents where such information is accessible electronically in other government agencies databases, single window environments (and Cargo Community Systems) and/or private repositories.

The **IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information & Communication Technologies (ICT) in Customs. The Guide covers the establishment of electronic declaration system.

#### ICT considerations

To implement Article 10.1, 10.2 and 10.3, Members must pursue the path of simplification of business processes, reduced requirements for information and documentation, and standardization of data elements. The WCO **Data Model** was developed precisely for this purpose, and during the implementation of this Agreement, Members have an opportunity to take measures to adopt this WCO instrument.

Implementation of Article 10.2 gives an opportunity for Customs administrations to implement comprehensive dematerialization. The WCO Recommendation on Dematerialization of Supporting documents provides adequate guidance.

From the perspective of developing the ICT architecture and strategic ICT planning, this is a significant Article. Members must carefully consider the development of multiannual programmes to implement the provisions of this Article.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC
- DMPT

### **Article 10.3. Use of International Standards**

#### TFA provisions

3.1 *Members are encouraged to use relevant international standards or parts thereof as a basis for their import, export, or transit formalities and procedures, except as otherwise provided for in this Agreement.*

3.2 *Members are encouraged to take part, within the limits of their resources, in the preparation and periodic review of relevant international standards by appropriate international organizations.*

3.3 *The Committee shall develop procedures for the sharing by Members of relevant information, and best practices, on the implementation of international standards, as appropriate.*

*The Committee may also invite relevant international organizations to discuss their work on international standards. As appropriate, the Committee may identify specific standards that are of particular value to Members.*

#### Requirements and benefits

Article 10.3 encourages Members to use relevant international standards as a basis for their import, export or transit formalities and to take part in their preparation and periodic review in appropriate international organizations.

This Article further determines that the WTO Trade Facilitation Committee shall, as appropriate, develop procedures for sharing by Members of relevant information and best practices on implementation of international standards. The Committee may also invite relevant international organizations to discuss their work and the Committee may identify specific standards that are of particular value to Members.

The legal text of the TFA does not specify which international standards or standards-setting organizations should be considered “relevant” to development of import, export and transit formalities and procedures. However, the record of the TFA negotiations suggest that the international standards/organizations WTO Members considered particularly relevant will include-

- World Customs Organization
  - Revised Kyoto Convention
  - Convention on the Temporary Admission of Goods (Istanbul Convention)
  - International Convention (1986) on the Harmonized Commodity Description and Coding System (HS Convention)
  - WCO Data Model
- International Maritime Organization (IMO)
  - Convention (2005) on Facilitation of International Maritime Traffic
- International Civil Aviation Organisation (ICAO)
  - Convention (2006) on International Civil Aviation
- United Nations Economic Commission for Europe (UNECE):
  - UN layout key for Trade Documents
  - UN Trade Data Elements Directory
- Centre for Trade Facilitation and Electronic Business:
  - UN/EDIFACT

Throughout this Analysis, it has been suggested which WCO instruments should be considered in implementation of each of the TFA technical measures. It is on the basis of this TFA measure that such suggestions are justified. It is clear that the RKC plays a particularly important role in that regard. As a caution, note that the TFA measure encourages use of relevant international standards “except as otherwise provided for” in the TFA. This is a warning that certain TFA measures may contain obligations that go beyond or vary from the parallel RKC or other international standard.

WTO Members are encouraged to participate in the work of relevant international standards setting bodies if their resources allow (it is recognized that this can be a time and financial burden, particularly for developing and LDC Members). With respect to Customs standards, this refers to the work of the WCO in the constituent bodies responsible for trade-facilitation standards, such as the Permanent Technical Committee (PTC), the Working Group on the TFA (TFAWG), the Revised Kyoto Convention Management Committee (RKC/MC), Information Management Sub-Committee (ISCM), the Data Model Project Team (DMPT) and others.

Use of international standards, and particularly the WCO instruments, in implementation of the TFA measures will be essential to the trade facilitation objectives of the Agreement. It is evident that the TFA measures set out general principles only: they describe what must be achieved by WTO Members, and not how these principles shall be applied in practical terms. Moreover, there can be multiple ways that a particular measure can be implemented.

By providing guidance to WTO Member administrations on “best practices” in implementation, the WCO instruments and those of other international standards-setting organizations can assure greater harmonization and predictability of customs and border procedures. (Further inputs could be sought from the three standard-setting bodies referenced in the SPS Agreement, i.e. Codex, IPPC and OIE, regarding their work in this area.)

### Authorities concerned

## Analysis of Technical Measures of the TFA, September 2016

- Customs
- Other border agencies

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, §§ 3 (3.11) and 7 (7.2);
- Data Model;
- Recommendation (June 2009) concerning the use of the WCO Data Model;
- Recommendation (June 1990) on the use of the UNTDED;
- Recommendation (June 1990) on the use of UN/EDIFACT;
- IT Guide for Executives.

These provisions are compatible with WCO instruments and tools.

Standard 3.11 of the **RKC** GA stipulates that the contents of the Good declaration shall be prescribed by the Customs. The paper format of the Goods declaration shall conform to the UN-layout key. Furthermore, the standard indicates that for automated Customs clearance process, the format of the electronically lodged Goods declaration shall be based on international standards for electronic information exchange as prescribed in the WCO Recommendations on Information Technology.

Use of internationally accepted standards when introducing computer applications by Customs is also envisaged by Standard 7.2 of RKC GA.

Accompanying Guidelines to standards 3.11 and 7.2 are also considered very useful.

Reference to the WCO Data Model, the use of the UNTDED and UN/EDIFACT have been removed from the WTO text. However, **WCO recommendations** on the use of these standards are still considered valid for the implementation of Article 10.3.

**IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information and Communication Technologies in Customs.

### ICT considerations

To implement Article 10.1, 10.2 and 10.3, Members must pursue the path of simplification of business processes, reduced requirements for information and documentation, and standardization of data elements. The WCO Data Model was developed precisely for this purpose, and during the implementation of this Agreement, Members have an opportunity to take measures to adopt this WCO instrument, especially taking into consideration provisions of Paragraph 3.3.

From the perspective of developing the ICT architecture and strategic ICT planning, this is a significant Article. Members must carefully consider the development of multiannual programmes to implement the provisions of this Article.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC
- DMPT

## **Article 10.4. Single Window**

### TFA provisions

## Analysis of TFA Section I, September 2016

4.1 *Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.*

4.2 *In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or data requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.*

4.3 *Members shall notify the Committee of the details of operation of the single window.*

4.4 *Members shall, to the extent possible and practicable, use information technology to support the single window.*

### Requirements and benefits

Article 10.4 foresees that Members shall endeavor to establish or maintain a single window to which a trader can submit all documents and/or data required by customs and all other border or licensing authorities for the import, export or transit of goods, and from which the trader will receive all notifications.. In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public. Members shall notify the Committee of the details of operation of the single window. And shall, to the extent possible and practicable, use information technology to support the single window.

The concept of a Single Window that is incorporated in the TFA measure closely follows the widely-acknowledged definition set out in UN/CEFACT Recommendation 33 (UN/ECE 2005).<sup>31</sup> That is, a Single Window operates as a “single entry point” where a trader can submit data and/or documents required for import, export or transit by different border authorities. When the various authorities process the information and documents, they return their response to the trader through the same single window interface.

Where a Single Window is implemented, the participating authorities are required to share the information and documentation submitted by the trader. With certain exceptions, participating authorities shall not require a trader to resubmit documents or data that the trader has previously submitted to the Single Window.

The TFA measure makes an exception to the principle of “one-time submission” where there are “urgent circumstances” and in cases of other “limited exceptions,” which must be made public. These exceptional cases might include, for example, fall back procedures where there has been a system failure.

A Single Window can be a physical place where all documents required by border authorities for import, export or transit operations are manually presented by the trader. The facilitation benefits of a Single Window are much more significant if it is implemented as an electronic system. However, implementation of an electronic Single Window can be a significant project. Given those competing considerations, the TFA measure requires WTO Members, “if possible and practicable” to use information technology to support the Single Window. That is, a manual, paper-based single window would also meet the requirements of the TFA measure.

### Authorities concerned

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<sup>31</sup> U.N. Economic Commission for Europe, Recommendations and Guidelines on Establishing a Single Window: Recommendation No. 33 (2005)(single window allows “parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export, and transit-related regulatory requirements. If information is electronic, the individual data elements should only be submitted once.”).

## Analysis of Technical Measures of the TFA, September 2016

- Customs
- Other border agencies

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.25);
- SAFE;
- Single Window Compendium;
- Single Window Information Store (on WCO web site);
- Data Model;
- CBM Compendium;
- IT Guide for Executives
- Guidance on National Committees on Trade Facilitation.

These provisions are compatible with WCO instruments and tools. Although the RKC does not explicitly refer to Single Window, the RKC Guidelines cover, in part, the operation of the Single Window (3.25).

The definition of Single Window in the TFA text is simple and practical (paragraphs 4.1 and 4.2).

The **SAFE**, under Chapter 5.3 states that Governments should develop co-operative arrangements, nationally and internationally, between Customs and other Government agencies involved in international trade in order to facilitate the seamless transfer of international trade data (single window environment) and to exchange risk intelligence.

The WCO **Compendium on How to Build a Single Window Environment** contains practical aspects of the implementation of a Single Window.

The WCO **Data Model** covers data requirements of Customs as well as other government agencies and is therefore suitable for implementing a Single Window solution.

**CBM Compendium** provides Members with guidance on how to develop collaborative arrangements at national level which are a prerequisite for developing a sustainable Single Window system.

**IT Guide for Executives** provides information and insights into the strategic management process concerning the use of Information and Communication Technologies in Customs. This can be very useful in particular when it comes to enhancing the websites to comply with the necessary requirements in terms of transparency and predictability of border procedures.

In early 2016, the **Guidance on National Committees on Trade Facilitation** was updated to include information on Single Window and the WCO Data Model. This serves as an example of work of an NCTF that is relevant to cooperation between Customs and other agencies, in particular to the establishment and maintenance of a Single Window.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC
- DMPT

## **Article 10.5. Preshipment Inspection**

### TFA provisions

## Analysis of TFA Section I, September 2016

5.1 *Members shall not require the use of preshipment inspections in relation to tariff classification and customs valuation.*

5.2 *Without prejudice to the rights of Members to use other types of preshipment inspection not covered by paragraph 5.1, Members are encouraged not to introduce or apply new requirements regarding their use.<sup>32</sup>*

### Requirements and benefits

The WTO Members have stated that official preshipment inspection (PSI) systems impose considerable burdens on business and are costly to governments. Difficulties that have been identified include:

- extra costs to producers of complying with PSI requirements (including fees and charges for PSI services);
- shipping and payment delays caused by PSI procedures; and
- lack of transparency and accountability in PSI criteria and procedures.

Although certain of these effects of PSI have been dealt within the WTO PSI agreement, it is the intention of WTO Members under the TFA to wind-down the use of PSI for revenue purposes and, on the other hand, build up the capacity of Customs administrations.

The WTO Agreement on Pre-shipment inspection imposes disciplines on the use of pre-shipment inspection (PSI) services by WTO Members. Under Article 1.3 of the PSI Agreement, PSI activities are defined as follows: "Preshipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member.

These PSI activities are carried out in the territory of the exporting country by an entity (normally, a business firm) that is contracted or mandated by the country where the goods will be imported. Often, such PSI firms have been contracted where the Customs administration of the country of import lacks the necessary technical capacity or resources to verify elements required for appraisal of the goods, given the negative impacts such deficiencies can have on proper revenue collection.

According to Article 10.5, the Members shall not require the use of pre-shipment inspection for: 1. Tariff classification and 2. Customs valuation. Regarding other types of pre-shipment inspection, Members are encouraged not to introduce or apply new requirements regarding their use.

The TFA measure "encourages" WTO Members not to introduce new requirements concerning other PSI activities. Other types of PSI services may include verification of quantity of goods shipped to the importing country or conformity with quality standards or requirements.

However, the TFA specifically notes that that is intended to discourage only those PSI activities that are included within the WTO PSI agreement definition (which are, in general, related to revenue), and is not applicable to pre-shipment inspection undertaken for sanitary and phytosanitary purposes.

### Authorities concerned

- Customs
- Revenue Authority

### Links with WTO agreements

Minimizing formalities in compliance with the TFA could undermine Members' right to implement SPS controls in accordance with the **SPS Agreement**. However, TFA Article 10 includes qualifiers that explicitly allow for preshipment inspections for SPS purposes. Any possible problem is also avoided by

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<sup>32</sup> This paragraph refers to preshipment inspections covered by the Agreement on Preshipment Inspection, and does not preclude preshipment inspections for sanitary and phytosanitary purposes.

## Analysis of Technical Measures of the TFA, September 2016

paragraph 6 of the Final Provisions of the TFA (Article 24), which stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Practical Guidelines for Valuation Control;
- Niamey Declaration<sup>33</sup>;
- Guide on termination of inspection contract.

This article refers only to pre-shipment inspection, however, the WCO Secretariat considers it is appropriate to promote a similar approach in respect of destination inspection activities conducted by private sector companies in relation to classification and valuation functions; namely that Customs administrations should work towards termination of such contracts and plan to take back control of those core functions.

**Practical Guidelines for Valuation Control** provide some guidance in terms of developing a strategy for the elimination of pre-shipment inspection (for Customs Valuation purpose).

The Directors General of West and Central Africa Customs Administrations adopted, alongside the Council in 2013, the **Niamey Declaration** on interventions of inspection companies. The Declaration call on three actors:

- (i) Customs Administrations: to take ownership of reform and develop strategies and action plans to build the necessary capacity to assume responsibility for functions covered by these contracts, to commit to good governance and the combat of corruption and to build partnerships;
- (ii) Governments: to provide political will and support to the Customs, to involve Customs in contract negotiations and ensure that such contracts should be short-term, provide for the transfer of appropriate know-how and technology and performance measures, as well as contract management provisions;
- (iii) The WCO: to engage with other international organizations, donors and regional economic communities to support Customs administrations.

The main purpose of the **Guide on termination of inspection contract** is (1) to provide background information related to inspection services, (2) to present the initiatives and tools that the WCO) has developed to assist its Members in their initiatives to take ownership of missions outsourced by Governments to private sector Inspection companies, and, (3) to introduce the case studies provided by Members having successfully taken over from these service providers.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- TCCV

## **Article 10.6. Use of Customs Brokers**

### TFA provisions

6.1 *Without prejudice to the important policy concerns of some Members that currently maintain a special role for customs brokers, from the entry into force of this Agreement Members shall not introduce the mandatory use of customs brokers.*

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<sup>33</sup> Developed by and for the West and Central African Region, but relevant and useful to others.

## Analysis of TFA Section I, September 2016

6.2 *Each Member shall notify the Committee and publish its measures on the use of customs brokers. Any subsequent modifications thereof shall be notified and published promptly.*

6.3 *With regard to the licensing of customs brokers, Members shall apply rules that are transparent and objective.*

### Requirements and benefits

The primary benefit of these provisions for traders is lower cost in Customs clearance: businesses may have in-house capacity to carry out the import clearance procedure, but are prohibited from doing so because they were obliged in certain countries to use Customs brokers. That could represent high costs for those companies, particularly where only a limited number of brokers are authorized by Customs to operate, which effectively creates a monopoly over the work.

Article 10.6 stipulates that from the entry into force of the TFA, Members shall not introduce the mandatory use of customs brokers. This TFA measure expresses the following RKC principle concerning the right to use representatives when transacting Customs business, contained in Standard 8.1 of the General Annex: "Persons concerned shall have the choice of transacting business with the Customs either directly or by designating a third party to act on their behalf." In accordance with that principle, a trader shall be permitted to make a goods declaration or may employ a Customs broker to make the declaration on his or her behalf.

While the TFA expresses this same RKC principle, it is qualified: WTO Members that currently mandate use of Customs brokers may continue to do so. This qualification is intended to accommodate "the important policy concerns of some Members that currently maintain a special role for customs brokers."

In the view of certain developing or LDC WTO Members, a goods declaration prepared by a Customs broker with expertise in Customs procedures, declaration and documentation requirements provides Customs with a greater assurance of compliance than declarations made by importers or exporters whose competence in technical Customs matters may not be developed.

Where a WTO Member requires a Customs broker to be licensed, the licensing rules shall be "transparent" and "objective."

Particularly in those countries where use of a Customs broker is mandatory, discretionary licensing requirements can be misused to limit the persons who can act as brokers, forcing businesses, who may have the "in house" expertise to conduct their own Customs transactions, to incur the cost of a third party broker. Licensing rules should be published or made publicly available and should permit any business who meets the published criteria to qualify for the license. Members shall notify the Trade Facilitation Committee on its measures on the use of customs brokers.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3 (3.6, 3.7) and 8 (8.1, 8.2, 8.3, 8.4, 8.5, 8.6, 8.7);
- Study Report on Customs Brokers.

Paragraph 6.1 recognizes existing examples where Members practice mandatory use of customs brokers, while the **RKC** (standards 3.7, 8.1 and 8.3, in particular) doesn't impose such limitations. For instance, Standard 3.7 stipulates that any person having the right to dispose of the goods shall be entitled to act as a declarant; Standard 8.1 of the RKC GA stipulates that persons concerned shall have the choice of transacting business with the Customs either directly or by designating a third party to act on their behalf. Standard 8.3 indicates that Customs transaction where the person concerned elects to do business on

his own account shall not be treated less favorable or be subject to more stringent requirements than those Customs transactions which are handled for the person concerned by a third party.

**Study Report on Customs Brokers** provides a general background and overview of Customs Brokers' role in the international supply chain together with some suggested policy and organisational considerations on Customs Brokers regime and a model checklist for licensing/regulating brokers. Based on survey results and research, the study report includes a detailed analysis of Members' practices and key outcomes at the aggregate level with some best practices shared by Members.

### ICT considerations

The programme to manage the overall engagement with Customs Brokers will also benefit from the use of ICT. It is perhaps advantageous to use ICT based solutions to maintain the Customs Broker profiles, their revenue accounting records, and the profiles of individuals employed by the brokers to operate Customs procedures and access Customs and/or Single Window facilities. After all, a bulk of the consignments will be cleared based on information supplied by the Brokers. It is therefore necessary to track and monitor the level of training, competencies and capacities of Customs brokers and their employees from a risk management perspective.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- IMSC

## **Article 10.7. Common Border Procedures and Uniform Documentation Requirements**

### TFA provisions

7.1 *Each Member shall, subject to paragraph 7.2, apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout its territory.*

7.2 *Nothing in this Article shall prevent a Member from:*

- differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;*
- differentiating its procedures and documentation requirements for goods based on risk management;*
- differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;*
- applying electronic filing or processing; or*
- differentiating its procedures and documentation requirements in a manner consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.*

### Requirements and benefits

Lack of uniformity in Customs documents and procedures adds unnecessary costs to traders. For example, it requires the exporter to arrange for different formats or data elements of a required document (where the different Customs offices use different forms) or obtain additional documents depending on the final destination of the product. It encourages "port shopping," where clearance at certain Customs offices is perceived to be more advantageous than others, which can add to shipping costs as well as overburden certain Customs offices. And, where differences in Customs procedures or documentary requirements impact duty, it may have negative effects on the government's revenue collection.

Article 10.7 is phrased very broadly and requires that customs procedures and documentation within a member's territory have to be standardized, other than the exceptional handling scenarios listed in paragraph 7.2.

## Analysis of TFA Section I, September 2016

The purpose of this TFA measure is to ensure uniform application of laws related to release and clearance of goods at all ports of entry throughout the WTO Member's territory.

The measure was initially raised in the TFA negotiations in relation to Customs Unions, where the different country members of the Union are obligated to apply a common Customs tariff and Customs rules. Despite the common legal framework of such Customs Unions, it was said by proponents of this measure that imports of the same types of goods from the same origin were subject to different treatment by border officials (including methods/processes for sampling, testing, and analysis), depending on the member state of the Customs Union where the goods were entered, whereby the goods might be admitted at one port of entry but rejected at another.

The measure does not prescribe the means by which a WTO Member, whether a member of a Customs Union or not, shall enforce or assure uniformity in application of Customs procedures and documentation requirements. It may be through standardized training of Customs officers, or dissemination of standard operating procedures or administrative guidelines for Customs offices, publication of Customs decisions on rulings and appeals, or other means.

### Authorities concerned

- Customs

### Links with WTO agreements

Minimizing formalities in compliance with the TFA could undermine Members' right to implement SPS controls in accordance with the **SPS Agreement**. However, TFA Article 10 includes qualifiers that explicitly allow Members to apply different procedures and documentation requirements in a manner consistent with the SPS Agreement (TFA Article 10.7.2.e). Any possible problem is also avoided by paragraph 6 of the Final Provisions of the TF Agreement (Article 24), which stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 3 (3.11, 3.20)

**RKC** GA § 3 does not prescribe that Competent Customs Offices need to adhere to the same procedures while Paragraph 7.2 provides for the exception of differentiated handling for different goods, different risks, different modes of transport, electronic filing or SPS requirements. In that regard, RKC standards provide more facilitation measures to traders.

### ICT considerations

It is mainly through ICT-based solutions that we can effectively ensure that Customs procedures and documentation requirements are applied uniformly to all goods.

From the perspective of developing the ICT architecture and strategic ICT planning, this is a significant Article. Members must carefully consider the development of multiannual programmes to implement the provisions of this Article.

From the perspective of developing the ICT architecture and strategic ICT planning, this is a significant Article. Members must carefully consider the development of multiannual programmes to implement the provisions of this Article.

### WCO Bodies Concerned

- TFAWG

- PTC
- RKC/MC
- IMSC

## Article 10.8. Rejected Goods

### TFA provisions

8.1 *Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter.*

8.2 *When such an option under paragraph 8.1 is given and the importer fails to exercise it within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.*

### Requirements and benefits

By allowing the importer the option to return rejected goods, the exporter has the opportunity to salvage the consignment. If returned, the exporter, for example, might segregate the consignment into smaller lots and examine each lot in detail and identify the bad lots if possible. This might be particularly important for SMEs, who would otherwise suffer disproportionate loss if the entire consignment were destroyed by import authorities.

Article 10.8 stipulates that the importer shall, subject to and consistent with its laws and regulations, have the right to return to the exporter, or any other person, imported goods that have been rejected by competent authorities due to failure to comply with prescribed Sanitary and Phytosanitary regulations or technical regulations. If, the importer fails to exercise this option within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.

According to its proponent, this measure is necessary because competent authorities of certain WTO Members have not allowed the option of re-export, but order non-conforming goods to be directly destroyed. This TFA measure requires WTO Members, “subject to and consistent with its laws and regulations,” to provide the importer with the option to re-consign or return the goods to the exporter or his designee. Only if the importer does not exercise this right within a reasonable period of time may the competent authority take a different course of action against the goods.

With respect to food consignments rejected entry, “some countries permit re-export only to the country of origin or to countries which have stated in advance that they are prepared to accept the consignment knowing that it has been refused entry elsewhere.”<sup>34</sup>

### Authorities concerned

- Customs
- Other border agencies (particularly the Food Safety authority)

### Links with WTO agreements

**SPS and TBT Agreements** are silent on these provisions which can therefore be considered as SPS/TBT-plus provisions.

(Further inputs could be sought from the three standard-setting bodies referenced in the SPS Agreement, i.e. Codex, IPPC and OIE, regarding their work in this area.)

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<sup>34</sup> Codex Alimentarius, Food Import and Export Inspection and Certification Systems (2007)

Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 3, 4 (4.19)

The RKC does not specifically mention the return of goods which don't meet prescribed sanitary or phytosanitary regulations or technical regulations. However, under article 4.19 RKC mentions the repayment which shall be granted to the importer/exporter for the goods that are returned as they are not in accordance with the agreed specifications (not explicitly referring to sanitary or phytosanitary regulations or technical regulations, though) at the time of importation/exportation.

(The RKC Guidelines (4.19) also state that "The goods must be re-exported or re-imported within a reasonable time either to a foreign supplier or to another person designated by the supplier.")

WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC

**Article 10.9. Temporary Admission of Goods/Inward and Outward Processing**

**Article 10.9.1. Temporary Admission of Goods**

TFA provisions

*9.1 Each Member shall allow, as provided for in its laws and regulations, goods to be brought into its customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are brought into its customs territory for a specific purpose, are intended for re-exportation within a specific period, and have not undergone any change except normal depreciation and wastage due to the use made of them.*

Requirements and benefits

Paragraph 9.1 of Article 10.9 foresees that Members shall allow, as provided for in their laws and regulations, goods to be brought into its customs territory conditionally relieved, totally or partially, from payment of import duties and taxes, under certain conditions. These provisions are almost identical to the ones contained in the RKC.

The TFA measure sets out only the general principle that these three Customs procedures, as defined above, shall be allowed. As such, it is WTO Member's flexibility to define, in its laws and regulations, the manner of implementation of these procedures, such as:

- the goods that shall be eligible for temporary admission;
- requirements related to guarantees;
- time periods for discharge of the procedures;
- requirements related to authorizations for use of the procedures;
- requirements related to Customs supervision of the procedures;
- use of equivalent goods, etc.

Temporary admission of goods can facilitate exchanges of educational, scientific or cultural material, and therefore promote education and scientific research as well as cultural development, activities fundamental to human advancement. Economic advantages accrue from allowing national enterprises to examine, test and even temporarily use foreign goods with facilitated access as well as either total or partial exemption from the import duties and taxes normally chargeable on them.

Authorities concerned

- Customs

## Analysis of Technical Measures of the TFA, September 2016

- Revenue authority

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC SA G § 1 ;
- Istanbul Convention;
- A.T.A. Convention

These provisions are compatible with WCO instruments.

Standards and Guidelines to **RKC SA G**, Chapter 1, provide definition of temporary admission, basic principle and field of application, information on formalities prior to the granting and conditions for temporary admission, identification measures, time limit for re-exportation, transfer of temporary admission, prohibitions and restrictions, termination of temporary admission, cases for temporary admission etc..

The ATA systems, based on the **Istanbul Convention** and the **A.T.A Convention** are important internationally accepted systems for the movement of goods under temporary admission through multiple Customs territories. It relies on an international chain of guaranteeing associations that provide the security for any duties and taxes which may become liable on the temporarily admitted goods.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- Administrative Committee on Istanbul Convention/CPs to the ATA Convention

## **Article 10.9.2. Inward and Outward Processing**

### TFA provisions

#### *9.2 Inward and Outward Processing*

*(a) Each Member shall allow, as provided for in its laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be re-imported with total or partial exemption from import duties and taxes in accordance with the Member's laws and regulations.*

*(b) For the purposes of this Article, the term "inward processing" means the customs procedure under which certain goods can be brought into a Member's customs territory conditionally relieved, totally or partially, from payment of import duties and taxes, or eligible for duty drawback, on the basis that such goods are intended for manufacturing, processing, or repair and subsequent exportation.*

*(c) For the purposes of this Article, the term "outward processing" means the customs procedure under which goods which are in free circulation in a Member's customs territory may be temporarily exported for manufacturing, processing, or repair abroad and then re-imported.*

### Requirements and benefits

Paragraph 9.2 of Article 10.9 stipulates that Members shall allow, as provided for in their laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be re-imported with total or partial exemption from import duties and taxes in accordance with the Member's laws and regulations.

These provisions are almost identical with the ones contained in the RKC, except for one variation. The minor variation between the TFA measure and the RKC definition of these procedures is that inward processing, in the TFA conception, encompasses duty drawback.

The TFA measure sets out only the general principle that these three Customs procedures, as defined above, shall be allowed. As such, it is WTO Member's flexibility to define, in its laws and regulations, the manner of implementation of these procedures, such as:

- the goods that shall be eligible for inward/outward processing;
- requirements related to guarantees;
- time periods for discharge of the procedures;
- requirements related to authorizations for use of the procedures;
- requirements related to Customs supervision of the procedures;
- use of equivalent goods, etc.

Inward and outward processing facilitates the trade of goods which enter a Customs territory only temporarily for manufacturing, processing or repair. It allows a country to increase its competitiveness, as payment of import duties and taxes every time goods are imported, on a temporary basis, into one country or another are partially or totally eliminated

### Authorities concerned

- Customs
- Revenue Authority

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC SA F §§1, 2 and 3:
- Istanbul Convention;
- A.T.A. Convention.

These provisions are compatible with WCO instruments but the RKC is much more specific.

Standards and Guidelines to **RKC SA F**, Chapters 1, 2 and 3, provide abundant guidance on basic principles, field of application, authorization procedures, identification measures, stay of goods inside/outside of territory, termination of procedures, etc. Chapter 3 deals specifically with drawback which is not mentioned under the WTO text, but can nevertheless be applied.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC

## **ARTICLE 11: FREEDOM OF TRANSIT**

### TFA provisions

1. *Any regulations or formalities in connection with traffic in transit imposed by a Member shall not be:*

- maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner;*
- applied in a manner that would constitute a disguised restriction on traffic in transit.*

2. *Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.*

3. *Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules.*

## Analysis of Technical Measures of the TFA, September 2016

4. *Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.*
5. *Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.*
6. *Formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to:*
  - (a) *identify the goods; and*
  - (b) *ensure fulfilment of transit requirements.*
7. *Once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory.*
8. *Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit.*
9. *Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.*
10. *Once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met.*
11. *Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary<sup>35</sup> instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled.*
12. *Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.*
13. *Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.*
14. *Each Member shall make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee.*
15. *Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.*
16. *Members shall endeavour to cooperate and coordinate with one another with a view to enhancing freedom of transit. Such cooperation and coordination may include, but is not limited to, an understanding on:*
  - (a) *charges;*
  - (b) *formalities and legal requirements; and*
  - (c) *the practical operation of transit regimes.*
17. *Each Member shall endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.*

### Requirements and benefits

In general, the benefits of implementation of these transit measures are reduced delays and costs for traders with respect to goods carried in transit.

Transit disciplines are of special relevance to traders in landlocked WTO country Members, which are often developing and least developed countries. In importing or exporting goods, landlocked Members are at a disadvantage due to the fact that they have to transit the goods through the territories of their neighboring Members. Therefore they incur an additional cost of transport in comparison with other Members who can ship their export goods without transiting another Member's territory. Such disadvantages are exacerbated when landlocked Members face differing formalities for transit,

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<sup>35</sup> Nothing in this provision shall preclude a Member from maintaining existing procedures whereby the means of transport can be used as a guarantee for traffic in transit.

burdensome documentation requirements, unreasonably high transit charges, etc., which generate an additional and unnecessary cost on traders in landlocked Members, especially SMEs. Such an increase in cost would inevitably make the price of exported goods higher, making goods from landlocked Members uncompetitive in international markets. For the neighboring Members, if one Member introduces more streamlined transit procedures compared with the others, the flow of transit goods would inevitably concentrate on those streamlined transit procedures, depriving the other neighbouring Members of their opportunities for economic development through the increased flow of transit goods.<sup>36</sup>

Paragraph 1 of Article 11 foresees that regulations or formalities on transit shall be eliminated or reduced if no longer required or a less trade-restrictive solution becomes available, and that they should not be applied in a manner that would be a disguised restriction on trade.

Paragraph 2 foresees that traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit. Charges that may be imposed on transit only for transit administrative procedures entailed or transit services provided, and shall be limited in amount to the expense of such procedures or cost of such services.

According to Paragraph 3, the Members shall not seek to impose or maintain voluntary restraints or similar measures on traffic in transit.

Paragraph 4 indicates that Members shall not treat goods that pass in transit through another Member's territory to the final destination less favorably than if the goods were shipped to the destination without passing through that other Member's territory.

Paragraph 5 encourages Members to make available, where practicable, physically separate infrastructure for traffic in transit.

Paragraph 6 indicates that formalities, documentation and customs controls shall not be more burdensome than necessary to identify the goods and ensure fulfillment of transit requirements.

Paragraph 7 stipulates that goods will not be subject to any customs charges nor unnecessary delays or restrictions once they have been put under a transit procedure and authorized to proceed from the point of origination in a Member's territory.

Paragraph 8 stipulates that Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit.

According to Paragraph 9, Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.

According to Paragraph 10, the customs office of exit shall promptly terminate the transit operation if transit requirements have been met.

Paragraph 11 states that the guarantee (surety, deposit or other monetary or non-monetary instrument for traffic in transit) shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled, while Paragraph 12 indicates that once the transit requirements have been satisfied, the guarantee shall be discharged without delay. A guarantee system ensures that the Customs duties and taxes which are at risk during a transit operation are covered at all times until the goods are presented to the Customs office of destination. At the same time, a guarantee system also serves another important function; it is the only available solution for increasing the likelihood that the goods will be presented to Customs at the office of destination as requested, and do not disappear en route.

Paragraph 13 allows for comprehensive guarantees or renewal of guarantees without discharge for subsequent consignments.

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<sup>36</sup> TF/TF/W/28 (22 April 2005)(Communication of Bolivia, Mongolia and Paraguay)

In line with Paragraph 14, information about setting up guarantees shall be made publicly available.

In accordance with Paragraph 15, Members may require the use of customs convoys or customs escorts only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.

Paragraph 16 indicates that Members shall endeavor to cooperate and coordinate with one another with a view to enhancing freedom of transit. This may include an understanding on charges, formalities and legal requirements and the practical operation of transit regimes.

Paragraph 17 indicates that Members shall endeavor to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

### Authorities concerned

- Customs
- Other border agencies
- Transport ministry

### Links with WTO agreements

The **SPS Agreement** applies to goods in transit but does not contain a dedicated article on this. Accordingly, in addressing transit procedures in considerable detail, TFA Article 11 can facilitate transit also for goods that are subject to SPS controls. Examples of SPS-plus elements for goods in transit include the requirement to limit formalities and documentation requirements (TFA Article 11.6), or to allow for advance filing and processing of documentation and data (TFA Article 11.9). At the same time, paragraph 6 of the Final Provisions of the TF Agreement (Article 24) ensures that any controls on goods in transit that may be necessary from an SPS perspective will not be compromised.

The text of the **TBT Agreement** does not contain specific provisions on transit, nor does it indicate that goods in transit are excluded from its coverage. However, Article 11.8 of the TFA indicates that Members shall not apply technical regulations and conformity assessment procedures within the meaning of the TBT Agreement to goods in transit.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 5, SA E §§ 1 and 2;
- Transit Handbook;
- The Istanbul Convention on Temporary Admission (Annex A regarding ATA carnets);
- Transit e-learning course.

Freedom of transit and principle of non-discrimination, as covered especially under paragraphs 1 to 4, are not covered by equivalent provisions in WCO instruments.

The Article V (GATT) definition of traffic in transit differs slightly from the sphere of application of Chapter 1 of Specific Annex E to the **RKC**. RKC does not cover advance filing.

Freedom of Transit in Article 11 is not limited to Customs transit only. It is a holistic approach including other government agencies in particular transport ministries. Coordination and close working with other government agencies is essential for an efficient transit system.

WCO instruments and tools provide abundant standards and technical specifications for implementing Customs transit operations. Chapter 1 of RKC SA E and its Guidelines provide provisions and guidance regarding: types of transit, persons responsible to Customs for compliance with the obligations, goods declaration for Customs transit, sealing and identification of consignments, transfer from one transport unit to another en route, mixed transport, time limits for Customs transit, transit advice note, termination of Customs transit, international agreements relating to Customs transit, authorized consignors and consignees, etc. Appendix I to the Guidelines also provides Members' examples of Customs transit procedures.

Paragraph 7 corresponds to Standard 3, while Paragraphs 10, 11 and 12 relate to Standards 23 and 24 of Chapter 1 in the RKC SA E and the accompanying Guidelines which provide more information on the types of termination and monitoring the termination of transit, etc. Chapter 5 of the RKC GA and the accompanying Guidelines provide more information on types of guarantees, or security as named in the RKC, including requirement and forms of security, amount of security, waiver of security, general security (refers to comprehensive guarantee in TFA), level of security and discharge of security. Paragraph 13 is in line with Standard 5.5 of the RKC GA, where comprehensive guarantee is named 'general security' and Guidelines provide information on procedures for granting such security, security certificates, authorizations, validity period,

Paragraphs 14 and 15 regarding making publicly available information on guarantees and customs convoys/escorts can be viewed in the context of Article 1 of the TFA, and related WCO instruments and tools apply.

In the context of Article 11, it is important also to consider the standards and guidelines of Chapter 2 of the RKC SA E referring to transshipment. Namely, it often occurs, for reasons of trade or transport that goods arrive in a Customs territory in order to be transferred from the importing means of transport to another means of transport in which they then leave that territory for their destination. Frequently the arrival, the transfer of goods from one means of transport to another and the exportation of the goods all take place within the area of a single Customs office. To facilitate this operation the legislation of some administrations contains a procedure that enables the goods to transfer from one conveyance to another under Customs control and without payment of import or export duties and taxes. This procedure, for which a simplified control system is generally used, is called "transshipment". Transshipment can be regarded as a simplified application of the transit system.

**The Transit Handbook** deals with various aspects of the operation of Customs transit procedures. It serves as a practical guide to assist WCO Members to develop a more efficient and effective transit system which would contribute to enhancing economic competitiveness and security revenue. More recently, the Transit Handbook was updated to include information on regional guarantees. Namely, considering the potential complexity of regional transit operations, a regional or international guarantee system is more efficient than a chain of national guarantees.

The **Istanbul Convention** groups various facilities for the temporary admission of goods into a single instrument. Consequently it does not deal with matters of Customs transit. However, Annex A relates, in particular, to ATA carnets, which can be accepted for the transit of goods under temporary admission which have to be conveyed to or from their destination under Customs control, either in the Customs territory of temporary admission or through a Customs territory or countries between those of exportation and importation.

### ICT considerations

While this Article seeks to reiterate the rights of transit, which is established in the GATT, its efficient and effective implementation would be greatly facilitated by the implementation of an ICT-powered transit management systems. ICT based systems help in the lodgment of documentation under a transit regime and facilitate the timely flow of information to all relevant Customs offices. Use of electronic information helps in the sharing of critical customs information in real time. The effectiveness of control in transit operations is enhanced when participating countries exchange electronic data on goods in transit.

Transit declaration data, when submitted electronically, can also be used for advance, pre-arrival reporting. This enables customs to carry out prior risk assessment and may facilitate release upon arrival. In any transit system, data matching of entry and exit of transit consignments is an important function, which can be performed effectively. It is also linked to effective management of transit guarantee chains. In general, the use of IT in transit systems helps in reducing the administrative burden on traders, to speed-up border processes and to reduce fraud.

The use of real-time container tracking devices helps in further enhancing the security and compliance aspects of transit operations. Real-time tracking services are being used in a number of transit regimes in different regions of the world.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- Administrative Committee on Istanbul Convention/CPs to the ATA Convention

### **ARTICLE 12: CUSTOMS COOPERATION**

#### Background and benefits

The antecedents of this measure can be found in discussions of WTO Members in the late 1990's concerning difficulties encountered by developing countries in implementation of the WTO Valuation Agreement and, particularly, the effective prevention of valuation fraud. These led to proposals by Members to establish a "multilateral solution that enables customs administrations of importing countries to seek and obtain information on export values contained in the export declaration to the customs administrations of exporting countries, in a time-bound manner, in doubtful cases."<sup>37</sup>

Apart from providing WTO Members with certain enhanced ability to combat fraud, an important benefit foreseen for a multilateral mechanism for information exchange is that it can enhance and deepen Customs cooperation between WTO Members. It would also lead to sharing of information on best practices in managing Customs compliance, as well as enhanced cooperation in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness.

Provisions of Article 12 can be grouped into three distinctive parts:

1. Article 12.1 which relates to voluntary compliance;
2. Article 12.2-12.11 which relates to exchange of specific data between Customs administrations;  
and
3. Article 12.12 which relates to exchange of data based on bilateral plurilateral and regional agreements and which is broader in scope.

#### **Article 12.1. Measures Promoting Compliance and Cooperation**

##### TFA provisions

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<sup>37</sup> WT/GC/W/227 (5 July 1999) (Communication from India)

## Analysis of TFA Section I, September 2016

1.1 *Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders.*<sup>38</sup>

1.2 *Members are encouraged to share information on best practices in managing customs compliance, including through the Committee. Members are encouraged to cooperate in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness.*

### Requirements and benefits

According to Article 12.1, Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders. Members are encouraged to share information on best practices in managing customs compliance, including through the Trade Facilitation Committee.

### Authorities concerned

- Customs

### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 1 (1.3), 3 (3.27, 3.28, 3.29, 3.31, 3.32, 3.39), 6 (6.2, 6.3, 6.4, 6.5, 6.6, 6.8, 6.9, 6.10) and 9 (9.1, 9.2, 9.3, 9.4, 9.5); SA H § 1 (Standard 20, 23, 24 and 25).;
- Voluntary Compliance Framework;
- Model Bilateral Agreement.

Standard 1.3 or the **RKC GA** foresees Customs to institute and maintain formal consultative relationships with the trade to increase cooperation and facilitate participation in establishing the most effective methods of working commensurate with national provisions and international agreements.

Standards in Chapter 3 of the RKC GA encourage voluntary compliance providing opportunities to traders to amend Good declarations under certain conditions. Accompanying guidelines provide more information about voluntary compliance.

**Voluntary Compliance Framework** provides guidance on Voluntary Disclosure Programmes which give clients a chance to correct inaccurate or incomplete information or to disclose information that clients have not reported during previous dealings with Customs authorities, without penalties in the appropriate circumstances. The Voluntary Compliance Framework help traders comply voluntarily and correctly with Customs law, regulations or requirements.

In line with Paragraph 1.2, the **Model Bilateral Agreement's** Article 3 envisages exchange between Customs administrations of information for the application and enforcement of Customs Law, including information on new law enforcement techniques having proved their effectiveness, new trends, means or methods of committing Customs offences, goods known to be the subject of Customs offences, as well as transport and storage methods used in respect of these goods, etc.

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<sup>38</sup> Such activity has the overall objective of lowering the frequency of non-compliance, and consequently reducing the need for exchange of information in pursuit of enforcement.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

### **Article 12.2. Exchange of Information**

#### TFA provisions

2.1 Upon request and subject to the provisions of this Article, Members shall exchange the information set out in subparagraphs 6.1(b) and/or (c) for the purpose of verifying an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy of the declaration.

2.2 Each Member shall notify the Committee of the details of its contact point for the exchange of this information.

#### Requirements and benefits

The purpose of the information exchange is to allow the requesting country to “verify an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy” by comparing the documents normally presented to Customs in the country of import with those normally presented to Customs in the country of export with respect to the same goods.

Article 12.2 foresees that Members shall exchange the information set out in paragraphs 6.1 (b) and/or (c) for the purpose of verifying an import or export declaration. Members shall notify the Committee on the details of its contact point for the exchange of information.

#### Authorities concerned

- Customs

#### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

#### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA §§ 6 (6.7) and 7 (7.1);
- Nairobi Convention;
- Model Bilateral Agreement;
- Recommendations on Mutual Administrative Assistance of 1953;
- Recommendation of the Customs Co-operation Council Concerning Bilateral Agreements on Mutual Administrative Assistance (June 1995);
- Recommendations on the Pooling of Information concerning Customs Frauds of 1967;
- Declaration on the improvement of Customs Cooperation and Mutual Administrative Assistance (The Cyprus Declaration) of 2000;
- Guide to the Exchange of Valuation Information;
- GNC Feasibility Study;
- Customs Enforcement Network Global Application (CEN);
- National Customs Enforcement Network Application (nCEN);
- Customs Enforcement Network Communication Platform (CENcomm).

## Analysis of TFA Section I, September 2016

The WTO TFA text does not cover information exchange on voluntary basis (but on request basis only). Other WCO tools cover the spontaneous information exchange.

The WTO TFA text focuses on information exchange for the purposes of verifying import/export declarations.

It refers to exchange of available information in respect of a consignment presented as legitimate trade. It does not envisage

- Exchange of information on commodity smuggling, drug trafficking, IPR, CITES and Hazardous waste enforcements.
- Investigative assistance, backtracking investigations, etc.
- Exchange of advance information.

In the TFA there is a possibility that Customs administrations will not be a contact point of information exchange.

However, the Nairobi Convention stipulates direct communication between Customs (Article 6) and so does the Johannesburg Convention (Article 3).

Article 19 of the Model Bilateral Agreement also provides for communication of the requests for assistance to be addressed directly to the designated contact points of Customs administrations.

According to the TFA, contact points will be notified to the TF Committee. The Nairobi and Johannesburg conventions also request notification to the WCO.

Standard 6.7 of the **RKC GA** stipulates that Customs shall seek to cooperate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs control. Chapter 7 of the RKC GA further encourages the use of information technologies to support Customs operations.

Article 5 of the **Nairobi Convention** is broader in scope than the TFA and includes “any intelligence, documents or other information communicated or obtained”. The scope is broader also under the Model Bilateral Agreement and its Article 1 which specifies that “information” means any data, whether or not processed or analyzed, and documents, reports and other communications in any format including electronic, or certified or authenticated copies thereof.

Furthermore, the Nairobi Convention envisages assistance by a Customs administration on its own initiative (Annex I), which is not envisaged by the TFA.

The Nairobi Convention provides concrete examples of assistance in its annexes (in the assessment of import or export duties and taxes, relating to controls, relating to surveillance, enquiries and notifications, in action against the smuggling of narcotic drugs and psychotropic substances, in action against smuggling of art, antiques and other cultural property). In addition, Article 11 of the Nairobi Convention stipulates that the provisions of the Convention shall not preclude the application of any more extensive mutual assistance which certain Contracting Parties grant or may grant in future. This goes far beyond the scope of the TFA Article 12.2, but could be viewed under the scope of Article 12.12.

Article 4, Paragraph 1 of the **Model Bilateral Agreement** refers to providing information to assist the requesting information that has reasons to doubt the truth or accuracy of a declaration, which is in line with TFA Paragraph 6.1 (b). This falls under “Information for the Assessment of Customs Duties”, while articles 5, 6 and 7 further include exchange of information relating to Customs offences, automatic exchange of information and advance exchange of information. Furthermore, Chapter IV of the Model Bilateral Agreement covers special types of assistance (spontaneous assistance, notification, recovery of customs claims, surveillance of information etc).

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This type of assistance is not envisaged by Article 12.2, but again could fall under the scope of Article 12.12 of the TFA which allows Members to maintain or enter into bilateral, plurilateral, or regional agreements for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment.

**Guide to the Exchange of Valuation Information** is designed to facilitate the exchange of valuation information among Customs administrations. It consists of (1) a checklist regarding valuation verification actions to be taken by the Customs administration of the importing country before requesting information from the Customs administration of the exporting country and (2) a set of recommended procedures, applicable to the Customs administrations of both the importing and exporting countries, for the exchange of valuation information.

### ICT considerations

The WCO Feasibility Study on Globally Networked Customs (GNC) captures the implications for information management arising from exchange of information between countries. Article 12 defines the rights and obligations of members and the conditions under which information exchange could occur. The WCO Feasibility Study contains detailed discussions regarding ICT Architecture, data standards, interoperability challenges, security concerns and data management issues (storage access and retention).

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC
- IMSC

## **Article 12.3. Verification**

### TFA provisions

*A Member shall make a request for information only after it has conducted appropriate verification procedures of an import or export declaration and after it has inspected the available relevant documentation.*

### Requirements and benefits

Before making a request, WTO Members are required to “conduct appropriate verification procedures” of the import or export declaration and inspect the relevant documentation. This refers in part to procedures defined under the WTO Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value.

Guidance on verification procedure and relevant documents to be checked before making the request may be found in the Guide to Exchange of Customs Valuation Information drafted by the Technical Committee on Customs Valuation as part of its response to a mandate from the WTO.

Article 12.3 foresees that a Member shall make a request for information only after it has conducted appropriate verification procedures of an import or export declaration and after it has inspected the available relevant documentation.

### Authorities concerned

- Customs

### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement;
- Guide to the Exchange of Valuation Information.

Paragraph 1 of the Article 2 along with Annex II of the **Nairobi Convention** foresees the requirements and verification of the all the available relevant documents by the requested administration before making the request, as it clearly provides for exchange of information only in those cases where there is a good reason to believe by the requested administration that a serious Customs offence has been committed.

Article 4 of the **Model Bilateral Agreement** envisages the requesting Member to carry out verification procedures and to communicate such information to the requested Member.

The **Guide to the Exchange of Valuation Information** provides extensive guidance on valuation verification actions to be taken by the Customs administration of an importing country before requesting information from the Customs administration of the exporting country.

Article 12.4 refers to the type of information that needs to be included in a request of a Member, provided through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, to the requested Member. If the requesting Member is not in a position to comply with any of the sub-paragraphs of paragraph 4.1, it shall specify this in the request.

Requesting Member need to provide information on domestic laws and legal system regarding data protection when they request information.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **Article 12.4. Request**

### TFA provisions

4.1 *The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, including:*

- the matter at issue including, where appropriate and available, the number identifying the export declaration corresponding to the import declaration in question;*
- the purpose for which the requesting Member is seeking the information or documents, along with the names and contact details of the persons to whom the request relates, if known;*
- where required by the requested Member, confirmation<sup>39</sup> of the verification where appropriate;*
- the specific information or documents requested;*
- the identity of the originating office making the request;*
- reference to provisions of the requesting Member's domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information and personal data.*

<sup>39</sup> This may include pertinent information on the verification conducted under paragraph 3. Such information shall be subject to the level of protection and confidentiality specified by the Member conducting the verification.

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4.2 *If the requesting Member is not in a position to comply with any of the subparagraphs of paragraph 4.1, it shall specify this in the request.*

### Requirements and benefits

Article 12.4 refers to the type of information that needs to be included in a request of a Member, provided through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, to the requested Member. If the requesting Member is not in a position to comply with any of the sub-paragraphs of paragraph 4.1, it shall specify this in the request.

Requesting Member needs to provide information on domestic laws and legal system regarding data protection when they request information.

### Authorities concerned

- Customs

### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement;
- Guide to the Exchange of Valuation Information.

Article 7 of the **Nairobi Convention** deals with the content of the requests for assistance. More detail is provided in the individual Annexes which deal with different types of assistance.

Article 19 of the **Model Bilateral Agreement** deals with Communication of requests and is more comprehensive than the TFA text.

In line with Paragraph 4.1 (c), Article 4 of the Model Bilateral Agreement envisages the requesting Member to carry out verification procedures and to communicate such information to the requested Member.

The **Guide to the Exchange of Valuation Information** provides extensive guidance on valuation verification actions to be taken by the Customs administration of an importing country before requesting information from the Customs administration of the exporting country.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **Article 12.5. Protection and Confidentiality**

### TFA provisions

5.1 *The requesting Member shall, subject to paragraph 5.2:*

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- (a) *hold all information or documents provided by the requested Member strictly in confidence and grant at least the same level of such protection and confidentiality as that provided under the domestic law and legal system of the requested Member as described by it under subparagraphs 6.1(b) or (c);*
  - (b) *provide information or documents only to the customs authorities dealing with the matter at issue and use the information or documents solely for the purpose stated in the request unless the requested Member agrees otherwise in writing;*
  - (c) *not disclose the information or documents without the specific written permission of the requested Member;*
  - (d) *not use any unverified information or documents from the requested Member as the deciding factor towards alleviating the doubt in any given circumstance;*
  - (e) *respect any case-specific conditions set out by the requested Member regarding retention and disposal of confidential information or documents and personal data; and*
  - (f) *upon request, inform the requested Member of any decisions and actions taken on the matter as a result of the information or documents provided.*
- 5.2 *A requesting Member may be unable under its domestic law and legal system to comply with any of the subparagraphs of paragraph 5.1. If so, the requesting Member shall specify this in the request.*
- 5.3 *The requested Member shall treat any request and verification information received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested Member to its own similar information.*

### Requirements and benefits

Article 12.5 contains conditions regarding protection and confidentiality, which the requesting Member needs to abide by, subject to paragraph 5.2 which states that if it is unable under its domestic law and legal system to comply with any of the subparagraphs of paragraph 5.1 it is requested to specify this in the request. In accordance with Paragraph 5.3, the requested Member shall treat any request and verification information received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested Member to its own similar information.

As noted, protection of confidential commercial information, as well as the use of information provided by another WTO Member in a domestic judicial proceeding, was a concern of WTO Members. To accommodate these concerns, the TFA measure imposes a number of restrictions on the requesting Member.

### Authorities concerned

- Customs

### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement;
- Guide to the Exchange of Valuation Information.

The WTO TFA Text doesn't differentiate nominal and non-nominal data, which is important for enforcement purposes.

Paragraph 5.1 (b) is in line with Article 5 (Paragraph 1. (b)) of the **Nairobi Convention**.

Chapter VIII (Articles 24 and 25) of the **Model Bilateral Agreement** covers use, confidentiality and protection of information and is in line with the TFA text.

The **Guide to the Exchange of Valuation Information** specifies that any information provided under the procedures of the Guide should be treated in accordance with the applicable confidentiality provisions.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## Article 12.6. Provision of Information

### TFA provisions

6.1 *Subject to the provisions of this Article, the requested Member shall promptly:*

- respond in writing, through paper or electronic means;*
- provide the specific information as set out in the import or export declaration, or the declaration, to the extent it is available, along with a description of the level of protection and confidentiality required of the requesting Member;*
- if requested, provide the specific information as set out in the following documents, or the documents, submitted in support of the import or export declaration, to the extent it is available: commercial invoice, packing list, certificate of origin and bill of lading, in the form in which these were filed, whether paper or electronic, along with a description of the level of protection and confidentiality required of the requesting Member;*
- confirm that the documents provided are true copies;*
- provide the information or otherwise respond to the request, to the extent possible, within 90 days from the date of the request.*

6.2 *The requested Member may require, under its domestic law and legal system, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings, or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position to comply with this requirement, it should specify this to the requested Member.*

### Requirements and benefits

Article 12.6 includes actions which the requested Member shall take, subject to the provisions of this Article. Paragraph 6.2 specifies that the requested Member may require, under its domestic law and legal system, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position to comply with this requirement, it should specify this to the requested Member.

The information and documents that may be requested are thus limited to:

- specific information set out in the import or export declaration (e.g., description of goods, grade or specification, HS classification, value, quantity, country of origin, etc.), or a copy the import or export declaration itself;
- specific information contained in the following supporting documents, or copy of the document itself:
  - commercial invoice
  - packing list
  - certificate of origin
  - bill of lading.

The obligation of the requested WTO Member extends only to these listed documents presented to it by the exporter (or importer, as the case may be), and in the form in which they have been presented.

### Authorities concerned

- Customs

### Links with WTO agreements

## Analysis of TFA Section I, September 2016

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement.

The WTO TFA text limits exchange of information as set out in the import or export declaration and the accompanying documents: commercial invoice, packing list, certificate of origin and bill of lading.

The Article 2(1) and 2(2) along with Annex II and III of the **Nairobi Convention** sets out general process of provision of information.

The WTO TFA Text sets out timeline for the provision of the requested information or otherwise (90 days, to the extent possible). Article 6(6) of the Nairobi Convention provides that the Customs administration of the requested Contracting Party shall reply to a request for assistance as soon as possible.

Paragraph 6.2 allows the requested Member to require an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings or in non-customs proceedings without the specific written permission of the requested Member. This is in line with Paragraph 2 of Article 5 of the Nairobi Convention.

Articles 1(f), 4(1), 19 (6) and 24 of the **Model Bilateral Agreement** squarely cover the provisions of the TFA.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **Article 12.7. Postponement or Refusal of a Request**

### TFA provisions

7.1 *A requested Member may postpone or refuse part or all of a request to provide information, and shall inform the requesting Member of the reasons for doing so, where:*

- it would be contrary to the public interest as reflected in the domestic law and legal system of the requested Member;*
- its domestic law and legal system prevents the release of the information. In such a case it shall provide the requesting Member with a copy of the relevant, specific reference;*
- the provision of the information would impede law enforcement or otherwise interfere with an on-going administrative or judicial investigation, prosecution or proceeding;*
- the consent of the importer or exporter is required by its domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information or personal data and that consent is not given;*  
*or*
- the request for information is received after the expiration of the legal requirement of the requested Member for the retention of documents.*

7.2 *In the circumstances of paragraphs 4.2, 5.2, or 6.2, execution of such a request shall be at the discretion of the requested Member.*

### Requirements and benefits

The receiving WTO Member may deny or postpone a request under specified conditions; namely, if the release of information -

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- is contrary to public interest;
- is prevented under domestic law/legal system;
- would impede law enforcement or interfere with investigation or prosecution;
- is prohibited by domestic law without consent of person concerned, and consent not given.

The requested WTO Member may also refuse the request if it is received after legal recordkeeping period has expired, or if it does not contain all required information, or if the requesting WTO Member is unable to provide all required assurances concerning use and protection of the information.

In the circumstances of paragraphs 4.2, 5.2, or 6.2, execution of such a request shall be at the discretion of the requested Member.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement.

These provisions are in line with Article 3 and Article 6 (2) of the **Nairobi Convention** which allows a contracting party to decline to provide assistance, if that assistance would infringe upon its sovereignty, security or other substantial national interests or prejudice the legitimate commercial interests of any enterprise, public or private and such requests would be subject to domestic laws and regulation in force.

Chapter IX (Article 26) and Article 2 (2) of the **Model Bilateral Agreement** dealing with Exemptions is in line with the provisions of the TFA text.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **Article 12.8. Reciprocity**

### TFA provisions

*If the requesting Member is of the opinion that it would be unable to comply with a similar request if it was made by the requested Member, or if it has not yet implemented this Article, it shall state that fact in its request. Execution of such a request shall be at the discretion of the requested Member.*

### Requirements and benefits

Article 12.8 foresees that execution of request will be at the discretion of the requested Member, if requesting Member is unable to comply with a similar request.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

## Analysis of TFA Section I, September 2016

- Nairobi Convention;
- Model Bilateral Agreement.

These provisions are aligned with Article 4 of the **Nairobi Convention** and Article 26 (2) of the **Model Bilateral Agreement**.

### WCO Bodies Concerned

- PTC
- RKC/MC
- EC

## Article 12.9. Administrative Burden

### TFA provisions

9.1 *The requesting Member shall take into account the associated resource and cost implications for the requested Member in responding to requests for information. The requesting Member shall consider the proportionality between its fiscal interest in pursuing its request and the efforts to be made by the requested Member in providing the information.*

9.2 *If a requested Member receives an unmanageable number of requests for information or a request for information of unmanageable scope from one or more requesting Member(s) and is unable to meet such requests within a reasonable time, it may request one or more of the requesting Member(s) to prioritize with a view to agreeing on a practical limit within its resource constraints. In the absence of a mutually-agreed approach, the execution of such requests shall be at the discretion of the requested Member based on the results of its own prioritization.*

### Requirements and benefits

To avoid administrative burden of responding to excessive number of requests, the TFA requires requesting WTO Members to take into account the resource and cost implications of its request, as well as weigh its fiscal interest against the efforts that will be required to be made by the Requested Member to respond.

If a requested Member receives an unmanageable number of requests from one or more Members, it may ask one or more of such Members to prioritize; in the absence of a “mutually agreed” approach, the Requested Member has discretion to execute the requests in an order of its own prioritization.

According to Article 12.9, the requesting Member shall take into account the associated resource and cost implications and the proportionality between its fiscal interest in pursuing its request and the effort to be made by the requested Member in providing the information.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement;
- Guide to the Exchange of Valuation Information

Article 8 of the **Nairobi Convention** and Article 27 of the **Model Bilateral Agreement** do support the provisions of the TFA to a large extent

**Guide to the Exchange of Valuation Information** envisages also that in requesting valuation information, the requesting administration needs to bear in mind the associated resources and cost implications for the requested administration. The proportionality between the fiscal interest involved in a

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request and the efforts to be made in providing the information should be considered and frivolous requests should be avoided.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **Article 12.10. Limitations**

### TFA provisions

*A requested Member shall not be required to:*

- (a) modify the format of its import or export declarations or procedures;*
- (b) call for documents other than those submitted with the import or export declaration as specified in subparagraph 6.1(c);*
- (c) initiate enquiries to obtain the information;*
- (d) modify the period of retention of such information;*
- (e) introduce paper documentation where electronic format has already been introduced;*
- (f) translate the information;*
- (g) verify the accuracy of the information; or*
- (h) provide information that would prejudice the legitimate commercial interests of particular enterprises, public or private.*

### Requirements and benefits

Article 12.10 stipulates actions which a requested Member shall not be required to carry out.

Requested parties do not have to conduct surveillance/enquiries to obtain the requested information.

No additional documents or information other than those submitted with the declaration can be called for.

Also they do not have to verify the accuracy of information.

It does not cover the exchange of information about smuggling or other forms of illicit trade.

Translation of the documents cannot be requested.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

This is not specifically mentioned in WCO instruments and tools, but is not in contradiction with them. Rather, WCO instruments and tools are more comprehensive. Their remit and scope do cover aforementioned activities.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## Article 12.11. Unauthorized Use or Disclosure

### TFA provisions

11.1 *In the event of any breach of the conditions of use or disclosure of information exchanged under this Article, the requesting Member that received the information shall promptly communicate the details of such unauthorized use or disclosure to the requested Member that provided the information and:*

- (a) take necessary measures to remedy the breach;*
- (b) take necessary measures to prevent any future breach; and*
- (c) notify the requested Member of the measures taken under subparagraphs (a) and (b).*

11.2 *The requested Member may suspend its obligations to the requesting Member under this Article until the measures set out in paragraph 11.1 have been taken.*

### Requirements and benefits

Article 12 stipulates actions which the requesting Member needs to take in instances of unauthorized use or disclosure of received information. This includes communicating to the requested Member the details of such unauthorized use or disclosure, taking necessary measures to remedy the breach and preventing any future breach and notifying the requested Member these actions taken. The requested Member may suspend its obligations to the requesting Member until the measures mentioned have been taken.

### Authorities concerned

- Customs

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Nairobi Convention;
- Model Bilateral Agreement.

These provisions are covered by Article 5 of the **Nairobi Convention** and Article 24 and 25 of the **Model Bilateral Agreement**.

### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## Article 12.12. Bilateral and Regional Agreements

### TFA provisions

12.1 *Nothing in this Article shall prevent a Member from entering into or maintaining a bilateral, plurilateral, or regional agreement for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment.*

12.2 *Nothing in this Article shall be construed as altering or affecting a Member's rights or obligations under such bilateral, plurilateral, or regional agreements, or as governing the exchange of customs information and data under such other agreements.*

### Requirements and benefits

According to Article 12.12, the WTO TFA does not affect Member's right or obligations under bilateral, plurilateral or regional agreements for sharing or exchange of customs information and data, including on

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a secure and rapid basis, such as on an automatic basis or in advance of the arrival of the consignment. Members may enter into or maintain such agreements.

### Authorities concerned

- Customs

### Links with WTO agreements

Addressing customs procedures and cooperation, TFA Article 12 is not of direct relevance in sanitary and phytosanitary matters and the **SPS Agreement**. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- RKC, GA § 6 (6.7);
- Nairobi Convention;
- Model Bilateral Agreement;
- Johannesburg Convention
- CMAAs/MOUs
- SAFE s;
- Guidelines on ISCM (Advance Electronic Cargo Information);
- GNC;
- National Customs Enforcement Network; CENComm.

Standard 6.7 of the **RKC** GA stipulates that Customs shall seek to cooperate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs control.

The commentary to the **Nairobi Convention** clarifies that it is not intended to affect the facilities provided under existing or future bilateral agreements. Bilateral agreements may even be concluded between Contracting

Parties to the Convention, to supplement the provisions of the Convention on specific points and to settle certain aspects which are of particular interest to the countries concerned.

**Model Bilateral Agreement** goes far beyond the scope of the exchange of information envisaged by Article 12.2 and falls under the scope of Article 12.12. In addition to exchange of information of different sorts (information for the application and enforcement of Customs Law, information for the Assessment of Customs Duties, information relating to customs offences), it includes automatic exchange of information (Article 6) and advance exchange of information (Article 7) as specifically mentioned under Paragraph 12.2. The Model Bilateral Agreement further includes special types of assistance (spontaneous assistance, notification, recovery of customs claims), as well as cross-border cooperation (i.e. hot pursuit, cross-border surveillance, covert investigations and joint control and investigation teams).

**Johannesburg Convention** could be recognized as the plurilateral agreement.

Based on the Nairobi Convention and Model Bilateral Agreement a number of bi-lateral, regional and plurilateral **CMAAs/MOUs** are successfully working in terms of exchange of information and providing of investigative assistance on a wide range of issue.

The **SAFE** requires Members to establish and enhance Customs-to-Customs network arrangements to promote seamless movement of goods through secure international trade supply chains. Paragraph 1.2 of the SAFE in particular aims at strengthening co-operation between Customs administrations to improve their capability to detect high risk consignments based on advance electronic information.

Technical Specification of the Standard 1 of the Pillar 1 (Integrated Supply Management) and the Guidelines on ISCM provide for Customs-to-Customs data exchange, in particular for high-risk consignments, to support risk assessment and facilitate release.

It further provides that to enable mutual recognition of controls, Customs should agree on consistent control and risk management standards, the sharing of intelligence and risk profiles as well as the exchange of Customs data, taking into account the work which has been carried out within the context of the WCO Global Information and Intelligence Strategy. Such agreements should foresee the possibility of joint monitoring or quality control procedures to oversee the adherence to the standards.

The **Guidelines on ISCM** further recommend that as part of the integrated Customs control chain as well as the Authorized Supply Chain and as stipulated in international instruments on mutual administrative assistance, Customs administrations along the supply chain may consider the routine Customs-to-Customs data exchange, in particular for high risk consignments. Such an electronic messaging system could include the exchange of notifications about the export transaction including the control results as well as a corresponding arrival notification. It also addresses the issue of data privacy and confidentiality.

The **Customs Enforcement Network (CEN)** is a global depository of non-nominal enforcement-related information with, at its core, a database of seizures and offences covering various areas of Customs' competence. Additionally, the CEN contains a communication component, namely an internal email system, a forum, and a dedicated website which are all conceived to facilitate information exchanges between Customs officers on a more general basis, whether it be for bilateral exchanges or exchanges under the scope of a regional agreement. Furthermore, a list of contact details for people responsible for Mutual Administrative Assistance is available to users on the CEN Website.

The **national Customs Enforcement Network (nCEN)** is a tool for the collection of nominal data on seizures and offences, suspected persons, and business entities on a national level. Although like the CEN it has an internal email system and forum for the exchange of information, this is restricted to the national level. The nCEN however has a special information communication interface which allows for the exchange of seizure information with other countries that are also using the nCEN. This type of exchange is based on bilateral agreements.

The **Customs Enforcement Network communication platform (CENcomm)** was conceived to enable secure and timely information exchange between a group of users, especially during cross border operations. It provides the opportunity, through the use of the standardized templates available in the system, to exchange the kind of information mentioned in paragraph 12.12.1.

The **Feasibility study carried out by the WCO for a 'Globally Networked Customs (GNC)'** recognized that through 'GNC', there could be a systematic approach to exchange information between Members based upon protocols, standards and guidelines. "Utility Blocks" define the specific protocols standards and guidelines that are applicable for that type of exchange. GNC could be a good tool to effectively facilitate exchange of information in identified cases as envisaged in Article 12 of TFA, by adopting a tailor made Utility Block (UB) and legal architecture.

#### WCO Bodies Concerned

- TFAWG
- PTC
- RKC/MC
- EC

## **ARTICLE 23: INSTITUTIONAL ARRANGEMENTS**

### **Article 23.2. National Committee on Trade Facilitation**

## Analysis of Technical Measures of the TFA, September 2016

### TFA provisions

*Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement*

### Requirements and benefits

In accordance with Article 23.2, each Member shall establish or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of the TFA. Thus, all stakeholders that will be affected by the implementation of the TFA should essentially be part thereof. It could potentially play a pivotal role in developing priorities and a Roadmap or strategic plan (potentially followed by action plans, too) with clear timelines for the implementation of TFA provisions in close collaboration with all relevant government agencies and other stakeholders, thus incorporating and synergizing wider trade facilitation perspectives, challenges and solutions.

Whilst some NCTFs were established already during the trade facilitation negotiations for the purpose of identifying negotiating positions and for coordinating WTO needs assessments, other NCTFs were or will be newly established for coordinating the implementation of the TFA. In other countries, even before the TFA negotiations were launched there where already Trade Facilitation-related committees existing, aiming at harmonizing border procedures. Obviously, it is worth examining the possibility of utilizing an already existing mechanism for the implementation of Article 23.2 before establishing a new committee and potentially duplicating functions and efforts.

### Authorities concerned

- Customs
- Other border agencies
- Trade authority
- Revenue authority
- Transport authority....

The TFA provisions do not specify which entities are required to be part of National Committees on Trade Facilitation (NCTF). However, there is general consensus that all stakeholder directly involved in the implementation of the TFA should be part of this group, both from the public and private sector. The private sector plays a very important role in the NCTFs, bearing in mind that it is one of the key beneficiaries and in a position to assess the usefulness of any trade facilitation reforms. The private sector is usually presented in the NCTF through the chamber of commerce and various associations (importers, exporters, brokers, carriers etc), but also by representatives of private companies.

### Relevant WCO instruments, tools and guidance (not exhaustive)

- Guidance on National Committees on Trade Facilitation;
- CBM Compendium.

**Guidance on National Committees on Trade Facilitation** aims to advise Members on requirements of Article 23.2 and to provide basic guidance on an efficient structure of an NCTF based on Members' good practices and experiences.

Chapter 3 of the **CBM Compendium** is relevant in providing Members preparing for implementation of the TFA with useful information that can help in their work relating to Article 23.2.

### WCO Bodies Concerned

- TFAWG
- PTC