

A Commentary on the Article on Expedited Shipments in the WTO Trade Facilitation Agreement

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The Article on Expedited Shipments in the WTO Trade Facilitation Agreement (TFA) will have a significant impact on the express shipping industry. This article provides a commentary on the Article through an analysis of various questions that will arise from its implementation. The commentary aims to assist the stakeholders in preparing for implementation of this article.

I INTRODUCTION

The history of the express shipping industry began in the mid-nineteenth century, when several express shipping companies (e.g. Wells Fargo established in 1852¹ and the Pony Express established in 1860²) were launched. In 1872, Montgomery Ward established the first mail order house³ in Chicago and, via parcel post, distributed catalogues filled with merchandise for sale to rural Americans.⁴ The express shipping industry subsequently boomed; a broad variety of merchandise, especially small items, was shipped either by the monopolistic national postal service or by private companies.⁵ An American magazine depicted the market of express shipping at that time as:

Express companies extend their business wherever it promises to pay. The Post-office extends its operations wherever there are settlers.⁶

During the twentieth century, especially in the 1970s,⁷ the express shipping industry expanded dramatically due to demands for speed (just-in-time methods), efficiency, and reliability in shipping goods. These demands were met by customized mass production, lean inventory management, e-commerce,⁸ improvements in transportation (especially aviation) and the use of advanced technology in logistics.

The express shipping industry is now considered to be one of the fastest growing sectors in the global economy, a generous job provider and an important contributor to national Gross Domestic Product (GDP).⁹ Moreover, it can be argued that the express shipping industry is vital for a country's logistics infrastructure and also the global business environment.¹⁰ Whatever the size or impact of the express shipping industry may be, it is evident that it plays a critical part in both domestic and international trade.

Notes

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¹ See Philip L. Fradkin, *Stagecoach: Wells Fargo and the American West* (Free Press 2002).

² See Glenn Danford Bradley, *The Story of the Pony Express: An Account of the Most Remarkable Mail Service Ever in Existence, and Its Place in History* (A. C. McClurg & Company 1913).

³ Rita L. Maroney, *History of the U.S. Postal Service, 1775–1982* 6 (The Service 1983).

⁴ U.S. Postal Service, *Universal Service and the Postal Monopoly: A Brief History* 8 (2008).

⁵ *Ibid.*

⁶ See Harper's Weekly (7 Dec. 1889).

⁷ Oxford Economics, *The Impact of the Express Delivery Industry on the Global Economy* 5 (2009), http://www.euroexpress.org/uploads/ELibrary/REPORTS & STUDIES_The Impact of the Express Delivery Industry on the Global Economy, September 2009.pdf (accessed 18 Jan. 2017).

⁸ Edward K. Morlok et al., *The Parcel Service Industry in the U.S.: Its Size and Role in Commerce* i (2000), <http://www.seas.upenn.edu/~morlok/morlokpage/parcelfullrpt.pdf> (accessed 18 Jan. 2017).

⁹ See Oxford Economics, *supra* n. 7.

¹⁰ See WTO, TN/TF/W/15.

The express shipping industry does, however, face some challenges, including the granting of monopoly rights,¹¹ barriers to the entry of foreign express operators,¹² lack of independent in-country regulator,¹³ postal taxes and concession fees.¹⁴ Furthermore, some Customs-related issues – e.g. unforeseen delays at Customs, limitations on express shipments (especially in terms of value or weight) – can be significant and can have a negative impact on express shipping companies.¹⁵

The World Trade Organization (WTO) Negotiations on Trade Facilitation afforded a golden opportunity to deal with these Customs-related issues. In 2005, the US circulated to the Negotiating Group on Trade Facilitation (NGTF) a communication on Express Shipments (TN/TF/W/15), where it proposed that ‘WTO members develop specific elements for commitment on treatment of express shipments.’ After several rounds of consultations between WTO members, the Article on Expedited Shipments was finalized in the WTO Agreement on Trade Facilitation (TFA):

ARTICLE 7: RELEASE AND CLEARANCE OF GOODS

8 Expedited Shipments

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.¹⁶ If a Member employs criteria¹⁷ 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

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¹¹ Many countries have experienced the process of corporatization of postal services. This has resulted in increased competition where both state-owned post operators and private companies are participants. Many countries, however, maintain certain monopoly rights for their universal postal service providers. Therefore, there is a call for reducing the scope of monopoly rights.

¹² E.g. some countries prevent foreign delivery companies from conducting domestic delivery services. See WTO, S/C/W/319, para. 77.

¹³ See Global Express Association, *Trade Agreements: Long Term Objectives of the Express Delivery Industry* (2012), [http://www.global-express.org/assets/files/Members Library/Trade Agreements - Long Term Objectives of the Express Delivery Industry \(FINAL\).pdf](http://www.global-express.org/assets/files/Members Library/Trade Agreements - Long Term Objectives of the Express Delivery Industry (FINAL).pdf) (accessed 18 Jan. 2017).

¹⁴ See Communication from Switzerland, WTO, S/CSS/W/73, para. 12.

¹⁵ See WTO, S/C/W/319, para. 78.

¹⁶ In cases where a Member has an existing procedure that provides the treatment in para. 8.2, this provision does not require that Member to introduce separate expedited release procedures.

¹⁷ 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.

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.

Once the TFA enters into force, this three-paragraph article will have a significant impact on the express shipping industry.

2 WHAT IS MEANT BY ‘EXPEDITED SHIPMENTS’?

During the trade facilitation negotiations, the US was a main driver for the introduction of ‘express shipments’ as a trade-facilitative measure into the WTO.¹⁸ In a later communication (TN/TF/W/144), the US changed the title from ‘express shipments’ to ‘expedited shipments’ and defined it as ‘goods shipped on an expedited basis while being tracked and controlled by an operator, and subject to the expedited customs procedures’.¹⁹ The final TFA legal text does not include a definition but implicitly refers to this concept as ‘those goods entered through air cargo facilities to persons who apply for such treatment’. (cf. TFA Article 7:8.1) Thus, within the TFA, expedited shipments only fall under the scope of air cargo; that is to say, goods purely carried by railway and road are not subject to this article. Accordingly, ‘expedited shipments’ within the TFA can be considered to be a subset of the broader term ‘express shipments’ which may also be delivered via railway or road.

Expedited shipments may take a multitude of forms; they range from ‘documents and parcels to electronic components, designer fashions, and pharmaceutical products’.²⁰ Most are high-value and low-weight, because the expense for shipping these goods through air cargo facilities are higher than by other modes of transport.

The delivery of expedited shipments consists of a specialized service provided to the senders and recipients and involves multiple sectors. According to the Central Product Classification (CPC) of the United Nations (Version 2.1), the delivery of expedited shipments can fall under three classes: *air and space transport services of freight* (CPC code: 6531), *postal services* (CPC code: 6801) and *courier services* (CPC code: 6802).

Under the class of air and space transport services of freight, there are two subclasses – *air transport services of letters and parcels* (CPC code: 65311) and *air transport services of other freight* (CPC code: 65319), as below:

Air and Space Transport Services of Freight

CPC Class	Explanatory note
6531 Air transport services of freight	
65311 Air transport services of letters and parcels	– transportation of letters and parcels by air, scheduled or non-scheduled, on behalf of postal and courier services
65319 Air transport services of other freight	– air transportation of individual articles and packages assembled and shipped in specially constructed shipping containers designed for ease of handling in transport – air transportation of freight not elsewhere classified

Source: UN Central Product Classification (CPC), Version 2.1, 2015

Postal services and courier services, however, are the main classes for the delivery of expedited shipments. Postal services and courier services are different: postal services are normally provided by the *designated operator(s)*²¹ under a universal service obligation (in other words, postal services are universal), while courier services are not. In the context of Universal Postal Union (UPU), *universal postal service* refers to ‘the permanent provision of quality basic postal services at all points in a member country’s territory, for all customers, at affordable prices’.²² The monopolistic regimes of universal postal service and designated operator(s) (mostly the national postal service) exclude private express shipping companies from the class of postal services. The class of courier services encompasses the

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¹⁸ See WTO, TN/TF/W/15.

¹⁹ See WTO, TN/TF/W/144.

²⁰ Ruosi Zhang, *The Liberalization of Postal and Courier Services: Ready for Delivery?*, in *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* 388 (Juan A. Marchetti & Martin Roy eds, Cambridge University Press 2008).

²¹ See Universal Postal Convention, Art. 1.8.

²² See *ibid.*, Art. 1.13.

services provided by the express shipping companies. Large express shipping companies, such as UPS, DHL, FedEx and TNT, are referred to as 'integrators' because they combine land and air transport services with freight forwarding, customs brokerage and other information-intensive activities.²³ According to such a classification, DHL's delivery of a book purchased online to a consumer, for example, should be called a courier service rather than a postal service. Both the designated postal operators and the private express shipping companies could be considered as providers of the expedited shipment services, so hereinafter they will collectively be called 'expedited shipment operators'.

POSTAL AND COURIER SERVICES

CPC Class	Explanatory note
6801 Postal services	
68011 Postal services related to letters	<ul style="list-style-type: none"> – collection, transport and delivery services for newspapers, journals and periodicals, whether for domestic or foreign destinations, rendered under a universal service obligation – collection, transport and delivery services for letters, brochures, leaflets and similar printed matter, whether for domestic or foreign destinations, rendered under a universal service obligation
68012 Postal services related to parcels	– collection, transport and delivery services for parcels and packages, whether for domestic or foreign destinations, rendered under a universal service obligation
6802 Courier services	
68021 Domestic courier services	<ul style="list-style-type: none"> – collection, transport and delivery services for domestic destinations of letters, parcels, and packages, as rendered by courier and using one or more modes of transport, other than those rendered under a universal service obligation – messenger services provided by bicycle couriers
68022 International courier services	– collection, transport and delivery services for international destinations of letters, parcels, and packages, as rendered by courier using one or more modes of transport, other than those rendered under a universal service obligation

Source: UN Central Product Classification (CPC), Version 2.1, 2015

3 SHOULD MARKET ACCESS BE THE PREMISE?

The TFA Article on Expedited Shipments allows each member to employ criteria that limit who may apply for the expedited release procedures (cf. TFA Article 7:8.1). Since the TFA does not directly touch upon market access, this Article assumes that the applicant is pre-established in a WTO member's Customs territory. Consequently, a foreign applicant that has no presence in that member's Customs territory shall in the first place seek market access under the WTO's General Agreement on Trade in Services (GATS) or through bilateral/regional mechanisms (e.g. regional/preferential trade agreements).

The GATS defines four modes of supply of services: (1) cross-border supply, (2) consumption abroad, (3) commercial presence, and (4) presence of natural persons.²⁴ With regard to expedited shipments, the four modes are discernible, taking WTO member A and company B (a foreign expedited operator) for example:

Cross-border supply:	An addressee in member A receives a letter or parcel delivered by company B through the postal or courier networks.
Consumption abroad:	A national of member A travels abroad to another country and consumes the postal or courier service provided by company B in that country.
Commercial presence:	Company B establishes its local affiliate, subsidiary, or office in member A.
Presence of natural persons:	A foreigner employed by company B provides his delivery service in member A.

In 1991, in order to enable members to undertake specific commitments with respect to trade in services, the GATT Secretariat distributed the Services Sectoral Classification List (MTN.GNS/W/120, usually referred to as 'W/120') which clarified the scope of service and identified relevant sectors and subsectors in service. In the W/120, postal services (CPC code: 7511) and courier services (CPC code: 7512) are categorized as communication services. The GATT W/120 was based on the first version of UN provisional CPC published in 1991, but the UN CPC has been revised at least two times. Nevertheless, 'WTO Members have tended to avoid any major changes in the list to ensure the stability and comparability of commitments over time,'²⁵ so 'changes in the subsequent versions of the CPC have not led to a conversion of current commitments under the GATS, which continue to be based on the Provisional CPC.'²⁶ This answers why the

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²³ WTO, S/C/W/39, 10.

²⁴ See General Agreement on Trade in Service, Art. I:2.

²⁵ Central Product Classification (CPC), Version 2.1, ST/ESA/STAT/SER.M/77/Ver.2.1, para. 85.

²⁶ *Ibid.*

CPC codes of postal services and courier services under the GATS are different from those under the CPC version 2.1. One question that arises, however

According to the GATS, a WTO member shall set out in a schedule the specific commitments²⁷ it undertakes. The member's commitments are related to market access (cf. GATS Article XVI), national treatment (cf. GATS Article XVII), etc. In the Schedule, a member may also specify terms, limitations and conditions on its commitments.²⁸ For example, below is the schedule of courier service set out by Hong Kong, China:

Commitments of Hong Kong, China in Courier Services²⁹:

Modes of supply: (1) Cross-border supply, (2) Consumption abroad, (3) Commercial presence, (4) Presence of natural persons

Sector or Subsector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Courier Services	(1) Unbound	1) Unbound	
Courier services: these are limited to the provision of services on a fee or contract basis for the delivery of documents and parcels, but excluding services reserved to the Post Office under the Post Office Ordinance	(2) None (3) None (4) Unbound	2) Unbound 3) None 4) Unbound	

At present, a total of sixty-four WTO members are undertaking commitments in the sectors of postal services and/or courier services³⁰; some members are only committed to either postal services or courier services. A number of members have specified limitations or conditions on their commitments in these sectors (e.g. Hong Kong, China excludes 'services reserved to the Post Office under the Post Office Ordinance' from its commitments), or maintained full discretion with regard to certain modes of supply (e.g. Hong Kong, China indicates 'unbound' with regard to the market access to courier services). Thus, the opening of an expedited shipment market on a global scale is circumscribed. It is not possible for an expedited shipment operator to directly deliver shipments (cross-border supply) or to establish an affiliate (i.e. a commercial presence, which is of particular importance to the expedited shipment operator³¹) to which ever country it wants to develop its business in.

In conclusion, when it comes to applying for the treatment of expedited release under the TFA, a domestic expedited shipment operator is entitled to do so, while a

foreign operator is required to ensure that the hosting country has undertaken market access (as well as national treatment) commitments.

4 IS IT A 'CONTRACT' BETWEEN THE EXPEDITED SHIPMENT OPERATOR AND THE MEMBER GOVERNMENT?

This Article is unique in comparison with others in the TFA, as it appears similar to a contract between a WTO member government and the expedited shipment operator. The hallmark of this Article is conspicuous: (1) the obligations of the two parties (namely, the member government and the expedited shipment operator) towards each other are clearly defined, (2) there is causality between the two parties' obligations.

Article 7:8.1 specifies the obligations of an expedited shipment operator to a WTO member government (cf. bullets (a) to (h)). These obligations include building necessary infrastructure, maintaining reliable operations, and ensuring compliance. The WTO member government may require an expedited shipment operator to comply with these obligations as a pre-requisite.

In return, the obligations of a WTO member government towards an expedited shipment operator, as inscribed in Article 7:8.2, include (a) minimizing documentation requirement, (b) releasing the shipments rapidly, (c) applying the obligations under (a) and (b) regardless of the weight or value of shipment or type of goods, and (d) setting up a *de minimis* threshold for the exemption of Customs duties and taxes. The four points form the core of this article. By the same token, the obligations of a WTO member government become the rights of an expedited shipment operator. An eligible expedited shipment operator will lawfully benefit from the four trade-facilitative obligations that a WTO member government undertakes.

Further, the expedited shipment operator's obligation to meet the criteria required by the WTO member government can be taken as the 'cause' (or 'means'); the WTO member government's obligation of providing trade-facilitative treatments to the expedited shipment operator can be taken as the 'effect' (or 'end'). The causality between the cause and effect (or means and end) is obvious: as long as the expedited shipment operator meets the criteria outlined in Article 7:8.1, the WTO member government has no reason to shirk its responsibility in offering the trade-facilitative measures, because the two parties' obligations are

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²⁷ Besides the sector-by-sector commitments, there are also the horizontal commitments in a member's schedule.

²⁸ See General Agreement on Trade in Service, Art. XX: 1 (a).

²⁹ WTO, GATS/SC/39, 10.

³⁰ See <http://i-tip.wto.org/services/>.

³¹ See WTO, S/CSS/W/61, para. 10.

binding. One question that arises, however, is 'should the provision of trade-facilitative measures be based on the precondition that the WTO member government has approved the expedited shipment operator to run such a business (as well as to have market access if it is a foreign company)?' This question has largely been ignored. Despite the fact that Article 7:8.3, bestows on the WTO member government a wide range of rights to 'examine, detain, seize, confiscate or refuse entry of goods, or to carry out post-clearance audits', these rights are mostly Customs-related. Evoking the lack of an independent in-country regulator, as mentioned previously, it is mainly the department of transportation, industry, commerce, or other in the WTO member government rather than the Customs administration that approves and regulates the expedited shipment operations. In terms of regulating the expedited shipment operators, this article, focusing on Customs matters, is only 'the tip of the iceberg'.

5 IS IT AN 'AUTHORIZED OPERATORS PLUS' ARTICLE?

During the WTO trade facilitation negotiations, some negotiators argued that there was no need for setting out a special article on expedited shipment because the expedited shipment operators might apply for the status of authorized operators in order to obtain the trade-facilitative measures. If so, could the TFA Article 7:7 (Trade Facilitation Measures for Authorized Operators) displace the TFA Article 7:8 (Expedited Shipments)?

Theoretically, an expedited shipment operator, as a trading practitioner, is given the opportunity of becoming an authorized operator and therefore shall be provided the trade-facilitative measures prescribed for in TFA Article 7:7.3. But the criteria and treatments for the authorized operators are largely different from those for the expedited shipment operators.

First, the criteria for authorized operators may include (1) an appropriate record of compliance with Customs and other related laws and regulations, (2) a system of managing records to allow for necessary internal controls, (3) financial solvency, including, where appropriate, provision of security or guarantee, and (4) supply chain security. (cf. Article 7:7.2 (a)) These criteria are not as rigid as those for expedited shipment operators (cf. Article 7:8.1) so an expedited shipment operator would be easily qualified as an authorized operator.

Second, the treatment provided to authorized operators comprises at least three of the following measures: (a) low documentary and data requirements, (b) low rate of physical inspections and examinations, (c) rapid release time, (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. Points (a) and (c) are in keeping with the treatment for expedited shipment operators (cf. Article 7:8.2 (a) and (b)), but the latter are more specific. Moreover, since a WTO member government need only commit to at least three of the seven measures, the commitments do not necessarily fall under the minimized documentation requirement and rapid release that the expedited shipment operators most need. In addition, the points related to the authorized operators do not include the *de minimis* arrangement tailor-made for the expedited shipment operators. In this regard, the article on authorized operators cannot fully satisfy the needs of expedited shipment operators which are unique and specific; it is essential to constitute an independent article on expedited shipments.

As seen from the criteria for the applicant and the treatments provided by the WTO member government, Article 7:8 is supplementary to Article 7:7. In a sense, Article 7:8 is an 'authorized operators plus' article: an expedited shipment operator will benefit from the trade-facilitative measures listed under Article 7:8 on the one hand, and might still benefit from the measures under Article 7:7, if it is accredited as an authorized operator, on the other.

6 DOES THE WEIGHT OR VALUE OF SHIPMENTS MATTER?

Trade facilitation is about, inter alia, minimizing documentation and expediting the release of goods, so it is crucial that the TFA sets forth the corresponding disciplines – i.e. Article 7:8.2 (a) and (b) – on expedited shipments. Article 7:8.2 (c), however, emphasizes that Article 7:8.2 (a) and (b) shall be applied regardless of the weight and value of shipments. Does the weight or value of shipments matter?

Expedited shipments encompass a variety of goods, which differ in weight and value. UPU is concerned about the weight of parcels delivered by the designated postal operators. It defines 'special conditions relating to limits of weights', for example:

- (1) The exchange of parcels whose individual weight exceeds 20 kilogrammes shall be optional, with a maximum individual weight of 50 kilogrammes.
- (2) Designated operators of countries which set a weight of less than 50 kilogrammes shall, however, have the option of admitting parcels in transit in bags or other closed receptacles between the weights of 20 and 50 kilogrammes.³²

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³² See UPU, Parcel Post Manual (2013), Art. RC 114.

UPU also distinguishes lightweight parcels from heavier items and has resolved to 'drive greater use of electronic support for all lightweight package services, in the areas of tracking, signature, cash on delivery, electronic customs clearance and accounting'.³³

In the meantime, the World Customs Organization (WCO) divides, according to value, shipments of goods into four categories³⁴:

Category 1:	Correspondence and documents having no commercial value and which are not subjected to duties and taxes
Category 2:	Low value consignments for which no duties and taxes are collected
Category 3:	Low value dutiable consignments
Category 4:	High value consignments

Each category of shipments is accompanied by a different mode of documentation requirements and Customs clearance procedures that would facilitate their immediate release.

In the context of UPU and the WCO, the weight or value of shipments matters. These institutions' differentiation between shipments of different weight or value equates to applying Article 7:8.2 (a) and (b) in a more operational fashion. On the other hand, as Article 7:8.2 (c) is applicable to 'shipments of any weight or value', it would be a challenge for the WTO member governments (mainly Customs administrations) to design operational trade-facilitative mechanisms that could apply to all categories of shipments of different weight or value.

It is noteworthy that the wording of 'Members shall endeavour to' means that Article 7:8.2 (c) could be interpreted as a 'best endeavour provision', which is *per se* binding but not as enforceable as other provisions. Moreover, the inclusion of this provision as an individual point seems rather ill-judged; this provision would better be placed somewhere else or rather as a footnote because it is only about how to apply points (a) and (b) as a by-law.

7 IS DE MINIMIS A NEW NOTION?

It is not the first time that the notion of *de minimis* appears in the WTO legal texts. Article 60 (De Minimis Imports)

of Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), for example, has provided that 'Members may exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.' *De minimis* connotes a defined limit or threshold under which an item is judged insignificant so as to be unworthy of attention. In jurisprudential terms, the concept is inspired by a Latin adage: *de minimis non curat lex*, which means 'the law does not take account of trifles; it will not, for example, award damages for a trifling nuisance.'³⁵ This jurisprudence also covers GATT Article VIII:3 – 'No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.' Then, with the introduction of *de minimis* into the rules on expedited shipments, this common law principle is reaffirmed in the WTO legal texts.

Various institutions, in addition to the WTO, have called for a *de minimis* discipline on expedited shipments. The International Chamber of Commerce (ICC), in its Customs Guidelines, proposes that '[a] modern, efficient and effective Customs administration applies a *de minimis* regime, reviewed annually to take account of inflation, whereby certain goods, including documents, private gift packages and trade samples, not exceeding a certain value or weight, are exempted from import duties and taxes and from formal declaration procedures.'³⁶ The WCO, in the Revised Kyoto Convention, provides that '[n]ational legislation shall specify a minimum value and/or a minimum amount of duties and taxes below which no duties and taxes will be collected.'³⁷ Furthermore, in the Guidelines for the Immediate Release of Consignments by Customs, the WCO sets forth an individual category for 'low value consignments for which no duties and taxes are collected.'³⁸ At the 2011 Asia-Pacific Economic Cooperation (APEC) summit, leaders in this region agreed to '[e]stablish commercially useful *de minimis* values in our economies that will exempt low-value shipments from customs duties and streamline entry documentation requirements, as a key contribution to our goal of an APEC-wide 10 percent improvement in supply-chain performance by 2015'.³⁹ Though not specific to expedited

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³³ See UPU Resolution C 32/2012.

³⁴ See WCO, Guidelines for the Immediate Release of Consignments by Customs (2014).

³⁵ *Oxford Dictionary of Law* 183 (8th ed., 2015).

³⁶ ICC Customs Guidelines (2012).

³⁷ WCO, the Revised Kyoto Convention, General Annex, Ch. 4: Duties and Taxes, Art. 4.13.

³⁸ See its paras 5.1–5.8.

³⁹ See 2011 APEC Leaders' Declaration.

shipments, these provisions or commitments shall explicitly be applicable to this constituent part of international consignments.

With regard to determining the *de minimis* threshold, the TFA Article on Expedited Shipments is rather flexible: (1) it leaves enough discretion to each WTO member in determining how high the threshold would be. In fact, according to the Global Express Association (GEA),⁴⁰ the WTO members currently apply generous *de minimis* at varying thresholds (from 10 EUR to 800 USD), and (2) it paves two tracks for determining the threshold. One is the 'shipment value'; the other is the 'dutiabale amount' (in other words, the 'duty liability'). Some WTO members specify the thresholds on the basis of value, whereas others (e.g. China, Switzerland)⁴¹ prefer the dutiabale amount.⁴²

8 CONCLUSION

Express shipping service has a rich history and is playing an important role in today's international trade. The WTO Negotiations on Trade Facilitation afforded a golden chance for the industry to deal with Customs-related issues by determining relevant international disciplines in this area. Although the jargon 'expedited shipments' instead of 'express shipments' finally inscribed in the WTO legal text narrows down the applicability of the TFA to this industry, the new WTO disciplines are instrumental in regulating the expedited shipment operations.

As the TFA article 7:8 should be primarily implemented by Customs administrations, it could be useful to examine the issues raised in this article. The principle findings are:

- (1) According to the UN CPC, expedited shipments shall mainly fall under the classes of 'postal services'

and 'courier services', which differ according to whether the services are universal.

- (2) When it comes to a foreign expedited shipment operator applying for special treatment under this Article, market access would be a pre-requisite.
- (3) The Customs administration of a WTO member government would undertake the obligations of providing trade-facilitative measures as long as the expedited shipment operator meets the conditions as set out in the Article (as well as is permitted to operate such business by other relevant government departments).
- (4) An expedited shipment operator may also enjoy other trade-facilitative benefits if it is accredited as an authorized operator.
- (5) WTO member governments shall provide trade-facilitative measures regardless of the weight or value of shipments, which actually matter in terms of operation. This situation requires the Customs administrations to take full account of the procedures that would not ignore any category of goods.
- (6) The notion of *de minimis* has been called for by the business community and the Customs community and has now been enshrined by the WTO Article. WTO member governments are given sufficient leeway in determining the *de minimis* thresholds.

On 22 February 2017, the TFA entered into force. At this moment, a commentary on the article of expedited shipments could assist the principle stakeholders – the expedited shipment operators and Customs administrations – in preparing for implementing the related rules.

Notes

⁴⁰ GEA, *Overview of De Minimis Value Regimes Open to Express Shipments World Wide* (2016), [http://www.global-express.org/assets/files/Customs Committee/de-minimis/GEA-overview-on-de-minimis_April-2016.pdf](http://www.global-express.org/assets/files/Customs%20Committee/de-minimis/GEA-overview-on-de-minimis_April-2016.pdf) (accessed 18 Jan. 2017).

⁴¹ In China, a single shipment with duty liability less than RMB 50 is exempted from collection. In Switzerland, total duties less than CHF 5 are waived. *See ibid.*

⁴² *See* WCO, Doc. SP0536E1a, Annex.