

10th Anniversary Special Issue: Trade Facilitation

EDITORIALS

Nora Neufeld, *Great Expectations: How the World Trade Organization's Trade Facilitation Agreement Impacts Trade and Trade Cooperation*

Maureen Irish, *The Trade Facilitation Agreement: Is the Doha Development Round Succeeding?*

ARTICLES

Mohammad Saeed, Eleonara Salluzzi, Victoria Tuomisto, et al., *The 'Rights' of the Private Sector in the Trade Facilitation Agreement*

Bipin Menon, *Trade Facilitation—A Boundless Opportunity for India*

Stephen Creskoff, *India's Path to Improved Trade Facilitation and Enhanced Economic Development*

Christina Wiederer, *The Role of Logistics in Supporting International Trade and Development—A Literature Review*

Hsing-Hao Wu, *Refining the WTO Trade Facilitation Agreement in the Face of an Uncertain Trade Environment: Challenges and Opportunities*

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THE 'RIGHTS' OF THE PRIVATE SECTOR IN THE TRADE FACILITATION AGREEMENT

MOHAMMAD SAEED, ELEONARA SALLUZZI, VICTORIA TUOMISTO, ET AL.*

This article explores the role the private sector can play in the implementation of the Trade Facilitation Agreement (TFA). Notwithstanding that World Trade Organization (WTO) Members' governments bear the responsibility to implement the obligations arising from the TFA, the agreement creates direct implied rights for the business community. In conformity with the domestic legal framework of each WTO Member, private sector actors may enforce nationally their implicit rights deriving from the TFA as well as advocate towards their own governments to challenge other WTO Members for not implementing the agreement. To enhance the private sector's participation in trade facilitation reforms, this article suggests ways of involving economic operators in the trade facilitation policymaking and implementation process, notably through public-private dialogue (PPD) entrusted in the National Trade Facilitation Committees (NTFCs), as a key way to cooperate and coordinate with public border agencies on the implementation of the TFA.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE ECONOMIC IMPACT AND BENEFITS OF THE TRADE FACILITATION AGREEMENT FOR THE PRIVATE SECTOR
- III. PRIVATE SECTOR RIGHTS – ARTICLE-WISE DISCUSSION OF THE WTO TFA
- IV. THE ROLE OF THE PRIVATE SECTOR IN IMPLEMENTING THE WTO TFA
- V. CONCLUSION

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I. INTRODUCTION

The World Trade Organization's (WTO) Trade Facilitation Agreement (TFA) is the first multilateral agreement negotiated since the establishment of the WTO in 1995 and seeks to address issues related to cutting red tape in cross-border trade and promoting simplification, modernisation, and harmonisation of trade processes.

The current trading environment is characterised by global and regional value chains with goods crossing multiple borders in the process of conversion from their initial state to final product. Due to just-in-time production as well as consumer demands towards faster e-commerce, businesses increasingly rely on national border regulatory agencies to provide efficient cross-border services to minimise their costs and the time spent trading goods across borders. The uncertainty resulting from bureaucratic procedures in international trade adds significantly to these costs, which are especially burdensome for small and medium sized enterprises (SMEs) which lack the resources and the capacity to comply. Any effort to reduce the red tape in international trade procedures, including through the implementation of the Trade Facilitation Agreement, should jointly benefit the private sector to increase their competitiveness and government agencies to reduce their workload and operational costs.

The TFA acknowledges the private sector as a key beneficiary as well as government partner and implementer of trade facilitation reforms and accords explicit and sometimes implicit rights to traders in its legal formulation. A legally binding instrument for WTO Members, the TFA goes beyond other trade facilitation regimes such as that laid out in the World Customs Organization's (WCO) Revised Kyoto Convention (RKC).

Measures ranging from customs-led schemes of authorised operators and post-clearance audit to mechanisms for engaging in public-private dialogue generate a set of soft rights for traders in the Member States¹. By making it mandatory to hold regular consultations, provide opportunity to comment on proposed or new regulations, and establish a national committee to facilitate implementation and domestic coordination, the TFA recognises the importance of involvement of all trade stakeholders including the private sector. These initiatives provide the private sector with a platform to regularly engage with government agencies and play their part in the prioritisation of reforms, policy formulation, and monitoring of implementation. In this article, it will be argued that in a manner that is

¹'Measure' is a common expression used by governments and development partners for legal provisions written as articles and sub-articles of the TFA.

uncustomary to WTO law (or international trade law generally), the TFA establishes a significant and unprecedented number of soft rights for traders in particular, in the Member States. Furthermore, while governments are obligated to implement all provisions of the agreement, the private sector is expected to play a decisive role in all phases of the reform process. First, the paper will introduce the broad content and objectives of the WTO TFA, as well as its expected benefits for the private sector. Second, a detailed article-by-article analysis of selected TFA measures will ensue to reveal the rights of private sector individuals. Finally, the paper will conclude with a discussion on the strategic and operational roles the private sector can play in the implementation of the agreement.

II. THE ECONOMIC IMPACT AND BENEFITS OF THE TRADE FACILITATION AGREEMENT FOR THE PRIVATE SECTOR

The WTO TFA is the first multilateral agreement to come into force since the establishment of the WTO, thus reinvigorating the multilateral trade system after the impasse of the Doha Development Round. WTO treaties set out legally binding rules, which represent part of public international law that WTO Members are required to comply with.

The WTO TFA represents no exception to this rule. Entered into force on February 22, 2017 upon its ratification by two-thirds of the WTO membership, the TFA creates binding obligations for Member States that aim to simplify, modernise and harmonise their import, export and transit procedures as per the legal text of the Agreement. This will eventually expedite the movement, release and clearance of goods, consequently saving time and reducing costs for traders.

Economic incentives for the implementation of the WTO TFA are considerable: transaction costs associated with international trade remain high, even as other costs such as customs duties and transportation have fallen. According to the OECD, trade transaction costs “such as expenses relating to supplying information and documents to the [authorities] amount to 2-15% of the value of traded goods”.² Unlike transportation costs and customs duties, trade transaction costs, because of the market inefficiency they engender, constitute a deadweight loss to the global economy. Thus, for example, if the information needed to comply with the requirements of border authorities could be supplied in a more efficient manner, i.e., at a lower cost, society as a whole would benefit.

The TFA, which is designed to address trade transaction costs and is therefore seen as a ‘win-win’ for the global economy, could deliver a 14.3% reduction in

²Organisation for Econ. Cooperation & Dev., *Quantitative Assessment of the Benefits of Trade Facilitation*, TD/TC/WP(2003)31/FINAL (Nov. 13, 2003).

global trade costs and between USD750billion and USD 1trillion in export gains, adding around 0.5% per year to world GDP growth.³ These benefits are likely to be disproportionately skewed when it comes to developing countries where trade transaction costs tend to be higher. A study by Arvis *et al.*,⁴ for example, estimated that trade costs in developing countries in 2010 were equivalent to applying a 219% *ad valorem* tariff on international trade, as compared to high-income countries, where the *ad valorem* equivalent amounted to 134%.

Unlike tariff reductions, TFA obligations are not trade-offs or give-and-take; rather, they are aimed at addressing the inefficiencies and lack of transparency of trade-related procedures, implying rights to trading partners and traders. The accord includes novel provisions promising developing and least-developed countries technical and financial assistance to implement their future TFA obligations. While necessary due to the limited resources and capacity in the mentioned regions, such assistance is an insufficient condition for trade facilitation reforms to have the greatest possible effect. It is the private sector that accounts for the bulk of trade and that consequently encounters border delays in practice. Too frequently, however, it is excluded from the reform process, limiting policymakers' understanding of the practical burdens traders face in cross-border operations.

However, the private sector needs to be at the centre of trade facilitation reform processes as it bears the brunt of cross-border inefficiencies, generating both direct and indirect costs to business. In particular, direct costs entail the time and resources directly invested in managing export administrative operations such as collecting, producing, transmitting, and processing the required information and documents. More importantly, businesses endure indirect costs such as increased operational costs, increasing financing requirements and lost business opportunities. Therefore, the reduction of the cost and time of cross-border requirements will minimise unforeseen costs and delays thereby improving overall business performance.

Throughout the TFA negotiations, international private sector representatives were vocal and an integral part of the advocacy efforts to ensure that the ground realities faced by business were included in the design process of a number of provisions.

A novelty in the trade facilitation scene, both the explicit legal provisions of the TFA as well as its expected impact aim to address the key challenges faced by the

³ WTO, 2015..World Trade Organization. *World Trade Report 2015— Speeding Up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement* (2015).

⁴Jean-Francois Arvis et al., *Trade Costs in the Developing World: 1995-2010*(World Bank Pol'y Research Working Paper No. 6309, 2013).

private sector. The following sections will discuss the way in which the Agreement accommodates legal rights for private sector actors, and how businesses can effectively take part in its implementation.

III. PRIVATE SECTOR RIGHTS – ARTICLE-WISE DISCUSSION OF THE WTO TFA

The legal text of the Agreement suggests that the benefits will not only accrue to Member States that have the primary responsibility to implement it but also to private sector operators. In fact, the TFA lays out implied ‘soft’ rights for the private sector, meaning that WTO Members’ governments are the ones responsible to fulfil their TFA obligations, but the greatest gains will be reaped by the private sector operators. However, are private individuals entitled to enforce their rights enshrined in the TFA?

The WTO is an organisation where Member States negotiate trade rules and are responsible for the implementation of the agreed rules. Whether WTO obligations, directly or indirectly, can be linked to the individual nationals of WTO Member States is widely debated in the legal fraternity. The majority of WTO Members seem not to recognise a direct effect of the WTO law on Member States’ nationals. The European Court of Justice (ECJ) has extensively pronounced itself on this matter, reiterating in its case law the non-recognition of direct effect of WTO law and thereby not deviating from the WTO interpretation of multilateral obligations vis-à-vis individuals⁵. WTO agreements do however provide indirect rights to private sector operators through procedural and administrative requirements to be met by member governments that give a channel to seek relief, provide comments or appeal adjudicatory rulings at the national level, and submit comments to national agencies.

Nonetheless, some countries automatically incorporate international law into their domestic legal system and have adopted criteria to assess whether a provision of international law – under certain conditions – is directly applicable. This means that an individual can enforce his rights and approach national courts if he deems

⁵ On this issue, the *Portugal v. Council* case (Case C-268/94, Portuguese Republic v Council of the European Union, 1996 E.C.R. I-6207), the *Affish* case (C-183/95, Affish BV v Rijksdienstvoor de keuring van Vee en Vlees, 1997 E.C.R. I-4362), and the *T Port* case (C-68/95, T. Port GmbH & Co. KG v Bundesanstalt für Landwirtschaft und Ernährung, 1996 E.C.R. I-6088) all represent the ECJ’s clear stance of denying the direct invocability of WTO agreements not only concerning direct actions brought by private actors, but also in respect of direct actions brought by EU Member States. For a detailed elaboration on this topic, see H. Ruiz Fabri, *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?*, 25(1) EUR. J. INT’L L. 151 (2014), and GEERT ZONNEKEYN, *DIRECT EFFECT OF WTO LAW: A COLLECTION OF ESSAYS* (2008).

that an international provision affecting him is not being properly implemented by his State⁶.

In light of the above, it can be asserted that individuals might enforce their rights deriving from the TFA, when the domestic legal system incorporates international law as an integral part of the domestic law, which must be applied and complied with by all State organs like Switzerland and some countries in Latin America Countries. Nonetheless, private individuals who are nationals of one WTO Member state and want to challenge another WTO Member for not implementing a TFA measure cannot invoke the WTO Member's judicial system but would need their own national government to agree to challenge the non-compliant WTO Member in the Dispute Settlement Body of the WTO.

This being said, it can be concluded that the TFA surely creates 'direct implied rights' for private sector actors aimed at reducing the time and costs they are usually faced with in cross-border trade transactions. However, the enforcement of these rights depends upon the system of incorporation of international agreements into the domestic legal system and enforcement thereof. What follows is a legal analysis of the key TFA measures generating direct rights and benefits for the private sector, assessing what type of soft rights the TFA creates for traders.

Article 1.1 – Publication

This measure requires WTO Members to publish a minimum amount of trade information, including required forms and documents for import, export and transit procedures, applied duty and tax rates, restrictions and prohibitions, penalties and appeal procedures in an easily accessible and non-discriminatory manner, though there is no requirement of the same being in a language other than the Member's official language. The measure confers an implied right on traders to have access to correct and up-to-date information in a timely manner. This provision is intended to ensure fair application of rules as well as generate predictability and certainty for traders, who are entitled to access such information under the TFA.

Article 1.2 – Information available through Internet

To grant an additional right to traders, article 1.2 of the TFA requires Members to also upload on the internet a description of the procedures connected to the import, export and transit of goods, as well as the forms and documents required for import, export and transit procedures. Moreover, this measure strongly

⁶See Fisman Korenica and Dren Doli, *The Relationship between International Treaties and Domestic Law*, 24(1) PACE INT'L L. REV. 92 (2012).

encourages Members to also make information available online in one of the WTO official languages. If published through the internet, information will be available more immediately and widely and will place small and medium enterprises (SMEs), especially in geographically dispersed areas, on a level playing field with larger companies for open and transparent access to information. Furthermore, it will give access to the practical steps for cross-border procedures to help traders to comply with those even without paying for such services.

Article 1.3 – Enquiry points

This measure requires WTO Members to set up an enquiry point to answer queries of traders, governments and other interested stakeholders on matters covered in Article 1 and to provide the required forms and documents related to the items mentioned hereto. This article confers a right to traders, governments and other interested parties to have their queries answered. However, this right is extended also to traders who are nationals of other WTO Members. This means that traders living and working beyond the geographical boundaries of a WTO Member state have the right to be provided with the required information and/or documentation by any Member's enquiry point.

Article 2.1 – Opportunity to comment and information before entry into force

When a new or amended law or regulation regarding import, export and transit of goods is about to be changed or introduced, WTO Members have an obligation to grant traders and other stakeholders the opportunity and time to provide comments on the proposed trade-related law or regulation. It should be noted here that this article does not include changes to duty rates or tariff rates, measures with a relieving effect, and measures applied in urgent circumstances. By obligating Members to provide such opportunities, Article 2.1 creates an implied right for traders to share their views in the legislative process that concerns any law or regulation related to international trade. Moreover, the article requires WTO Members to publish information about new or amended law or regulation regarding import, export and transit of goods as early as possible before its entry into force, so that traders can be acquainted with them. Thanks to this measure, traders will be able to better plan their business operations and adjust them in time for the new changes, reducing business risks and financial losses.

Article 2.2 – Consultations

In light of the fundamental role that the private sector plays in trade facilitation reforms, article 2.2 of the TFA requires Members to arrange for regular consultations between their border regulatory agencies and traders within their

territory. This measure formulates a right for the traders to be consulted regularly by border agencies on trade-related policies that will affect them. This lets them have a voice in the policymaking process and help in shaping solutions addressed to them while governments benefit from the ground realities, experiences, and buy-in of stakeholders. As in other TFA measures, the practical requirements, nature and implementation modality of consultations are left to the discretion of the Members.

Article 3 – Advance rulings

Article 3 of the TFA obligates Members to put in place mechanisms allowing traders to submit requests for advance rulings—prior to importation—on how goods will be classified. Hence, this measure creates a direct implied right for traders to demand that Customs issue a binding decision regarding the good's tariff classification and its origin before their importation. Once the advance ruling is issued, Customs officers are bound by it and shall commit to it, so as to grant a certainty to the trader, before the importation, on how the goods will be treated once they arrive at the border. Moreover, this measure provides an additional right to whereby they traders may request Members to issue a written notice to the applicant when they revoke, modify, or invalidate the advance ruling, setting out the relevant facts and the basis for the decision. Although not mandatory, Article 3 of the TFA also encourages WTO Members to provide advance rulings on other customs measures such as requirements for relief of exemption from customs duties, requirements for quotas, including tariff quotas, and appropriate method or criteria for determining customs value.

Article 4 – Procedures for appeal or review

If a trader is not satisfied with a Customs administrative decision, Article 4 of the TFA allows them to appeal the decision by requesting WTO Members to provide such a right to traders. More specifically, Members have an obligation to grant a right to traders to appeal or review Customs decisions in administrative and/or judicial bodies. The appeal or review must be conducted by an official that is independent of the Customs officer who issued the contested decision or by an authority at a higher level. Moreover, if the decision is unduly delayed, the business has the right to appeal to the next higher level of the administration or judicial authority. Decisions that can be appealed or reviewed include tariff classification, customs valuation, assessment of administrative penalties and refusal or rejection of a claim for drawback or a refund.

Article 5.1 – Notifications for enhanced controls or inspections and Article 5.2 – Detention

Where a Member adopts or maintains a system of issuing notifications to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages or feedstuffs to protect human, animal, or plant life or health within its territory, Article 5.1 proposes that such WTO Members may issue risk-based notifications. It also suggests that Members may issue the notifications on specific points of entry where the sanitary and phytosanitary conditions on which the notification is based, apply. Moreover, when a Member issues a notification for enhanced inspections, this measure obligates the Member to immediately inform an importer when they terminate or suspend the notification, and to promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner. This is to allow the importers to promptly get acquainted with the changed rules, and adjust their business transactions accordingly. Likewise, article 5.2 of the TFA creates a right for the importer or carrier to be promptly informed in case Customs or any other competent authority requires the detention of the imported goods for inspection.

Article 5.3 – Test procedures

Article 5.3 of the TFA enables businesses of a WTO Member State with the opportunity to request a second test where the results of the first test of a sample of goods intended for import, carried out by the border authorities, was at variance with the declaration. Therefore, this measure seeks to ensure fairness for traders creating a right for them to apply for a second test, with the benefit for businesses that false positives in testing can no longer lead to entry refusal, confiscation or destruction. The confirmatory test does not necessarily need to be carried out in accredited laboratories or in a different laboratory than the one where the first test was done. Member's border agency would consider the results of the second test for the release and clearance of goods in accordance with national laws in force.

Article 6.1 – General disciplines and Article 6.2 – Specific disciplines- on fees and charges

To enhance the fairness of the business environment, article 6.1 of the TFA demands WTO Members to publish detailed information on fees and charges imposed on importation and exportation, specifically on their *raison d'être*, the responsible authority and how to pay them. Moreover, this article demands Members to grant adequate time between publication and their entry into force, so that traders have the necessary time to get acquainted with them and plan accordingly all the costs related to their operations. In a further attempt to promote fairness for the private sector, the subsequent article – Article 6.2 – limits the fees and charges for Customs processing to the approximate cost of the service rendered and not calculated *ad valorem*. This measure creates rights for traders that

the fees and charges must be commensurate with the appropriate costs of the services rendered. It also creates an obligation for governments (and a right for the private sector) that fees and charges must be published before asking traders to pay.

Article 6.3 – Penalty disciplines

Article 6.3 of the TFA aims at avoiding disproportionately high, unfair and poorly documented penalties by requiring WTO Members to document the rationale for the penalty and the rules for determining the penalty amounts. Moreover, it obligates Members to ensure that when a penalty is imposed, their Customs administration provides an explanation in writing to the person found to be breaching a Customs law, regulation or procedure. Therefore, if a penalty is imposed, traders have the right to request a written explanation from the Customs administration, which shall specify the nature of the breach and the applicable law, and the regulation or procedure under which the amount or range of penalty for the breach has been prescribed. In this way, with a legally documented and justifiable explanation, traders have grounds to make an effective appeal or petition to reduce or cancel the penalty. Furthermore, it also provides for proportionality between nature of offence and the penalty and due consideration for voluntary disclosure of mistakes.

Article 7.1 – Pre-arrival processing

To reduce Customs bottlenecks, as well as time and cost incurred due to clearance delays, article 7.1 of the TFA requires WTO Members to set up a mechanism allowing submission of import documents prior to the arrival of goods. The documents include cargo manifest, Customs declaration, invoice, certificates, permits and licenses among others. The objective of this measure is to allow border regulatory agencies to begin processing the documentation prior to the arrival of the goods, with the objective of immediately releasing goods if no physical inspection is required. Moreover, this article requires WTO Members to enable electronic submission of these documents. Under this article, an importer has an implied right to request border agencies to process import documentation before the goods arrive into the country, so as to expedite the clearance and release processes and deliver the goods directly from the airplane or ship when the goods arrive, and no further regulatory compliance is warranted.

Article 7.2 – Electronic payment

Under article 7.2 of the TFA, traders have a right to demand border agencies to offer the option of electronic payments for duties, taxes, fees, and charges collected by Customs incurred upon importation and exportation. Since the article

does not specify which electronic payment methods are envisaged, it is plausible that such methods may include online payment using a credit or debit card, mobile solutions, electronic fund transfers and automatic credit or debit payments to the trader's bank account.

Article 7.3 – Separation of release from final determination of Customs duties, taxes, fees and charges

If the assessment of duties, taxes, fees and charges is not determined rapidly, traders have a right to request release of goods prior to their final determination under a guarantee. In fact, article 7.3 requires WTO Members to ensure that their Customs administration grants traders the possibility to release the goods prior to the final determination of Customs duties, taxes, fees and charges under certain conditions; namely under the payment of duties, taxes, fees and charges already determined, or a guarantee (surety, deposit, etc.). Moreover, this measure explicitly requires Members to make sure that the guarantee amounts should not exceed the amount of duties, taxes, fees and charges at stake. Upon a limited and predictable bank guarantee, traders have the right to have their goods released before the due amount is determined, enjoying greater predictability of delivery times and reduced costs.

Article 7.4 – Risk management and Article 7.5 – Post-clearance audit

Although these two articles do not formulate direct implied rights for businesses, but if well adopted and implemented, the private sector can nonetheless expect to significantly benefit from these techniques. Article 7.4, for instance, instructs border agencies of Member States to concentrate their resources on high-risk consignments and expedite the release of low-risk consignments based on appropriate selectivity criteria, which may include HS code, country of origin, nature of the product, compliance record of traders and means of transport. If these risk techniques are implemented, benefits for traders are considerable: with a risk management system in place, traders can expect fewer inspections and faster release times, leading to an increased number of transactions as a result of enhanced Customs efficiency. Complementary to risk management, Article 7.5 requires Members to adopt post-clearance audit as a way to shift part of border agencies' control away from the border in order to expedite the release of goods. According to this measure, border agencies could verify the accuracy and authenticity of declarations through the examination of the relevant books, records, business systems and commercial data held by the traders at their premises after the release of the consignment.

Article 7.7 – Trade facilitation measures for authorized operators

Under the TFA, traders with good track record of compliance with import or export procedures may be entitled to benefit from special trade facilitation measures. In fact, article 7.7 requires Members to offer additional benefits and facilities to companies. The TFA indirectly grants compliant traders the right to benefit from certain facilitations by obligating Members to provide at least three of the following trade facilitation measures to their authorized operators: reduced documentary compliance, fewer physical inspections, rapid release time, deferred payment of duties, taxes, fees and charges, use of comprehensive reduced guarantees, a single declaration for a given period and clearance of goods at the trader's premises.

Article 7.8 – Expedited shipments

This measure is particularly intended to benefit express delivery companies that rely on just-in-time delivery services to keep pace with the highspeed and volumes of e-commerce and ensure customer satisfaction. Article 7.8 of the TFA requires Members to set up special procedures to allow the expedited release of consignments entered through air cargo. More specifically, such companies are entitled to benefit from special procedures – namely minimized documentation, release based on single submission of information on certain shipments, rapid release and provision of a *de minimis* shipment value for which Customs duties and taxes will not be collected—if certain conditions are met. The qualifying criteria to apply for a rapid release of express consignments include the submission of information necessary for the release of the shipment prior to arrival, ensuring high degree of control from pick-up to delivery, liability of payment of all duties and taxes, and a good compliance record.

Article 7.9 – Perishable goods

When an importer is dealing with a consignment of perishable goods, the TFA provides a direct implied right to arrange for a suitable storage facility pending the consignment's release to ensure the quality of the goods. More specifically, article 7.9 requires Members to expedite the clearance of perishable goods as soon as possible, even outside of business hours if necessary, and to arrange a proper storage facility for the goods, or allow the importer to do so, pending their release. Moreover, the article requires Members to allow the release of perishable goods at the importer's or other storage facility, if consistent with domestic legislation. This measure is particularly important to avoid costly risks of loss in value of perishable goods, as well as added operational costs, such as extra insurance, transport and temporary storage warehousing costs.

Article 8 – Border agency cooperation

Although this article does not formulate a direct implied right for traders, the implementation of border agency cooperation can certainly bring enormous benefits to traders. This measure in fact requires Members to ensure that their border agencies responsible for border control cooperate domestically to coordinate their activities in order to facilitate trade. The measure also requires Members, to the extent possible, to cooperate with border agencies of other Members with whom they share a border in order to coordinate cross-border trade procedures at border crossings. Benefits of border agency cooperation among Members would include alignment of working days and hours, aligned procedures, formalities and joint controls.

Article 10.1 – Formalities and documentation requirements

As with the article above, Article 10.1 does not create an implied right for the traders directly. However, its implementation will be instrumental in eliminating outdated and inappropriate procedures. In fact, Article 10.1 requires WTO Members to review export, import and transit formalities to reduce the complexity of procedures and minimize documentation requirements. More specifically, this measure requires Members to ensure that formalities and documentary requirements are reviewed with the aim of reducing time and cost for traders, that the least trade-restrictive measures are chosen, and that formalities are not maintained if no longer required.

Article 10.2 – Acceptance of copies

With a view to reduce clearance time, remove redundancies in paper work and simplify documentation management, under Article 10.2 of the TFA, traders have a right to submit paper or electronic copies of supporting documents required for import, export or transit formalities. Moreover, when an original document has already been submitted to a government agency, this measure requires Members to ensure that other border agencies accept paper or electronic copies of the original document. Lastly, this article requires Members not to request the original document or the copy of the export declaration – as a requirement for importation – submitted to the Customs authority of the exporting Member, unless part of the importing Member's domestic law.

Article 10.4 – Single Window

To avoid time-consuming and costly redundant submission of multiple documents to border regulatory agencies, under Article 10.4, traders enjoy a direct implied right to submit all the required documentation to agencies involved in international trade through a single entry point and through a single submission. The right has to be ensured by the Member's government, which has the legal commitment and

responsibility to establish such facility for the traders, enabling them to send documents and data required for importation, exportation and transit to the concerned border agencies through the single window. The TFA also recommends WTO Members to support the establishment of the single window through the use of information technology, if possible, meaning that the exchange of data and documents between the border agencies and the traders would be done electronically. However, the TFA does not require the single window to be electronic, meaning that it can also be paper-based.

Article 10.5 – Pre-shipment inspection and Article 10.6 – Use of Customs brokers

Within the section on formalities connected with importation, exportation and transit, these two measures do not create “positive” but rather “negative” rights for traders, as they demand WTO Members not to require pre-shipment inspection in relation to tariff classification and Customs valuation, as well as not to require the mandatory use of Customs brokers (unless the use is already mandatory prior to TFA).

Article 10.8 – Rejected goods

This measure of the TFA seeks to ensure fair treatment of traders whose consignment has failed to comply with a Member’s sanitary and phytosanitary (SPS) or technical barriers to trade (TBT) regulations. Article 10.8 of the TFA requires Members rejecting a consignment to allow the release of the goods to the importer for re-consignment to a third country or to the exporter. Importers are thus entitled to be given back the non-compliant goods by the authorities of the rejecting Member. The benefits for traders are various: this measure limits the discretion of border authorities to destroy the goods against the trader’s wishes by providing a right to re-export the non-compliant goods to a third country with different standards; it also provides a chance to traders to salvage his shipment rather than taking a total loss.

Article 10.9: Temporary admission of goods and inward and outward processing

To facilitate trade in the era of global value chains (GVCs), this measure of the TFA requires Members to relieve goods entering their territory from the payment of Customs duties and taxes, if such goods are intended for re-exportation (inward processing) within a specific period of time. Moreover, this provision indirectly allows traders to re-import a good temporarily exported for manufacturing, processing, or repair abroad (outward processing) reimported with total or partial

exemption from import duties and taxes. Although not creating a direct right, if any Member government is not implementing these obligations and traders in the country of origin or destination are negatively affected, they can – through their respective governments – make the non-compliant government answerable in the WTO Dispute Settlement Body.

Article 11 – Freedom of transit

This measure of the TFA comprehensively disciplines treatment of goods in transit, giving a direct implied right to traders to provide a transit guarantee that must be limited to the degree of the risk presented. Guarantees, moreover, shall be discharged as soon as the transit is completed. As stipulated in this article, Customs formalities must be kept to a minimum, and fees and charges imposed on traffic in transit are prohibited. In line with the overarching aim of the TFA to enhance transparency, Article 11 also requires WTO Members to publish the information used to set the guarantee amounts, so that traders can plan their operations in advance. This article also confers traders an implicit right to conclude the transit procedure without being subject to unnecessary delays, restrictions or inspections *en route*.

Article 23.2 – National Committee on Trade Facilitation: the role of the private sector in trade facilitation reforms

The TFA explicitly accommodates private sector participation in two articles, *de facto* institutionalizing a public-private dialogue (PPD): Article 2 (Article 2.1 and 2.2) on opportunity to comment, information before entry into force and consultations, and Article 23.2, which stipulates the establishment of the National Trade Facilitation Committee (NTFC). The aim of the NTFC is to facilitate both domestic coordination and implementation of the provisions of the TFA. More specifically, its mandate is to identify bottlenecks to cross-border trade, formulate recommendations for regulatory and procedural reforms, as well as to monitor the effective implementation of trade facilitation reforms. All border agencies and representatives from the private sector must be represented to coordinate and enable trade facilitation reforms. Hence, it is the traders' right – and duty – to be consulted, have a seat at the table and join hands with the government to make the NTFC work successfully. How specifically this is achieved is left to the discretion of the Members. For effective functioning of the NTFC, it is crucial that the private sector as a cohesive group is represented in the governance structure of the NTFC, participate in its activities and actively contribute to the TFA implementation process. Although the government is responsible for the implementation of the Agreement, the private sector plays a pivotal role in the whole policymaking process – from reform design, to implementation and monitoring - as it will be illustrated in the next section.

IV. THE ROLE OF THE PRIVATE SECTOR IN IMPLEMENTING THE WTO TFA

As established, governments are *de jure* responsible for the implementation of the WTO Trade Facilitation Agreement. Delivering the full spirit of the Agreement requires adopting a holistic approach to trade facilitation reforms within which the private sector takes upon itself a share of the implementation.

Economic incentives for private sector involvement in trade facilitation reforms are high as businesses bear the brunt of the transaction costs that result from an inefficient and non-transparent trading environment. Businesses are the first to pay the price for trade transaction costs, such as slow or unpredictable delivery of traded goods, extortionate fees and charges imposed by border agencies, and lost business opportunities. These include direct transaction costs for businesses such as the cost (in time and effort) of collecting information on compliance procedures, preparing the correct documents and submitting them to the relevant border agencies. In addition, indirect transaction costs such as Foreign Direct Investment (FDI) foregone or sales lost, due to uncertainty regarding the timeframes required to complete an import or export transaction. Although businesses are the ones who experience the impact of this most clearly in their day-to-day activities, the costs are eventually passed on to consumers and society as a whole, in the form of higher prices, slower economic growth, and fewer jobs.

As previously discussed, the WTO Trade Facilitation Agreement accommodates private sector participation in a number of ways, including through the establishment or designation of a forum “to facilitate both domestic coordination and implementation”, namely the obligation to establish or designate a National Trade Facilitation Committee (NTFC) (Art 23.2). While the Agreement provides an official platform for public-private dialogue anchored in international law and dedicated to trade facilitation, the governance structure, planning and financing is left to the discretion of national governments and constitutes an important opportunity for businesses to advocate for their inclusive participation towards policymakers.

Although the TFA does not discipline the composition and operational modalities of an NTFC, international bodies such as the United Nations Conference on Trade and Development (UNCTAD) have advanced recommendations on the suitable membership and operations of NTFCs to ensure a meaningful implementation of such bodies. For instance, UNCTAD suggests equipping NTFCs with a strong and clear legal backing to ensure the authority of their mandate, and to set up a permanent secretariat with clear terms of reference to ensure NTFCs’ smooth functioning. Moreover, it is also strongly encouraged the balanced inclusion of private sector representatives in NTFCs’ membership to

ensure that the Committees are fair and inclusive, and that trade facilitation reforms create a positive impact for the end users of such policies. UNCTAD also advises the establishment of monitoring and evaluation mechanisms to measure results and the overall performance of NTFCs⁷.

NTFCs are also the most suitable bodies for providing an inclusive, sustainable and constructive consultation mechanism where the business community can contribute to ensure coherence in policy formulation and implementation by coordinating and collaborating with government agencies. In its Recommendation No. 40, the United Nations Economic Commission for Europe (UNECE) lays out approaches for effective consultations that are fair, transparent, accountable and participatory⁸. In terms of consultation best practices to adopt, UNECE suggests to conduct consultations as singular events for small projects focused on a specific topic, whereas for larger projects such as changes in the law or procedures consultations should be more regular and iterative. If consultations are formalised, UNECE explicitly mentions NTFCs as the most appropriate platform to ensure both public and private participation based on a clear mandate. UNECE's paper also recommends categorising topics for consultations on the basis of their width and level of participation – whether technical, operational or strategic.

Businesses should therefore be encouraged as key players in the implementation of trade facilitation reforms. With the specific provisions designed to promote public-private dialogue and to secure the input of the private sector in reform process, the private sector has a crucial role and duty both in ensuring that the Agreement's articles are duly implemented by national governments and by participating in the institutions that are established as a result of the WTO TFA. Through participation in public-private dialogue (PPD), businesses can ensure that the TFA reforms implemented reflect their priorities and address their concerns in a regular and consistent manner in order to maximise welfare gains for themselves and the entire business community.

To foster mutual trust and design effective solutions for tackling the major bottlenecks faced by traders, it is thus crucial that the private sector – as a partner of the public sector – takes an active and consistent part in public-private platforms, such as the NTFC. The level of engagement by different business actors may vary; however, it is advised that the private sector is represented in the

⁷United Nations Conference on Trade & Dev., National Trade Facilitation Committees: Beyond Compliance with the WTO Trade Facilitation Agreement?, UNCTAD/DTL/TLB/2017/3 (Transport and Trade Facilitation Series No. 8, 2017).

⁸United Nations Econ. Comm'n for Eur., United Nations Ctr. for Trade Facilitation and Elec. Bus., Recommendation No. 40 – Consultation Approaches: Best Practices in Trade and Government Consultation on Trade Facilitation Matters, ECE/TRADE/423 (2015).

governance structure and even co-chairs the work of the committee. The regular and consistent engagement between the business associations and border agencies helps to identify and prioritise the particularly stringent constraints that traders face in their cross-border trade operations, providing a well-grounded feedback on the review of procedures and discussing the implementation of new solutions.

There are a number of challenges inherent to private sector participation in policy design and reforms. Typical problems of private sector advocacy include its lack of inclusivity and coordination across sectors and sizes, which can render the private sector voice incoherent and lead to conflicting recommendations. Together with vested interests of certain business groups, this may in turn result in one-sided reforms, or even government failure to act. Business, especially SMEs, may also face insufficient capacity to participate and monitor trade facilitation reforms. Finally, a general mistrust between the public and private sector may lead to ineffective dialogue. A long-term public-private dialogue requires not only resources, but also constant relationship building and a framework of mutual trust and goodwill.

The success of trade facilitation reforms largely depends on the implementation of a well-designed approach that involves active involvement of businesses throughout the whole policymaking process. Inclusion and participation of the private sector in designing and prioritizing solutions, followed by evaluation and ongoing feedbacks from users, will enhance the benefits of policy formulation in trade facilitation. In particular, by taking ownership of the reform process as a cohesive community, the private sector has an enormous role to play in raising the importance of challenges of cross-border procedural trade on the governmental agenda, as well as increasing the policy desirability and feasibility of trade facilitation reforms.

Inclusive, comprehensive and coordinated PPD forums are particularly suited for strengthening public-private cooperation in reform implementation. For instance, identifying policy priorities, reducing regulatory costs, and building consensus on reforms needed under the umbrella of the NTFC. To ensure that reforms are demand-driven and in line with the needs and priorities of the private sector, PPD mechanisms should ensure that all economic actors and companies of all sizes are represented in the process. Furthermore, to be effective and meaningful, businesses must coordinate among themselves in order to represent and advocate for their stances in all stages of the policymaking process – from needs assessment, priority identification and solution design, to policy formulation and implementation, and post-reform monitoring and evaluation. To this end, it is necessary that the private sector identifies the policy objective at stake and holds preparatory meetings with the members to achieve a coordinated position to communicate in the PPD forum.

The engagement of the private sector with border agencies to efficaciously leverage PPDs should also happen at three inter-connected levels. At a technical level, companies' staff can engage with border agencies to engineer technical tasks that will help business compliance with border procedures. At the operational level, business managers have a ground to collaborate with public authorities to review legislation and official processes with a view to simplifying and streamlining cross-border trade procedures. At a top, strategic, level, senior decision-makers of national and multinational companies should engage in high-level discussions with border agency senior officers to discuss strategic trade facilitation objectives and policy guidelines.

In order for public-private dialogue to be meaningful and successful, both sides must recognize the legitimate objectives of the other side. Business advocacy is more likely to lead to greater efficiencies if the private sector recognise the legitimate policy objectives of the border regulatory agencies, and vice versa. The legitimate policy objectives of the border agencies include the need to raise revenues through the collection of duties and taxes, to conduct border controls in order to detect security threats and deter smugglers, and to ensure adequate protection against sub-standard products and risks to human, animal and plant health. These policy objectives are more likely to be met with the active collaboration of the private sector; business, in turn, are more likely to collaborate if procedures are efficient and transaction costs are kept low. Public-private dialogue can foster collaboration and the exchange of ideas between the two sides, which can in turn generate a virtuous cycle of facilitation and compliance to replace the vicious cycle of inefficiency and evasion that can sometimes undermine cross-border transactions.

Importantly, private sector can also take on the role of implementing specific measures. For example, chambers of commerce or other private sector associations may support the hosting and management of transparency enhancing provisions such as trade facilitation portals or enquiry points. Private sector solutions are especially beneficial for technology, such as the development of single-window infrastructure, as for example in Ghana where the single window was implemented through a public-private venture, the Ghana Community Network. Pre-shipment inspections are also commonly conducted through public-private collaboration, whereby the government delegates the inspection of imports to a private firm that operates in the exporting country.

Finally, efforts to increase individual compliance with trade regulations and tackle tax evasion at the firm level can engender confidence among border authorities and act as a catalyst to reform of the trading environment. Lack of trust between the private sector and border authorities is one of the key underlying challenges for

joint coordination and implementation of reforms. Some measures, such as post-clearance audit and authorized economic operator schemes explicitly seek to streamline border controls by increasing the levels of trust between traders and border authorities. This is an area that the business community can work on independent of border authorities, even prior to the reform process. In fact, at a company level, business can enhance their compliance with border requirements and cement collaboration and trust with border agencies by improving and automating their internal systems and processes with a view to establish a track record of accurate, easily accessible information that can be readily shared with border authorities.

V. CONCLUSION

As the legal analysis concludes, the TFA provides direct implied rights for private sector actors. The level of enforcement of these individual rights however depends on the national legal system of the individual Member State. In states where international trade law is an integral part of the domestic law, individuals may enforce their rights derived from the TFA. In addition, private sector actors can also lobby and convince their national governments to challenge other Member States for not implementing the agreement. The agreement thereby ensures that private sector actors may exercise their rights not only in their own country, but also in their destination markets.

Beyond granting rights, the TFA also establishes implicit duties for the private sector. Through public-private dialogue platforms and consultations, TFA builds mechanisms for private sector participation in the implementation process. In order to reap the expected benefits of trade facilitation reforms, traders need to first organise and coordinate between themselves, and engage in sustained efforts to advocate and cooperate with border agencies to identify key bottlenecks and prioritise, design and monitor implementation of reforms. Consistent participation and partnership with the public sector will ensure that the reforms predicated by the TFA, and beyond, reflect business priorities and maximise their welfare gains.

The novel design of the agreement will serve as a useful blueprint for trade agreements in the future. First, by addressing trade transaction costs faced by the whole trading community and generating export and economic growth at a global level, the TFA is widely recognised as a mutually beneficial agreement for all trading parties. Such a win-win arrangement as a core objective of any trade agreement will be of particular use at the multilateral level in the future. Second, the formulation of explicit rights and benefits for the primary users of the trading system – the traders themselves – should ensure the buy-in and trust of the private sector community in the trade negotiation process and more firmly include them both in the negotiation as well as the implementation phases.

Finally, the special and differential treatment accorded to developing and least-developed countries, allowing them to prioritise and sequence reforms according to the specific needs of their traders and linking technical assistance to their implementation capacity, is also a welcome innovation. Having a key role of the private business and aligning international agreements with businesses' needs is a forceful idea to be replicated. Tailoring future agreements to address the needs and rights of the private sector community in the developing regions will ensure the benefits of trade facilitation, and trade liberalisation more broadly, are reaching those that are most hindered by unfair, costly and inefficient trading practices and procedures. Not only will it extend the advantages to a wider set of beneficiaries, but also engender goodwill and trust back into the multilateral trading system.