

**THE RELATIONSHIP BETWEEN THE TRADE FACILITATION AGREEMENT AND THE  
AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES  
(SPS AGREEMENT)<sup>1</sup>**

**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).<sup>2</sup>

1.2. After almost ten years of negotiations, the Trade Facilitation Agreement (TFA) was concluded in December 2013 at the Bali Ministerial Conference as part of a wider Bali package<sup>3</sup> and a Protocol of Amendment<sup>4</sup> was adopted in November 2014 to insert the new Agreement into Annex 1A of the WTO Agreement. The TFA entered into force on 22 February 2017, following its ratification by two-thirds of WTO Members.

1.3. The provisions of the TFA are laid out in three sections. Section I contains a series of provisions covering border-related procedures, processes and other disciplines. Section II of the Agreement contains special and differential treatment provisions for developing and least developed country Members. Section III includes a number of provisions related to the overall implementation of the Agreement, including i d8- 7(i d8-ve)8-ve

## 2 RELATIONSHIP BETWEEN THE TFA AND THE SPS AGREEMENT

2.1. The TFA aims to expedite the movement, release and clearance of goods and to reduce transaction costs in trade. While most provisions of the TFA are to be implemented by customs authorities, many also apply to other agencies that deal with international trade, including SPS agencies. The TFA therefore raises interesting questions regarding its relationship with the SPS Agreement, given that many SPS controls are implemented at the border.

2.2. An example is the TFA provision on perishable goods (Article 7.9), according to which Members *inter alia* are to release perishable goods within the shortest possible time. However, such prompt release of goods in accordance with the TFA 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 TFA obligation to publish promptly all import, export or transit procedures, including fees (Article 1). If such an import, export or transit procedure 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 intersections between the TFA and the SPS Agreement are, however, addressed in the Final Provisions of the TFA, contained in Section III. Article 24.6 states that "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 o

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

- The SPS Agreement requires prompt publication of SPS regulations such as laws, decrees or ordinances which are applicable generally (Annex B.1, see also footnote 5);<sup>5</sup>
- The SPS Agreement does not require Members to make their SPS regulations available on the internet, but this is encouraged in the recommended transparency procedures (G/SPS/7/Rev.4, paragraph 4.5);
- Regarding translations, there is no obligation to publish SPS measures in languages other than that of the Member, but developed countries shall, upon request, provide translations of documents related to a specific notification (Annex B.8; G/SPS/7/Rev.4, paragraph 2.21);
- The SPS Agreement requires Members to establish an SPS enquiry point to answer reasonable questions from other Members 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 they have 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.4, paragraphs 2.13, 2.16, 2.23, 2.50, 5.2).

3.5. The TFA obligations on publication and availability of information are similar to the corresponding obligations in the SPS Agreement. There are, however, some SPS-plus areas in TFA 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 more limited 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

Members should be discussed, upon request, and taken into account in finalizing the regulation. In addition, Members must allow a reasonable interval between the publication of an SPS regulation and its entry into force (except in urgent circumstances). According to the Doha Decision on Implementation-Related Issues and Concerns, this "reasonable interval" shall normally mean a period of not less than six months (WT/MIN(01)/17, paragraph 3.2).

3.8. Thus, for the most part TFA Article 2 contains obligations that are already covered in more detail in the SPS Agreement and in the Doha Decision; 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 TFA 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. TFA 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 (TFA Article 3.9(b)(iv)). Such advance rulings on "additional matters" can presumably also include SPS-related advance rulings regarding, for instance, SPS procedures to be applied at the time of importation.

3.10. The SPS Agreement does not address the issue of advance rulings. Therefore, the TFA encouragement to provide advance rulings on "additional matters for which a Member considers it appropriate" (besides tariff classification and origin) could be classified as an SPS-plus provision.

### **3.4 TFA Article 4: Procedures for appeal or review**

3.11. Members are required to provide for administrative and/or judicial appeal of administrative decisions issued by customs (TFA Article 4.1). They are also encouraged to provide for such appeal or review for administrative decisions issued by "r

3.15. TFA Article 5.2 obliges Members to inform the carrier or importer about detention of imported goods for inspection. Article 5.3 addresses opportunities for second tests if a first test shows an adverse finding. The SPS Agreement is silent on both issues, so TFA Articles 5.2 and 5.3 could be classified as SPS-plus provisions.

### **3.6 TFA Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation and penalties**

3.16. TFA Article 6 regulates fees and charges other than import and export duties and certain internal taxes (VAT, sales taxes and excise duties, among others). 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 TFA 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 (TFA Article 6.1). TFA Article 6.2 deals with fees and charges for customs processing, and Article 6.3 addresses penalty disciplines, which would seem to be less relevant in an SPS context.

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.

not otherwise inconsistent with the Member's WTO rights and obligations" (TFA Article 7.3.6, see also TFA Article 7.8.3). In addition, TFA Article 24.6 also stipulates that the TF Agreement does not diminish Member's rights and obligations under the SPS Agreement.

### **3.8 TFA Article 8: Border agency cooperation**

3.22. TFA Article 8 requires each Member to ensure that its customs and other border authorities and agencies cooperate with one another and coordinate their activities in order to facilitate trade. It also requires Members to cooperate with neighbouring Members with a view to coordinating procedures at border crossings 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. The SPS Agreement contains no such provisions, and as such, TFA Article 8 could be considered an SPS-plus provision.

### **3.9 TFA Article 9: Movement of goods intended for import under customs control**

3.24. TFA Article 9 requires Members, to the extent practicable, to amnble, 3.9 TFA Article 9: Movement of goods i

3.27. Many of the provisions in TFA Article 10 could be classified as SPS-plus – 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. TFA Article 10.3 encourages Members to use international standards as a basis for import, export or transit formalities and procedures, but does not identify any specific international standards or standard-setting bodies. The SPS Agreement explicitly refers to the standards, guidelines and recommendations developed by Codex, OIE and IPPC, and some of their standards may be considered relevant in the context of TFA Article 10.3 as well. In addition, Members may need to consider additional international standards in relation to import, export or transit procedures.

3.29. Minimizing formalities connected with importation and exportation and transit in compliance with the TFA could limit 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 (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 SPS Agreement (TFA Article 10.7.2(e)). In addition, as noted before, TFA Article 24.6 stipulates that the TFA does not diminish Members' rights and obligations under the SPS Agreement.

### **3.11 TFA Article 11: Freedom of transit**

3.30. 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 must 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). Other obligations

which they will implement after a transitional period (Category B) and which they will implement only after a transitional period and capacity building (Category C). Although the SPS Agreement contains articles on special and differential treatment and on technical assistance, the approach taken in the TFA is innovative and goes beyond the relevant SPS Agreement provisions.

## **5 TFA SECTION III: INSTITUTIONAL ARRANGEMENTS AND FINAL PROVISIONS**

5.1. Section III establishes a permanent WTO Committee on Trade Facilitation at the WTO and requires Members to have a national committee to facilitate domestic coordination and implementation of the TFA. It also sets out a few final provisions.

### **5.1 TFA Article 23.1: WTO Committee on Trade Facilitation**

5.2. TFA Article 23.1 establishes a Committee on Trade Facilitation, open for participation by all



