



## Transparency Measures in the Trade Facilitation Agreement: Have these improved the scope of GATT Article X?

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**Abstract:** Article X of GATT 1994 represents the first attempt to make trade laws fair, transparent and predictable in order to facilitate trade at a global level. The background of these provisions can be traced as far back as GATT 1947. With effect from February 2017, a new Trade Facilitation Agreement (TFA) of the World Trade Organisation (WTO) entered into force. The TFA reviewed Article X, and it identified additional measures which are designed to facilitate international trade. This study examines how the TFA has improved and clarified the provisions stipulated in Article X. This was a desk study whose main sources of data were the legal instruments of the WTO and a review of published literature. It was a comparative analysis of Article X and the corresponding provisions laid down in the TFA. The study found that TFA has made significant improvements to Article X, all designed to make the international trade environment more transparent and predictable and thus expedite the movement of goods across borders. The TFA also makes the WTO Members more accountable to one another in the way they process international trade. The study therefore adds knowledge to academia and practitioners engaged in international trade.

**Keywords:** Article X; publication of trade laws; Trade Facilitation Agreement; transparency; WTO

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## 1. Introduction

Although the first global agreement emerged as GATT 1947 incorporating aspects of trade facilitation, history shows that throughout the years there had been efforts to ease the movement of goods in international trade. Evidence of this can be found in many medieval European towns, which depict the efforts undertaken to make trade easier and faster (Grainger, 2008, pp. 17, 20). Throughout the ages there have been innovations to create more convenient trade routes, indicating a desire to reduce trade costs and facilitate trade. Vasco da Gama opened a faster and less expensive alternative route to India in 1498 which facilitated trade between Europe and the East and replaced the traditional long overland route used by the Venetian traders before him (Northrup, 1998, p. 189). The trade route from Europe via Cape Town to the East ushered in a whole new era.

GATT 1947 brought 23 nations together who contracted to an agreement that included Articles V, VIII and X as specific commitments to facilitate trade.<sup>1</sup> According to Unger (2017) the contracting parties to GATT 1947 represented 80% of world trade at that time. The objectives of Articles V, VIII and X were to support global trade by ensuring speedy movement of goods across the borders of the parties. These three Articles form the foundation of what, today, is trade facilitation in that they address some of the issues dealing with the fast movement of goods from buyer to seller. Article V addresses the need to facilitate transit traffic across the borders. Article VIII concerns the streamlining of fees, and the procedures connected with imports and exports. Article X deals with the need to ensure fair, accessible and transparent trade laws or procedures. It requires the parties to promptly publish their trade laws and make them accessible. The Uruguay Round of negotiations of the World Trade Organisation (WTO) resulted in the Final Act of the Uruguay Round, which was signed on 15 April 1994 and incorporated GATT 1947 as GATT 1994 while the texts in Articles V, VIII and X remained essentially the same.

The agenda on trade facilitation was to be revived during the Doha Round and the WTO members committed themselves to facilitate cross border movement of goods (WTO, n.d.-a). They accordingly concluded negotiations on the Agreement on Trade Facilitation (hereafter Trade Facilitation Agreement or TFA) in December 2013 which was opened for signature in November 2014, and it became the first agreement

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<sup>1</sup> Art. V is titled *Freedom of Transit*, Art VIII is titled *Fees and Formalities connected with Importation and Exportation* and Art X is titled *Publication and Administration of Trade Regulations*.

to be concluded under the Doha Round and since the establishment of the WTO (WTO, 2017). The TFA entered into force on 22 February 2017 (WTO, n.d.-b).

Among the objectives of the TFA was to review GATT 1994 Articles V, VIII and X (hereafter referred to as Articles V, VIII and X). The study therefore seeks to identify the gap between aspects of trade facilitation in GATT 1994 and the TFA and how the review has bridged it. This study therefore seeks to establish the extent to which the TFA has improved the transparency measures in Article X. It will contribute towards future analyses and debates on trade facilitation. It will therefore assist trade lawyers, practitioners and academics to understand the improvements found in TFA.

This study is a comparative analysis of Article X and the relevant provisions of the TFA that reviewed it. It was a qualitative study based on a desktop review of primary and secondary literature. Both Article X and the corresponding provisions in the TFA are directed towards the same functionality of ensuring that trade is supported by open and fair systems that makes business more certain. Zweigert and Körtz (1998, p. 34) noted that variables can be usefully compared if they fulfil the same function.

The study starts by examining the concept of “trade facilitation” and Article X of GATT 1994. It proceeds to examine the evolution of the TFA and its purpose. Afterwards, it analyses the review that the TFA made to Article X. The comparative analysis of the two is finally followed by a conclusion.

## **2. Trade Facilitation**

While the term trade facilitation was not defined in GATT, it is evident that the three Articles focused on softer issues involving procedures and systems such as transit procedures, import and export processes.

From an unsophisticated perspective trade facilitation can be interpreted as any activity that involves removing bottlenecks in the international trade supply chain that results in the faster flow of trade, it should be noted both GATT 1994 and the TFA skirts away from defining the term in terms of hard infrastructural facilities. While it is clear that efficient road networks and warehousing facilities facilitate trade, the WTO does not define it from that perspective. Its definition limits its definition to ‘the simplification, modernization and harmonization of export and import processes (WTO, n.d.-b).

The emphasis is on implementing the import and export processes along the trade supply chain. The definition therefore makes it clear that trade facilitation occurs

when the import, export and transit processes are enhanced following their simplification, modernisation and harmonisation. The definition carries weight because it gives the context in which Articles V, VIII and X together with the TFA are all premised. Chauffour and Maur (2011, p. 327) however observed that existing literature generally accepts that, despite many elements of commonalities, there is no generally agreed definition or scope of trade facilitation. Sengupta (2007, p. 13) noted that the term “trade facilitation” was coined during the late 1960s when the United Nations (UN) bodies such as United Nations Conference on Trade and Development (UNCTAD) started using the expression, and from there it spread to other agencies and organisations. Chauffour and Maur (2011, pp. 11-12) further observed that trade facilitation is a relatively recent domain of international trade cooperation and that, in a number of cases, it is viewed as part of cooperation in customs matters. While certain aspects of Customs operations would fall under trade facilitation, it must however be noted that trade facilitation involves other issues which are well outside the purview of Customs. Whatever variations that may exist in the definition, the common base and fundamental issue is that trade facilitation involves streamlined processes designed to eliminate any hindrances to the movement of goods across borders.

This paper examines the relevant improvements by the TFA on Article X which deals with issues surrounding the publication of trade laws, the need to ensure that there is transparency and that the processes or systems are transparent. Both Article X and the TFA are WTO instruments, and as such the definition is therefore based from the same template.

### **3. Evolution of the Trade Facilitation Agreement**

Trade facilitation has been a global agenda as demonstrated by the negotiations that led to GATT 1947, particularly its components in Articles V, VIII and X. At the launch of the Doha Round in 2001, the Ministerial Council stated:

“...Recognising the case for further expediting the movement, release and clearance of goods, including goods in transit ... we agree that negotiations will take place after the Fifth Session of the Ministerial Conference ... In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994” (WTO, 2001).

The Doha Round consisted of over twenty agenda items whose goal was to lowering trade barriers and reviewing trade rules (WTO, n.d.-c). The trade facilitation agenda was prominent due to the need for WTO Members to commit themselves to easing trade flows (WTO, n.d.-a). It is clear that the purpose of the negotiations was to improve and clarify the relevant aspects of Articles V, VIII and X in order to speed up trade. The signing of the TFA did not therefore repeal Articles V, VIII and X which remained the bedrock of trade facilitation. The TFA is therefore a separate and comprehensive agreement of the WTO which brings clarity to relevant aspects of Articles V, VIII and X.

#### **4. Provisions under Article X: Publication and Administration of Trade Laws**

An overview of Article X is necessary before analysing the corresponding provisions in the TFA. Specifically, Article X addresses transparency in the publication of trade related laws and decisions; prompt publication and accessibility of such laws; predictability in the application and enforcement of these laws; and establishing mechanisms to ensure fair review and appeals against the actions of Customs. The article represents the oldest transparency provision in trade, whose scope covers elements with a far greater impact on global trade (Ala'i, 2011, p. 1016). The measures are prefixed with "shall" showing that they are obligatory and as opposed to best endeavours or like some of the optional measures spelt out in Article V and VIII. The key highlights of Article X as arranged in its three paragraphs are as follows:

*Paragraph 1* (Article X:1) requires all regulations and laws, which are general in nature, to be published promptly to enable governments and traders to become conversant with them. The instruments must be published to provide information pertaining to imports and exports to other governments. There is also a rider to the provision which does not obligate disclosure of confidential information. The emphasis is that these measures must be of a general application. This basically calls for any requirements regarding cross border trade to be known in advance and thus prepare those involved in trade. It requires a predictable and transparent trading environment for cross border movement of goods.

*Paragraph 2* (Article X:2) escalates the matter further in respect of measures of a general application in respect of cross border trade. It requires that enforcement of

new measures, in particular those that are more burdensome, must first be published before implementation.

*Paragraph 3* (Article X:3) is more comprehensive. In addition to a uniform, fair, impartial and reasonable implementation of measures, it requires Members to have institutions that would review administrative decisions and appeals. The paragraph calls for the highest demand of non-discrimination and accountability to one another,

There have been disputes involving noncompliance on Article X. In the case *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, the Appellate Body of the WTO condemned the United States for backdating a notice that introduced quantitative restrictions to be contrary to Article X:2 which stipulates that new or more burdensome requirements shall not be enforced before such a measure has been officially published.

## **5. Review of Publication and Administration of Trade Laws under the TFA.**

By 2001, when the Doha Round was launched, a review of GATT 1994 can be argued to have been long overdue, more so when considered that the agreement was generally an outcome of negotiations conducted in the 1940s. As such, trends such as automation and certain best practices involving trade facilitation did not appear in GATT 1994. The TFA is therefore a modern agreement of the WTO that was negotiated to clarify and improve the provisions in GATT 1994. Its preamble reaffirms this when it states its mandate as:

“*Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit...*” (TFA, 2014, preamble)

The following Articles of the TFA review the provisions covered in Article X.

### **5.1. Article 1: Publication and Availability of Information**

Article 1 is divided into thematic areas with subheadings dealing with publication, the use of internet and introduction of enquiry points and notification. The subdivision makes the article clearer, easier to follow and readable when compared to the texts are arranged in Article X:

### **5.1.1. Publication**

Whereas Article X:1 referred to publication for governments and traders only while Article 1:1.1 of the TFA broadens the stakeholders and it includes “other interested parties.” While Article X focused on imports and exports, the TFA brings out and specifies matters of transit. Some of the items listed for publication in paragraph 1.1 of Article 1 are:

- Applied rates of duties or taxes connected with imports and exports;
- Information pertaining to tariff classification, valuation and rules of origin;
- Procedures for appeal and review;
- Forms and documentation connected with imports and exports.

These items add value to the original Article X and can be related to other transparency issues found in GATT 1994<sup>1</sup> and the TFA.<sup>2</sup> The TFA emphasises that the information must be published in a non-discriminatory manner and must be easily accessible. The issue of publications is important in that it supports trade liberalisation and enables the global markets to be easily accessible when information is shared. It is therefore an important measure that contributes towards trade facilitation.

### **5.1.2. Internet**

This provision in Article 1:2 of the TFA is new and it aligns trade facilitation to developments in modern technology. Internet was non-existent in 1947, while in 1994, that technology was not that widely employed when compared to the period of negotiating the TFA. This provision encourages use of the internet in sharing information. It also identifies aspects that should be regularly updated on internet.

### **5.1.3. Enquiry Points**

Although Article X:1 spell out in a broad and simple statement that information on trade must be made available, it does not take the matter further. Article 1:3 of the TFA has new provisions that require WTO Members to take some definitive action in implementing this measure. It calls for the establishment of enquiry points that will deal with enquiries without raising service charges for the facility. The creation of these focal points facilitates the flow of required information from government

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<sup>1</sup> E.g. Art. VIII on fees and charges.

<sup>2</sup> E.g. Art. 4 on appeals and Art. 6:3 on penalties.

agencies to the public. There is however a rider in paragraph 3.3 of Article 3 to the effect that where fees or charges are to be raised, then these must be limited to the cost of the services rendered. This resonates well with Article VIII:1. The addition of enquiry points should be seen as a way to ensure that the sharing of informed is enabled by proposing practical means of effecting this and assisting trade.

#### **5.1.4. Notification**

According to VanGrasstek (2013, p. 273) a notification is a complement to the general requirement for transparency and the publication of measures, obliging countries not only to make their measures known via domestic outlets but that they also provide information to their trading partners via the WTO.

Article 1:4 of the TFA introduced a notification measure obliging Members to advise the WTO of the details or evidence pertaining to publication of trade information, websites of publication on internet and the contact information of the enquiry points stipulated in Article 1. In a way, this provision helps the WTO to keep tabs on the Members who are complying with these important provisions. This enables WTO Members to be accountable to one another. VanGrasstek (2013, p. 273) also observed that in respect of the various notification provisions under the WTO, the developed countries generally comply and make notifications when compared to the developing countries.

#### **5.2. Article 2: Opportunity to Comment, Information Before Entry into Force, and Consultations**

The obligation in Article X:1 of 1994 implies that laws shall be published promptly so that governments and stakeholders to get acquainted with these instruments in good time before implementation date. Article 2:1 of the TFA denotes a deliberate approach to consult and get inputs from stakeholders rather than the narrow slant whose motivation was for stakeholders to get familiarisation only. The new provisions allow stakeholders to get reasonable time to comment on the proposed new laws relating to the movement of goods across borders. The TFA therefore proposes proactive participation of the stakeholders rather the passive approach of understanding the law as is implied in Article X.

Article 2:2 of the TFA also introduces new provisions that require Members to ensure regular consultations between border agencies and their own domestic stakeholders. The practical impact of this improvement is that governmental



agencies, such as Customs, must consult their appropriate stakeholders before introducing new systems so that the concerns of business are taken into consideration. These provisions are in line with international best practices as laid down under Chapters 7 and 8 of the General Annex of the International Convention on the Simplification and Harmonisation of Customs Procedures, 1999 (hereafter the Revised Kyoto Convention or RKC). It must be noted that both Article X and the Article 2 of the TFA have some exception allowing Members not to consult on certain confidential information whose release in advance might disturb the flow of trade, for example, informing the public of anticipated reductions or increases in customs duties.

### **5.3. Article 3: Advance Rulings**

The movement of commercial goods across borders necessitates the submission of certain mandatory information and documents to facilitate border procedures. The mandatory information relates to details pertaining to nature of the goods; tariff classification; origin of the goods; and the value of the goods. Advance rulings are useful in that required details for the clearance of goods is obtained before the arrival of the goods at the border. The Trade Facilitation Agreement Database of the WTO (WTO, 2024) defines an advance ruling as:

“a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to:

- I. the good’s tariff classification; and
- II. the origin of the good.”

Article 3 of the TFA has new provisions on advance rulings, which was not previously covered in Article X. Advance Rulings are useful in that they enhance transparency and predictability of border processes. They also contribute to faster clearance of goods as the essential information is known well in advance and before the arrival of the goods.

### **5.4. Article 4: Procedures for Appeal or Review**

Trade laws cannot be proclaimed to be fair or transparent if they are not accessible or not known by the stakeholders who are supposed to benefit from them. Further,

there must be appeal procedures which must be known and open to those who may be aggrieved by the decisions of any of the authorities. Customs laws and other laws related to cross border movement of goods must therefore be transparent with provisions for appeal. Lack of an appeal process results in unfairness and would contribute to short cuts and corruption.

Both Article X and Article 4 of the TFA deal with appeals and reviews on Customs matters. Article X lays down a general principle that decisions by a Customs administration shall be subject to an appeal. Article 4 of the TFA is however more explicit and it brings out more information. It requires Members to have provisions in place for persons to appeal in respect of decisions by an office or an official. It also requires that such an appeal be heard by an authority independent or higher than the office or official who would have made that decision. Article 4 further lays fundamental principles that appeal process must be nondiscriminatory, have time limits and should be concluded without undue delay. The TFA also has a provision for a judicial appeal or review of decisions. The appeal procedures in the TFA in respect of Customs issues are aligned to international best practices laid down in the RKC (1999, Chapter 10 of General Annex).

The appeal procedures in the TFA are more comprehensive than what is provided in the Article X of GATT 1994. While acknowledging that Article 4 of the TFA is comprehensive, a weakness that features is that the TFA views trade facilitation more in the context of Customs. Both Article X and Article 4 of TFA emphasize Customs appeal, although the latter goes further to refer to border agencies. Both Article X and the TFA make no mention of appeal processes involving, for example, bank payment procedures and documentary issues involving transportation processes.

### **5.5. Article 5: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency**

Article 5 of the TFA concerns transparent measures at ports of entries when dealing with foods, beverages and feedstuffs. This is designed to protect human, animal and plant life in Member territories. The TFA places importance on the sanitary and phytosanitary (SPS) measures and provides guidance with respect to detentions of the products and the procedures that must be followed when testing such goods. These are new measures not previously covered in Article X. The new provisions in the TFA are aligned to the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Article 24:6 of the TFA underlines that

the provisions of Article 5 shall not supersede what has been stipulated in the SPS Agreement.

Article 5.1 encourages the use of risk management and uniform application of the measures. In respect of inspections or border controls, the TFA encourages the use of risk management and uniform application of the measures. It also calls that when the need to terminate or suspend the notifications arises the exporting Member or the importer must be informed.

Although Article 5 is under a broad title “Other measures to enhance impartiality, non-discrimination and transparency,” it can be critiqued that its content is narrow as it focuses on detentions and inspections. Its scope of coverage is not as wide as the title that it falls under. It should however be acknowledged that these are new provisions that introduces some necessary measures to ensure that the testing and detention is done transparently.

## **6. Additional Provisions**

In addition to the measures discussed in section 5, the TFA brings out additional measures which are designed to foster a fair and transparent environment in global trade. Article 6:5 on Penalty disciplines requires that when penalties for breach of Customs laws are imposed, the Members must ensure an explanation as to the nature of breach together with the applicable laws and the procedures used in assessing the penalty is given. Further, Article 7:7 stipulates some measures to facilitate importation of goods by trusted or authorised operators. The TFA stipulates that the criteria used to select authorised operators must be published, transparent and non-discriminatory.

## **7. Conclusions**

This study has shown that trade facilitation measures do not remain static, but they need regular review and to be responsive to changes in the business environment. It has demonstrated that the TFA not only clarified the provisions in Article X, but it also identified additional measures that would make international trade fair, more transparent and predictable in order to remove any hindrances to the movement of goods across borders. Most of the provisions of the TFA build upon what is stipulated in Article X, demonstrating that they complement each other. The TFA does not therefore replace Article X, but as per its mandate, it has brought clarity and

improved a number of issues pertaining to transparency in global trade. The advent of the 21<sup>st</sup> Century has seen an increase in the use of ICT in trade through digital trade, e-commerce and e-trade. The TFA recognises the use of technology and accordingly introduced measures to that effect. Unlike Article X that merely list a number of obligations of what must be done, the TFA goes a step further and has provisions to ensure that certain provisions are implemented. It can therefore be argued that the TFA has achieved its mandate of explaining and enriching the provisions in GATT 1994.

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