

THE RELATIONSHIP BETWEEN THE TRADE FACILITATION AGREEMENT AND THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (SPS AGREEMENT)¹

1 INTRODUCTION: AGREEMENT ON TRADE FACILITATION

1.1. Trade facilitation, which in a nutshell could be described as simplification of trade procedures in order to move goods in cross-border trade more efficiently, became a topic of discussion at the WTO's Singapore Ministerial Conference in December 1996 (see the Singapore Ministerial Declaration, paragraph 21). After several years of exploratory work, Members formally agreed to launch negotiations on trade facilitation in July 2004 (see Annex D of the so-called "July Package" of 2004). Under the 2004 negotiating mandate, Members were directed to clarify and improve GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations).²

1.2. Members concluded negotiations of the Trade Facilitation (TF) Agreement at the WTO's 9th Ministerial Conference in Bali, Indonesia in December 2013 (WT/MIN(13)/36, WT/L/911). The TF Agreement will enter into force after a formalistic legal review, notifications from developing and least-developed country Members on the planned implementation of the Agreement, Members accepting a protocol to insert the TF Agreement into Annex 1A of the WTO Agreement alongside the other multilateral trade agreements on goods by 31 July 2015, and ratification by two thirds of Members in accordance with Article X:3 of the WTO Agreement.³

1.3. The TF Agreement consists of two main sections: Section I, which sets out the substantive obligations on facilitating customs and other border procedures in 13 articles; and Section II, which contains special and differential treatment provisions for developing and least-developed country Members. These Members have flexibilities in implementing the Agreement, and are to designate, by 31 July 2014, which commitments they can implement immediately, and which they can only implement with more time and/or technical assistance.⁴

1.4. The structure of Section I is as follows:

- Article 1: Publication and availability of information
- Article 2: Opportunity to comment, information before entry into force and consultation
- Article 3: Advance rulings
- Article 4: Appeal or review procedures
- Article 5: Other measures to enhance impartiality, non-discrimination and transparency
- Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation
- Article 7: Release and clearance of goods
- Article 8: Border agency cooperation
- Article 9: Movement of goods under customs control intended for import
- Article 10: Formalities connected with importation and exportation and transit
- Article 11: Freedom of transit
- Article 12: Customs cooperation
- Article 13: Institutional arrangements

1.5. Articles 1-5 principally address transparency issues and expand on Article X of the GATT. Articles 6-11 mainly concern fees, charges and formalities for import, export and transit, and

¹ This is an information note prepared by the WTO Secretariat and is without prejudice to the positions of Members or to their rights or obligations under the WTO.

² http://www.wto.org/english/tratop_e/tradfa_e/tradfa_intro_e.htm.

³ WT/MIN(13)/36, WT/L/911, paragraph 2.

⁴ Developing and LDC Members are to designate all the substantive provisions in three categories: Category A, which they can implement upon entry into force of the Agreement; Category B, which they can implement only after a transitional period; and Category C, which they can implement only after a transitional period and capacity building.

expand on Articles V and VIII of the GATT. Article 13 addresses institutional arrangements (WTO Committee on Trade Facilitation and national trade facilitation committees).

2 RELATIONSHIP BETWEEN THE TF AND SPS AGREEMENTS

2.1. Concerning all border agencies – not just customs authorities – the TF Agreement raises interesting questions with regard to its relationship with the SPS Agreement given that many SPS controls are implemented at the border.

2.2. An example is the TF provision on perishable goods (Article 7.9), according to which Members are to release perishable goods within the shortest possible time. However, such prompt release of goods in accordance with the TF Agreement could potentially undermine Members' right to take measures to protect human, animal, and plant health in accordance with the SPS Agreement. Another example is the TF obligation to publish promptly all import, export or transit restrictions or prohibitions (Article 1) – on the other hand, if such import, export or transit restriction or prohibition is an SPS measure taken to protect human, animal or plant health, the SPS Agreement and its transparency provisions would also apply to the measure in question.

2.3. The above and other possible conflicts between the TF and SPS Agreements are, however, addressed in paragraph 6 of the Final Provisions of the TF Agreement, according to which "nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures". This provision would seem to safeguard the areas in which the TF Agreement goes beyond the SPS Agreement and can contribute to facilitating trade in goods subject to SPS controls (there is often room for streamlining SPS measures and their application), without diminishing Members' existing right to take science-based measures to protect human, animal or plant life or health within their territories.

3 TF VS SPS PROVISIONS

3.1. The text below summarizes the substantive provisions of the TF Agreement and the corresponding provisions of the SPS Agreement. It does not attempt to analyse either agreement in depth, but merely to ease comparisons between the two, and help the reader to ascertain in which respects the TF Agreement can be seen as going beyond the SPS Agreement (SPS-plus provisions). See Figure 1 (at the end of the note) for examples of SPS-plus provisions contained in the TF Agreement.

3.1 TF Article 1: Publication and availability of information

3.2. Members' obligations under publication and availability of information include the following:

- Publishing promptly a range of information related to importation and exportation requirements and procedures (see TF Article 1.1.1, a-j);
- Making available on the internet a description of importation, exportation and transit procedures, the required forms and documents, and contact information on enquiry points (whenever practicable, also in one of the official languages of the WTO);
- Establishing an enquiry point (or several) to answer questions from governments, traders and other interested parties; and
- Notifying to the Trade Facilitation Committee the official places, URLs of websites where the Member has made available the above information.

3.3. The SPS Agreement addresses publication and other transparency obligations in its Article 7 and detailed Annex B. Furthermore, 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). Of relevance is also the Doha Decision on Implementation-Related Issues and Concerns (WT/MIN(01)/17), according to which the SPS requirement to grant a "reasonable interval" between the publication of an SPS measure and its entry into force is to be understood to mean normally a period of at least six months.

3.4. As regards publication and availability of information, there are several intersections between the TF and SPS Agreements:

- The SPS Agreement requires prompt publication of SPS measures such as laws, decrees or ordinances which are applicable generally (Annex B.1, see also footnote 5);⁵
- The SPS Agreement does not require Members to make their SPS measures available on the internet, but this is encouraged in the recommended procedures on transparency (G/SPS/7/Rev.3, paragraph 62). As regards language versions, there is no obligation to publish SPS measures in languages other than that of the Member, but developed countries shall, upon request, provide document translations related to a specific notification (G/SPS/7/Rev.3, paragraph 26);
- The SPS Agreement requires Members to establish an SPS enquiry point to answer questions and provide relevant documents regarding SPS measures, control and inspection procedures, pesticide tolerance, etc. (Annex B.3);
- 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).

3.5. The TF obligations on publication and availability of information are largely similar to the corresponding obligations in the SPS Agreement. There are, however, some SPS-plus areas in TF Article 1. These include:

- The obligation to publish a wide range of information related to importation and exportation requirements and procedures (for instance on the required forms and documents, or on fees and charges), as opposed to the SPS obligation to publish SPS regulations;
- The obligation to make a description of importation, exportation and transit procedures available on the internet and whenever practicable, in one of the WTO official languages. On the SPS side, Members are only encouraged to publish SPS regulations on the internet – furthermore, this encouragement is in the recommended procedures on transparency, not the SPS Agreement itself.

3.2 TF Article 2: Opportunity to comment, information before entry into force and consultation

3.6. Members are to provide opportunities and an appropriate time-period to traders and other interested parties to comment on proposed introduction or amendment of laws and regulations related to the movement, release and clearance of goods. Such laws are to be published as early as possible before their entry into force. Members must also provide for regular consultations between border agencies and traders or other stakeholders within their territory.

3.7. The SPS Agreement obliges Members to establish an SPS national notification authority, notify other Members at an early stage about proposed SPS measures by using pre-set notification formats,⁶ and allow "a reasonable time" for comments (Annex B.5). The recommended procedures on transparency clarify that such reasonable period of time should normally be at least sixty calendar days (G/SPS/7/Rev.3, paragraph 13).

3.8. Thus, for the most part TF Article 2 contains obligations that are already contained in the SPS Agreement; however, the obligation to provide for regular consultations between border agencies, traders and other stakeholders could be classified as an SPS-plus provision.

3.3 TF Article 3: Advance rulings

3.9. An advance ruling is a written decision provided by a Member to an applicant (exporter or importer) prior to the importation of a good that sets forth the treatment that the Member will provide to the goods at the time of importation with regard to tariff classification and origin.

⁵ See also dispute case *Japan – Agricultural Products II* (DS76), in which the Appellate Body recalled that the publication requirement also applies to other generally applied instruments that are similar in character to those explicitly referred to in the illustrative list of footnote 5 to Annex B.1.

⁶ Available at http://www.wto.org/english/tratop_e/sps_e/transparency_toolkit_e.htm.

TF Article 3 obliges Members to issue advance rulings in a time-bound manner, and to notify applicants if they decline to issue a ruling. Members are also encouraged to provide advance rulings on "any additional matters for which they consider it appropriate" to issue one (TF Article 3.9.b.iv). Such advance rulings on "additional matters" can presumably also include SPS-related advance rulings regarding, for instance, SPS controls to be applied at the time of importation.

3.10. The SPS Agreement does 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" could be classified as an SPS-plus provision.

3.4 TF Article 4: Appeal or review procedures

3.11. Members are required to provide for administrative and/or judicial appeal of administrative decisions issued by customs (TF Article 4.1.1). They are also encouraged to provide for such appeal or review for administrative decisions issued by "relevant border agencies other than customs" (TF Article 4.1.6). These can include agencies in charge of SPS controls.

3.12. The SPS Agreement addresses the question of appeal and review in its Annex C, paragraph 1(i), which requires Members to adopt a procedure to review complaints concerning the operation of control, inspection and approval 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 obligation already existing in the SPS Agreement.

3.5 TF Article 5: Other measures to enhance impartiality, non-discrimination and transparency

3.13. Article 5 addresses systems designed to increase controls on imports following detection of violations, also called import/rapid alert systems (paragraph 1); detention of goods (paragraph 2); and test procedures (paragraph 3).

3.14. 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 Article 5. Any possible contradictions between the TF and SPS Agreements are nevertheless avoided by paragraph 6 of the Final Provisions of the TF Agreement, which stipulates that the TF Agreement does not diminish Members' rights and obligations under the SPS Agreement. Another interpretation of TF 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, TF Article 5, paragraph 1 could be seen as an SPS-plus provision.

3.15. Paragraph 2 of TF Article 5 obliges Members to inform the carrier or importer about detention of goods, and paragraph 3 to facilitate test procedures. Both contain issues on which the SPS Agreement is silent, so they could be classified as SPS-plus provisions.

3.6 TF Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation

3.16. Article 6 regulates fees and charges other than import and export duties and certain internal taxes (among others VAT, sales taxes and excise duties), so border charges such as those levied in connection with SPS control, inspection and approval procedures would seem to fall within its scope of application. The requirements are that Members publish information on such fees and charges in accordance with TF Article 1, accord an adequate time between the publication of new or amended fees and charges and their entry into force, and periodically review the charges with a view to reducing their number and diversity (TF Article 6.1).

3.17. The SPS Agreement also 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 TF 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.

3.18. In adding more specificity on transparency and requiring periodic review of fees and charges, TF Article 6 goes beyond Annex C of the SPS Agreement and as such, could be classified as an SPS-plus provision. However, when compared to SPS control, inspection and approval procedures that may be subject to the provisions of the entire SPS Agreement, the TF provisions on fees and charges imposed on or in connection with importation and exportation would not seem to add to the existing SPS requirements.

3.7 TF Article 7: Release and clearance of goods

3.19. This detailed article sets out the procedures which Members are to establish or maintain for the release and clearance of goods for import, export or transit. It regulates:

- Pre-arrival processing of import documentation and other formalities (to speed up release once the goods have arrived);
- Electronic payment;
- Release of goods before final determination of customs duties and other charges;
- Risk management to concentrate customs controls on high-risk consignments and expedite the release of low-risk consignments;
- Post-clearance audit to demonstrate compliance with customs controls;
- Publication of average release times;
- Additional trade facilitation measures for authorised ("trusted") operators who meet specific criteria, such as a good record of compliance, a system of managing records, etc.;
- Allowing for expedited shipments of, at least, goods entering through air cargo facilities (concerns, in particular, express delivery operators); and
- Releasing perishable goods within the shortest possible time, giving them priority in inspections, and allowing for proper storage pending release.

3.20. Many of the provisions in TF Article 7 could be classified as SPS-plus when applicable to SPS controls – some examples are the obligation to allow pre-arrival processing, or the requirement to publish average release times.

3.21. Expediting the release and clearance of goods in compliance with the TF Agreement could potentially undermine Members' rights to implement SPS controls in accordance with the SPS Agreement. However, TF 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" (TF Article 7.3.6, see also TF Article 7.8.3). Furthermore, any potential problem is also avoided by paragraph 6 of the Final Provisions of the TF Agreement, which stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

3.8 TF Article 8: Border agency cooperation

3.22. TF Article 8 mandates Members to ensure that their customs and other border authorities and agencies cooperate with one another and coordinate their activities in order to facilitate trade. According to the article, such cooperation and coordination may include:

- Alignment of working days and hours;
- Alignment of procedures and formalities;
- Development and sharing of common facilities;
- Joint controls;
- Establishment of one stop border post control.

3.23. A positive encouragement for cooperation between the different border agencies, TF Article 8 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, TF Article 8 does not create any new obligations and hence no contradiction with the SPS Agreement.

3.9 TF Article 9: Movement of goods under customs control intended for import

3.24. TF Article 9 requires Members, to the extent practicable, to allow goods intended for import to be moved under customs control from the point of entry to another customs office.

3.25. Allowing goods to be moved between customs offices could potentially raise some SPS concerns relating to the entry, establishment or spread of pests or diseases. However, TF 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 TF Agreement, which stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

3.10 TF Article 10: Formalities connected with importation and exportation and transit

3.26. This detailed article aims to minimize the incidence and complexity of import, export and transit formalities and to decrease and simplify document requirements. It regulates:

- Formalities and documentation requirements (Members are required to review such requirements and ensure that they are aimed at rapid release and clearance and reduced time and cost of compliance for traders, restrict trade as little as possible, and are removed if no longer needed);
- Acceptance of paper or electronic copies of supporting documents required for import;
- Use of international standards as a basis for importation, exportation or transit formalities;
- Establishment of single windows enabling traders to submit documentation through a single entry point;
- Pre-shipment inspections (Members are to eliminate them in relation to tariff classification and customs valuation and encouraged not to expand the use of other pre-shipment inspections (pre-shipment inspections for SPS-purposes are nevertheless not precluded in accordance with footnote 12 to TF Article 10.5.2));
- Customs brokers (Prohibition to introduce measures that make the use of customs brokers mandatory in import/export operations);
- Common border procedures and uniform documentation requirements (however, TF Article 10.7.2.e explicitly states that Members are not precluded from differentiating procedures and documentation requirements in a manner consistent with the SPS Agreement);
- Rejection of goods on account of failure to meet SPS regulations or other technical regulations (the importer is to be allowed, subject to the Member's laws and regulations, to re-consign or to return the rejected goods to the exporter or a person designated by the exporter – however, if the importer fails to act within a reasonable period of time, the competent authority may "take a different course of action to deal with such non-compliant goods"); and
- Temporary admission of goods, including for inward and outward processing.

3.27. Many of the provisions in TF Article 10 could be classified as SPS-plus when applicable to SPS controls – an example is the obligation to review formalities and document requirements with a view to reducing them, or the obligation to allow, as a first option, the importer to re-consign or return goods rejected on the grounds of SPS concerns.

3.28. Minimizing formalities connected with importation and exportation and transit in compliance with the TF Agreement 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 TF Article 10.5.2), and that allow Members to apply different procedures and documentation requirements in a manner consistent with the SPS Agreement (TF Article 10.7.2.e). Any possible problem is also avoided by paragraph 6 of the Final Provisions of the TF Agreement, which stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

3.11 TF Article 11: Freedom of transit

3.29. This detailed article requires Members to treat goods in transit no less favourably than if they were being transported directly from their place of origin to their destination. Regulations or formalities in connection with transit traffic should be the least trade restrictive possible, and not be applied in a manner which would constitute disguised restrictions. Members are encouraged to cooperate with one another with a view to enhancing freedom of transit (as regards charges, formalities and legal requirements, and practical operation of transit regimes).

3.30. Other obligations include, *inter alia*:

- Making available, where practicable, physically separate infrastructure for transit;
- Allowing for advance filing and processing of transit documentation.

3.31. 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, TF 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 (TF Article 11.6), or to allow for advance filing and processing of documentation and data (TF Article 11.9). At the same time, paragraph 6 of the Final Provisions of the TF Agreement ensures that any controls on goods in transit that may be necessary from an SPS perspective will not be compromised.

3.12 TF Article 12: Customs cooperation

3.32. This detailed article defines the requirements for improving customs cooperation through sharing information between customs authorities. Members are to exchange information to verify import/export declarations where there is a reason to doubt the accuracy of the declaration, and to share information, among others, on best practices in managing customs compliance. Members are also to provide technical guidance in administering compliance measures.

3.33. Addressing customs procedures and cooperation, TF Article 12 is not of direct relevance in sanitary and phytosanitary matters. However, in requiring enhanced cooperation between customs officials, the article can also have positive effects in the work of SPS control agencies.

3.13 TF Article 13: Institutional arrangements

3.34. This article establishes a Committee on Trade Facilitation to oversee implementation of the TF Agreement. This Committee will review the operation and implementation of the TF Agreement four years from its entry into force, and periodically thereafter.

3.35. Members are also to establish a national committee on trade facilitation, or designate an existing mechanism, to facilitate domestic coordination and implementation.

Figure 1 – Examples of SPS-plus provisions contained in the TF Agreement

