THE WTO TRADE FACILITATION AGREEMENT, ANTI CORRUPTION AND CUSTOMS:

A NEW TYPE OF ANTI CORRUPTION INSTRUMENT

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Abstract

The WTO Trade Facilitation Agreement, which entered into force in February 2017, is the first multilateral agreement to be concluded by the World Trade Organization. The Agreement focuses on the simplification, harmonization and standardization of procedures and formalities regarding the flow of international trade, in particular customs procedures as well as on issues relating to transparency and predictability. The objective of this thesis is to explore the anti-corruption potentials of the Agreement and to show that it is not only a trade agreement but also a new type of anti-corruption instrument. The fact that the Trade Facilitation Agreement is focussed on technical measures to do with cross border trade and at the same time prioritizes transparency and predictability uniquely positions it as a practical instrument capable of curbing bribery and corruption in cross border trade. In order to realize the anti-corruption potential of the Agreement its implementation must be based on an understanding of the instruments and best practices which are the basis of its provisions.
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1. Introduction

The World Trade Organization’s (WTO) Trade Facilitation Agreement (Hereafter referred to as The Trade Facilitation Agreement or the Agreement) is a new instrument that only entered into force in February 2017. The Agreement, the first multi-lateral agreement negotiated by the WTO to enter into force, is centred on the streamlining of the flow of trade across borders. The WTO states that the “agreement is ground-breaking in that, for the first time in WTO history, the commitments of developing and least-developed countries are linked to their capacity to implement. . .” and that “assistance and support should be provided to help countries achieve that capacity.”\(^1\) Given the Agreement’s recent entry into force no precedent has been set in terms of its implementation and future practice will have to reveal if and how dispute resolution will be used regarding potential violations of its provisions. This issue will be an interesting one to watch as the fact that the WTO Dispute Resolution Mechanism provides an enforcement mechanism in terms of the Agreement which more conventional anti-corruption treaties lack.

The topic of this paper is an exploration of the Trade Facilitation Agreement and what I see as its potentials as an anti-corruption instrument. In my view the clear and targeted subject matter of the Agreement, namely simplification, harmonization and transparency in cross border trade, makes it an excellent practical anti-corruption tool. Given the Agreement’s overwhelming customs focus and its close connection to the Conventions and instruments of the World Customs Organization (WCO) I believe that implementation and interpretation of its provisions must be based on a sound knowledge and understanding of those instruments. The Agreement focuses on transparency, impartiality and non-discrimination through provisions that emphasise i.a. the availability of information and its publication, advance information, appeal and review of decisions as well as technical solutions aimed at streamlining border procedures. The subject matter of the Agreement thus lends itself to an exploration of this kind and the insistence on simplification and facilitation of cross border trade also means that anti-corruption issues have to be taken into consideration. This is at least partly due to the fact that governments cannot only serve the trading community through liberalisation of policies and less burdensome requirements but also have to make sure that

\(^{1}\) “Trade Facilitation Agreement in Brief” 2 (WTO)
society is regulated through fair and impartial rules that protect citizens and businesses and enhance the rule of law.

As Customs is a key border agency involved in enforcing rules and regulations relating to the import, export and transit of goods it has a pivotal role to play in the implementation of the Trade Facilitation Agreement. Therefore the interplay of Customs vis a vis the Agreement is central to the discussion. The paper aims to show that it is crucial to base implementation of the Agreement on the tenets of anti-corruption and the promotion of integrity in both customs and trade and that the provisions of the Agreement provide a tool for doing so. In fact that there is a theoretical binary relationship between the provisions of the Agreement and the potential and need for anti-corruption action in Customs and trade.

The exploration of the Agreement’s anti-corruption essence centres around the tenet that due to its focussed nature as a trade agreement concentrated on issues of transparency, impartiality and non-discrimination it is perfectly placed to achieve success in combating bribery and curbing corruption in customs and trade alike. However, in order to fully unlock the anti-corruption potential of the Agreement its implementation must be informed by governance and best practice instruments in the field of trade facilitation (technical issues) and anti-corruption and integrity.

1 Trade Facilitation, the WTO and Anti-Corruption Instruments

In the modern, ever increasingly globalized world, international trade and the flow of goods along the so-called international supply- or value chain is a lifeline for societies. Containing and managing the international flow of trade is no mean task and due to the wide reaching effects of cross border trade numerous authorities and government institutions are involved in the task of regulating and processing its various aspects. The stakeholders of international trade are indeed countless, which in turn means that the regulatory process can be complicated and cumbersome. Reaching a consensus on the regulating of international trade is extremely complex. Not only is it necessary to get governments of the world’s economies to the negotiation table with the aim in mind of reaching a consensus, but consultations with organisations, traders and any number of interested parties have to be conducted and stakeholders given the opportunity to have a say. It is thus no understatement to claim that the conclusion of the Agreement on Trade Facilitation by the Membership of the WTO was a historic occasion, not only due to the fact that it is the first multilateral trade deal to be
successfully concluded and enter into force during the lifespan of the organisation. Rather the fact that consensus on an issue as complex as trade facilitation was reached between governments all across the board in terms of development and economic status is indeed a testament to the importance the world´s governments place on the smooth and seamless flow of trade. It is also no less a testament to the diligent work of the countless stakeholders all along the international value chain.

Given the “desire” voiced in the Preamble of the Trade Facilitation Agreement to “clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994\(^2\) with a view to further expediting the movement, release and clearance of goods, including goods in transit”\(^3\) the Agreement´s focus on issues of publication, transparency and predictability is inevitable. Speed and accuracy in the release and clearance of goods is dependent on clear procedures accepted and executed by actors all along the value chain, not least by border agencies such as Customs. Clarity and transparency is key in this regard as is predictability. If the transporting, handling, clearance and release if a consignment is not predictable international trade is likely to be put in a difficult position capable of affecting not only traders but consumers and public institutions as well.

The transparency and predictability focus of the provisions of the Trade Facilitation Agreement forges links between it and conventions, agreements and other instruments dedicated to the fight against bribery and corruption in general. This is not to claim that the explicit aim of the legislators was to create through the Agreement a new anti-corruption instrument but perhaps rather that in order to achieve successful facilitation of international trade effective anti-corruption measures must be provided for and implemented.

The international legal framework for combatting bribery and the fighting against corruption is available and quite clear. The United Nations Convention against Corruption (UNCAC)\(^4\) and the OECD Convention on Combating Bribery of Foreign Public Officials in International


\(^3\) Trade Facilitation Agreement, WTO Doc. WT/L/940 Preamble

Business Transactions amongst others, set the tone and provide an important regulatory framework for governments in their efforts to combat corruption and promote integrity and accountability in public affairs. It is, however, another story whether or not those instruments have had the desired effect and how the governments of the world are doing in implementing and enforcing them. The UNCAC is a wide reaching instrument which deals with an extensive range of corrupt activities. The number of parties to the Convention is 183 and signatories are 140. Even if the Convention covers a wide range of corrupt activities and is widely accepted its only enforcement mechanism is monitoring. In her study of international anti-corruption norms, the scholar Cecily Rose conjectures that the fact that the UNCAC is a binding instrument negotiated by a large number of States which has “. . . resulted in a binding treaty with non-mandatory, vague, and imprecise norms that are relatively incapable of keeping pace with evolving patterns of corruption.” The OECD Convention is much narrower in scope than the UNCAC and its commitments go deeper. It makes criminalizing the act of bribing a foreign official mandatory for signatories but this must be enforced via domestic law. According to Rose “. . . the OECD anti-bribery instruments have arguably balanced transparency, inclusiveness, and effectiveness most successfully, due in good part to the particular subject matter of the OECD Anti-Bribery Convention, and the working methods of the OECD as an institution.” There seems to be a consensus regarding the fact that the OECD Convention is, in spite – or perhaps because of – its more limited subject matter a more effective instrument than the UNCAC. However, the OECD is perhaps limited in the same way as the UNCAC in the sense that the only enforcement power the organization has in regard to the Convention is compliance monitoring and public reports.

While the Trade Facilitation Agreement is not an anti-corruption instrument in and of itself, its content on transparency and cooperation and the overall spirit of simplification, standardization and harmonization that permeates it make it a useful tool for combating corruption in general, and bribery in particular in international trade. The focussed nature of

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8 Ibid
the Agreement, its insistence on the facilitation of international trade through the
harmonization, simplification and standardization of border procedures also are a point in
favour of its potential success as an anti-corruption tool. This is particularly important as
corruption thrives in an environment that is complex and shrouded in secrecy. While paying
bribes may have been (and in some places still is) considered an unavoidable cost of doing
business it quite obviously is a barrier to trade as well as a barrier to healthy competition and
good governance. All of which are anathema to the stated goals and objectives of the WTO. A
further point in favour of the Agreement’s potential as an anti-corruption instrument is the
fact that it comes with a proven enforcement mechanism via the WTO Dispute Resolution
Body. This opens up possibilities for action against governments that do not abide by the
provisions in the Agreement. Given the insistence in the Agreement on issues of transparency
and predictability based to a large extent on tools, instruments and best practice by
International organizations this could mean that previously voluntary standards might gain the
status of legally binding instruments.

The WTO has had its share of criticism for not paying heed to issues of human rights and
public morals but scholars and policy makers have pointed out that this reputation is to some
extent undeserved as the focus of the organisation is on reducing barriers to trade rather than
anything else. However, the scene is not as simple as this might indicate as an awareness and
consideration of public morals has indeed been seeping into the policy making of the WTO
and the rulings of the Dispute Settlement Body. This is e.g. evident in the *US Gambling*
rule,9 where the prohibition on internet gambling was partially defended based on the public
morals reasoning that it might benefit organized crime and facilitate fraud and corruption.
Scholars, such as Christine E. Dryden, have argued that the WTO is indeed “... an
appropriate forum for an anti-bribery treaty because corruption and anti-corruption efforts
affect trade, and anti-corruption efforts align with the WTO’s goals of promoting
transparency and good governance.” And that “[t]he proposed treaty could improve
enforcement because it would include not only legislative and preventive obligations similar
to those in other anti-corruption treaties but also substantive enforcement obligations.”10
Dryden also mentions that arguments in the vein of indirect methods being more successful in

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10 Christine E. Dryden, Note: Exploring the Promise and Potential of a WTO Anti-Corruption Treaty, Law and Contemporary Problems 78:4 2016, 249
the fight against corruption than binding treaty law (similar to the views promulgated by Cecily Rose and discussed above) and says, referring to work by Pdideh Ala´I that:

“... in light of the failure to enforce anti-corruption laws, it has been proposed that direct anti-corruption measures are failing; indirect methods of reducing corruption should therefore be used instead. Because the WTO provides for transparency and encourages good governance, it might be the best forum for indirect corruption reduction. The WTO’s culture of transparency and due process could help fight corruption, and the organization is well positioned to promote these goals.”11

No mention is made of the Trade Facilitation Agreement in the discussion, but the methods described and the indirect methods mentioned in the above quotation are a near enough fit to the Trade Facilitation Agreement and its potential impacts on increased transparency and a measureable reduction in corruption.

The Trade Facilitation Agreement brings to the actors of international trade - be they governments, institutions or companies - a tool that can yield benefits in a multitude of ways. Given careful implementation and enforcement, the Agreement provides the actors along the international value chain with a practical mechanism to reduce bribes and corruption through i.a. simplified and streamlined border requirements and procedures. This is something which should have the potential not only of increasing state revenue but also to provide the private sector with added value due to simpler, quicker and less costly trade transaction free of corruption.

As a key border agency Customs has a pivotal role to play where international trade is concerned. Issues to do with the customs value and origin of goods, commodity descriptions and tariff classifications are just some of the tasks and concerns Customs and trade must engage with before during and after the export, import and transit of goods. Given the key role Customs rules and procedures play where cross border trade is concerned it seems apparent that simplification and harmonization of those rules and procedures has great potential for reducing bribery and corruption. If only due to the simple fact that by reducing transactions and thus direct contact between Customs officers and traders the scope for corrupt activities is reduced. The Trade Facilitation Agreement mirrors this reality – and thus the text of the Agreement, in particular the 12 Articles of Section I, focus largely on processes

11 Ibid, 255
and procedures that have to do with Customs formalities and treatment. Article 10 of the Agreement i.a. provides for the decrease and simplification of documentation requirements and stipulates that best practice in the field shall be taken into account. The establishment of a “single window” is also provided for – whereby a resource would be created which has the potential of significantly reducing the complexity of trade formalities and increasing transparency for public institutions and trade alike.

The main thrust of the provisions of the Trade Facilitation Agreement is on the need for transparent, predictable, impartial and non-discriminatory processes related to import, export and transit procedures and formalities. The focus and spirit of the Agreement is such that it should not be seen as simply a straightforward trade agreement but rather a more complex instrument ideally placed to both inspire anti-corruption efforts in international trade and provide a practical tool to ensure transparency and integrity in procedures relating to the import, export and transit of goods. However, stakeholders need to keep firmly in mind that in order for the spirit of the Agreement to prevail and the provisions to be effective the agencies entrusted with the implementation must ensure the upkeep and maintenance of an anti-corruption and integrity regime. As the principal agency in the implementation of the Trade Facilitation Agreement Customs has a large role to play and this provides a link with the WCO\textsuperscript{12} as the issue of modernization and the attendant issues of integrity in Customs and the fight against corruption are high on the organization’s agenda. This agenda coupled with the WTO’s focus on transparency and good governance should ensure the correct groundwork for ensuring that the Agreement fulfil its potential as a practical transparency and anti-corruption tool. As will be outlined in later Chapters the WCO has under its aegis a number of instruments and working bodies that deal with both the issue of Trade Facilitation generally and integrity specifically and recognizes the cross cutting nature of integrity and anti-corruption.

2 Bali and Beyond: What is Trade Facilitation?

Trade facilitation became a topic of discussion at the WTO during the Singapore Ministerial Conference in December 1996. At that time, the Council for Trade in Goods was tasked "to

\textsuperscript{12} The WCO was founded in 1952 as the Customs Cooperation Council. It’s founding document is the Convention Establishing a Customs Cooperation Council.
undertake exploratory and analytical work . . . on the simplification of trade procedures in order to assess the scope for WTO rules in this area”\textsuperscript{13}.

In 2001 the fourth WTO Ministerial Conference held in Doha, Qatar took up the subject of trade facilitation and paragraph 27 of the Ministerial Declaration adopted on November 14\textsuperscript{th} 2001 states that:

Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. 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 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.\textsuperscript{14}

The fifth Ministerial Conference held in Cancún, Mexico in September 2003 did not see a final mandate or conclusion being reached as, according to the Ministerial Statement issued at the conclusion of the Conference: “. . . more work needs to be done in some key areas to enable us to proceed towards the conclusion of the negotiations in fulfilment of the commitments we took at Doha.”\textsuperscript{15}

However, in paragraph 17 of a draft declaration presented by Chairperson Luis Ernesto Derbez on the fourth day of the Conference suggests that the following trade facilitation agenda be agreed upon:

Taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration, we decide to commence negotiations on the basis of the modalities set out in Annex E to this document.\textsuperscript{16}

In 2004, following extensive preparations, the General Council finally agreed to launch negotiations on trade facilitation. This was based on modalities set out in Annex D of the so-called “July package” (WT/L/579). This decision directed Members to clarify and improve Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with

\textsuperscript{13} Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC, paragraph 21
\textsuperscript{14} Doha Ministerial Declaration WTO Doc. WT/MIN(01)/DEC/1
\textsuperscript{15} Cancun Ministerial Statement, WTO Doc. WT/MIN(03)/20
\textsuperscript{16} Draft Cancún Ministerial Text (WTO) <https://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_rev2_e.htm> Accessed
Importation and Exportation), and Article X (Publication and Administration of Trade Regulations) of GATT 1994 as well as enhancing technical assistance and capacity building in the area. This directly echoes the mandate given to the Council for Trade in Goods by the Ministerial Conference in 2001 as well as the provisions of Annex E (Trade Facilitation) of the draft declaration of the 2003 Ministerial. The difference between the 2004 mandate and the Ministerial Conference declaration from 2001 however is that this time the mandate is directed at the Members, which means that it is a bona fide negotiation mandate rather than a mandate for preparations for negotiations. The text of Annex D to the July Package centralises the importance of the Customs aspect as the last sentence of paragraph 1 of Annex D states that the negotiations should aim at provisions for effective cooperation between Customs or any other appropriate authorities on trade facilitation and Customs compliance issues.17

Approximately from the non-closure of the Doha round in 2011, negotiations were ongoing within the membership of the WTO on issues related to trade facilitation, agriculture and special and differential treatment for least developed countries. The WTO’s ninth ministerial conference (MC9) held in Bali, Indonesia from 3-7 December 2013 was supposed to yield a positive result for the WTO in terms of actually delivering a product – an agreement - that the membership could accept, sign and transpose. Intense preparations and fierce negotiations had taken place prior to the meeting itself and hopes were high that a consensus would be reached on certain of the issues at stake in the Doha round. This lead to the negotiation process being known as „Doha light“. 18 What the MC9 did indeed yield was the so-called „Bali Package“19, a collection comprising 10 texts on the issues of trade facilitation, agriculture and special and differential treatment. This indeed was the first time in nearly two decades that the membership of the WTO successfully concluded (or nearly concluded as it turned out) a multilateral trade agreement. According to Wilkinson et al:

This is a considerable feat given that the WTO has come to be associated more with the antagonism and fierce politics of the Doha round and not the co-operation and compromise required for an agreement. Yet, what makes the conclusion of the Bali package all the more remarkable is that it has been negotiated at a time when considerable energy had been exerted in mega-regional negotiations such as the Trans-Pacific Partnership (TPP) and the

17 Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579, Annex D paragraph 1
19 See http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm
Transatlantic Trade and Investment Partnership (TTIP) as well as other plurilateral (. . .) and bilateral endeavours to the extent that many had believed the multilateral system moribund if not fundamentally broken.20

The acceptance of the Ministers of the texts of the Bali Package was considered to be the final point of the negotiation process and the next step was to be final legal proofing and preparation of the texts. In order to facilitate that process a Preparatory Committee on Trade Facilitation was appointed, that task of which was to make sure that a final and fully acceptable version of the legal text be produced. Furthermore, the committee got the task of drafting a protocol of amendment to insert the Trade Facilitation Agreement into Annex 1A of the Marrakech Agreement Establishing the World Trade Organization21.

The goal of a final text of the Trade Facilitation Agreement emerging within the timeframe decided upon at the Bali meeting did not come to fruition. The reason for this was that India declined to accept the final text on the premise that trade facilitation issues cannot be finalized in the absence of a solution regarding that country’s concerns over public stock holding systems for food security purposes. At the MC9 a so called „peace clause“ had been agreed to, the purpose of which was to ensure a consensus among the member states of the WTO as to them not challenging India’s food security measures which are not in line with WTO rules until a permanent solution to the issue is found. The fact that this solution was left open ended should have ensured a way for India to continue with its food security policy given that it does not negatively affect the possibility of other members to pursue their policies. Other member states, such as the European Union, expressed their disappointment at this state of affairs and made clear that they would be ready to support proposals that would respect the substance of the agreements reached in Bali.22 It has been pointed out that the Indian food security issue along with others which stalled the drawing up of the so called amendment protocol had less to do with the actual Trade Facilitation Agreement and more with unresolved Doha Round issues.23 An agreement entered into in November 2014 between India and the US cleared the way for

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20 Ibid, 3
the acceptance of the Bali texts and the finishing of the Trade Facilitation Agreement\textsuperscript{24} and Members at the WTO General Council finally accepted the Trade Facilitation Protocol on November 27\textsuperscript{th} 2014. Thus the Protocol was open for acceptance by Members (no deadline given) without the possibility for entering reservations. The threshold for entry into force was stipulated in accordance with paragraph 3 of Article X of the Marrakesh Agreement Establishing the World Trade Organization. What this meant is a 2/3 majority of the Membership of the WTO was needed in order for the Trade Facilitation Agreement to become operational.\textsuperscript{25} On February 22nd 2017, the requisite two thirds of the WTO Members had deposited their ratification documents meaning that the Trade Facilitation Agreement finally entered into force.\textsuperscript{26} The entry into force of the Trade Facilitation Agreement can without a doubt be described as a historic occasion as it is the first multilateral agreement concluded by the organisation since its inception in 1995.

2.1 Trade Facilitation: More than just cutting “red tape”

Since 1996 when the Singapore Ministerial Conference directed the Goods Council “to undertake exploratory and analytical work … on the simplification of trade procedures in order to assess the scope for WTO rules in this area”\textsuperscript{27} the Trade Facilitation agenda has grown at the WTO and according to some commentators „... the WTO is basically all about facilitating trade.“\textsuperscript{28} According to information published by the WTO itself its mandate has always been to deal with issues that impact international trade in a beneficial way and many of the WTO rules contain provisions that are intended to increase transparency, partly through the setting of procedural standards.\textsuperscript{29} What this indicates is that the trade facilitation agenda at the WTO is not a new concern but an extension and further deepening of the organization’s


\textsuperscript{25} Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WTO Doc. WT/L940, 2014

\textsuperscript{26} WTO, Press Release (22 February 2017)
https://www.wto.org/english/news_e/news17_e/fac_31jan17_e.htm

\textsuperscript{1} 9th Ministerial Conference, Bali 2013,’ Briefing Note: Trade Facilitation – Cutting „red tape“ at the Border’, http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm


\textsuperscript{29} WTO, 9th Ministerial Conference, Bali 2013,’ Briefing Note: Trade Facilitation – Cutting „red tape“ at the Border’, http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm
core business which is supposed to further define and elucidate relevant provisions of three Articles of the General Agreement on Tariffs and Trade (GATT)1994; Article V (Freedom of transit), Article VIII (Fees and Formalities connected with Importation and Exportation) and Article X (Publication and Administration of Trade Regulations). Trade Facilitation as such centres around the simplification, harmonization, standardization and transparency of the procedures of international trade relating to the formalities of import, export and transit. Procedures in this sense concern the activity (procedures and formalities) that relate to the collection, release, dissemination and processing of data and documents needed for the shipping and transport of goods in international trade. These central tenets of Trade Facilitation as such, which the the Trade Facilitation Agreement mirrors are exactly the key ingredients which unlock it’s potentials as an anti-corruption instrument.

Swedish Government, which has been at the forefront of the trade facilitation agenda has through its National Board of Trade (Kommerskollegium) conducted extensive research on trade facilitation and its attendant benefits. According to information published on the Kommerskollegium’s website the four principles listed above (pictorially presented in the figure below) form the core tenets that successful trade facilitation measures are built upon.

Figure 1: Trade Facilitation Principles: The Four Pillars

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30 Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579, Annex D paragraph 1.

31 Source of figure: UNECE Trade Facilitation Implementation Guide (via National Board of Trade, Sweden)
The Kommerskollegium has succinctly summed up these basic principles of trade facilitation:

In order to provide a worldwide accepted, consistent, transparent and predictable environment for international trade transactions, it is necessary to have much greater:

- Harmonization of applicable laws and regulations
- Simplification of administrative and commercial formalities, procedures and documents
- Standardization and integration of information and requirements, and the use of technologies so as to exchange this information efficiently
- Transparency, which implies making information on border requirements and procedures available and easily accessible to all interested parties.\(^{32}\)

It is received wisdom, repeated by numerous stakeholders and scholars, that in order to succeed, trade facilitation efforts require the support and full cooperation of various government authorities and the private sector.\(^{33}\)

A reduction in trade transaction costs (TTC) is a powerful driver behind the whole trade facilitation agenda. Estimates of the actual monetary benefits that will or might result from a strong and robust trade facilitation regime vary and the figures furthermore depend on the different variables used for the calculations.\(^{34}\) Estimates published by the WTO and the OECD of the likely reduction in TTC based on the implementation of the Trade Facilitation Agreement predict that trade facilitation measures have the potential to reduce worldwide TTC by anywhere from 12.5% to 17.5%, which by any measure would constitute a huge benefit for the world economy.\(^{35}\) According to the WTO it is not only, and not even primarily, economic operators from developed countries that will benefit from the trade facilitation agenda but even more so the developing economies along with the general public of developed and developing economies alike:

\(^{32}\) Kommerskollegium (National Board of Trade, Sweden), Basic Principles of Trade Facilitation. http://www.kommers.se/In-English/Areas-of-Expertise/Trade-Facilitation/Basic-Principles-of-Trade-facilitation/

\(^{33}\) See e.g. UNECE Trade Facilitation Implementation Guide, http://tfig.unece.org


Developing country exports are expected to grow between 14% and 22% while becoming more diversified. Companies are more likely to become more profitable which should encourage domestic investment. In addition, foreign direct investment is likely to be attracted to countries that fully implement the TFA. Finally, increased trade means better employment prospects for workers and greater revenue collection by the government.36

The OECD has published more detailed estimates of the potential economic gains countries implementing the Trade Facilitation Agreement might enjoy:

The potential cost reduction from a “full” implementation of the WTO Trade Facilitation Agreement is 16.5% of total costs for low income countries, 17.4% for lower middle income countries and 14.6% for upper middle income countries. If countries limit themselves to the mandatory provisions of the agreement, the potential reduction reaches 12.6% for LICs, 13.7% for LMICs and 12.8% for UMICs, 3.9, 3.7 and 1.8 percentage points less than if they “fully” implemented best practices. This scenario reveals significant opportunity costs for low and lower middle income countries, in particular.37

The TTC aspect of trade facilitation is emphasised by both organisations and scholars alike. This is understandable given the economic thrust of the Trade Facilitation Agreement and the organisations producing and implementing it as well as it most likely being a testament to the importance placed on easily identifiable measurements and benchmarks. Scholars Patricia Sourdin and Richard Pomfret go as far as stating that they “…define trade facilitation as a reduction in costs.”38 However, as indicated above the WTO takes a wider approach to the issue, as do scholars working under the aegis of the World Bank, where the approach to trade facilitation and definitions thereof is that no single definition of the phenomena exists.

However, John Wilson, in a paper delivered for the World Bank at a WTO Workshop on Technical Assistance and Capacity Building in Trade Facilitation states that:

The term generally refers to the simplification of procedural and administrative impediments to trade, such as Customs administration, licensing procedures, standards and technical regulations, and barriers to the mobility of businesspeople. Several fundamental principles have emerged which serve as the basis for trade facilitation:

• transparency,
• due process,

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36 Ibid
• non-discrimination,
• least-trade restrictiveness.\textsuperscript{39}

This view of trade facilitation is the most inclusive one and the one that is closest to the view taken here. What this entails is that while trade facilitation should focus on cutting red tape at the borders, minimizing transaction costs for traders and making sure that international trade can flourish, it must also focus on issues of transparency, fair and equitable treatment and non-discrimination if the provisions are to become functional and operational.

The WTO Glossary defines Trade Facilitation as: „[r]emoving obstacles to the movement of goods across borders (e.g. simplification of Customs procedures)”.\textsuperscript{40} This very clear and concise description does, to all intents and purposes, manage in its simplicity to encompass within it all the aspects potentially involved in the phenomena of trade facilitation. This simple formulation belies the multitudes of meaning embedded within it as the mere fact of “removing obstacles” cannot only mean removing “red tape” or ensuring that Customs transactions are simplified or pared down but must also take into account the fact that obstacles are not truly removed unless the whole process is transparent and predictable and performed in an equitable and fair manner. Furthermore, this simple definition also very clearly indicates (even if it is put in brackets) the close relationship of trade facilitation and Customs modernisation and reform. Given the emphasis on import and export and the formalities and paperwork inherent in those procedures and transactions Customs, by virtue of its mandate and work, is a key enabler of trade facilitation and success rests on the direct and targeted involvement by Customs authorities worldwide.

It is important to keep in mind that at least as far as Customs being a key border agency is concerned, trade facilitation neither means that the control of goods or enforcement of Customs laws and regulations is abandoned nor put on the back burner. Trade facilitation measures are always directed at facilitating, though simplification and standardization, the legitimate trade flow and by so doing ensuring the strategic use of manpower and other resources for the purposes of securing the supply chain and thus fulfilling the mandate of protecting society and ensuring the safety of the international supply chain.

\textsuperscript{39} John S. Wilson, ´ Trade facilitation lending by the world bank: recent experience, research, and capacity building initiatives´ www.wto.org/english/Tratop_e/tradfa_e/wkshop_2001/wilson.doc
\textsuperscript{40} WTO Glossary, http://www.wto.org/english/thewto_e/glossary_e/trade_facilitation_e.htm
3 The Background of the Trade Facilitation Agreement: GATT Articles V, VIII and X and transparency instruments

As indicated above, the idea behind the negotiation mandate for the Trade Facilitation Agreement was to clarify and improve three particular Articles of the GATT 1994, namely Article V on Freedom of transit, Article VIII on Fees and Formalities connected with Importation and Exportation and Article X on Publication and Administration of Trade Regulations. The General Council via a Decision adopted on 1 August 2004 communicated this intention.41 In the Preamble to the Trade Facilitation Agreement itself this intention is expressed as the “desire” of the members 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.”42 The other aspects of the Preamble have to do with the “particular needs of developing and especially least-developed country members and desiring to enhance assistance and support for capacity building in this area”43 as well as “the need for effective cooperation among Members on trade facilitation and customs compliance issues.”44

As indicated above the view taken here is that the Trade Facilitation Agreements has every potential to function as a transparency and anti-corruption instrument promoting and institutionalising predictability, transparency and anti-corruption in international trade, via clear and harmonized border procedures. Furthermore, that the implementation of the provisions of the Agreement has the potential to help improve integrity in public service and the private sector and work against corrupt practices in said sectors. Given the vulnerabilities of Customs where the risk of bribery and corruption is concerned the Trade Facilitation Agreement is an important addition to the already existing arsenal of tools and instruments aimed at promoting integrity and anti-corruption in Customs. What the Trade Facilitation brings that pre-existing instruments do not possess is a binding instrument which comes together with a dispute resolution mechanism with a proven track record of efficiency and speed.

41 Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579, Annex D paragraph 1
42 Agreement on Trade Facilitation WTO Doc. WT/L/940 Preamble
43 Ibid
44 Ibid
3.1 GATT 1994 Articles V, VIII and X

The Articles of the GATT upon which the Trade Facilitation Agreement is based and which it is expected to deepen and clarify contain general provisions on equal and least restrictive treatment of contracting parties concerning transit, fees and formalities and publication and administration of trade regulations. The relatively general nature of the provision contained in the GATT Articles resulted in a less than satisfactory outcome in terms of the facilitation of international trade and in the need for a more detailed and focussed presentation. This detailed presentation is what the Trade Facilitation Agreement is expected to provide. Furthermore, the provisions of capacity building support and implementation deadlines tailored to the actual ability of developing and least-developed countries are expected to maximize the likelihood of the successful implementation of the Agreement thus enhancing trade and economic growth. Given the Trade Facilitation Agreement’s grounding in these particular GATT Articles and the fact that the larger part of the Agreement (Section I) is indeed a detailed elaboration of the principles embedded in those Articles, it is important here to look closely at their content and the spirit they convey. It should come as no surprise that these particular GATT articles were identified as a logical basis for an agreement between the Member states of the WTO aiming to facilitate international trade as freedom of transit is a key enabler of smooth and efficient import and export. A fair and transparent regime on fees and formalities relating to international trade and the public availability of relevant law and regulations governing import, export and other trade related matters is a key enabler for traders and other players in the international supply chain to be compliant and law abiding.

3.1.1 Article V: Freedom of transit

The text of Article V is as follows:

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.
3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).  

Given the proposition that trade barriers often exceed tariff barriers as a deterrent to international trade and that transit procedures are indeed a lifeline for import and export to numerous countries it is not surprising that the issue of the freedom of transit and fair and transparent handling of goods in transit was pinpointed as a trade facilitation issue. It is of the utmost importance in terms of facilitating trade to ensure that transit of legitimate shipments is not restricted and that barriers are not erected via excessive and/or unfair fees. This again becomes an anti-corruption issue as without a clear legal and operational framework on border

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* GATT 1994 op cit, Article V
procedures to do with transit this is a function that is particularly vulnerable to corruption, e.g. in terms of the supply and demand sides of bribery.

### 3.1.2 Article VIII: Fees and Formalities connected with Importation and Exportation

The text of Article VIII is as follows:

1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

   (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).

   (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.*

2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.

3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

   (a) consular transactions, such as consular invoices and certificates;
   (b) quantitative restrictions;
   (c) licensing;
   (d) exchange control;
   (e) statistical services;
   (f) documents, documentation and certification;
   (g) analysis and inspection; and
   (h) quarantine, sanitation and fumigation.\(^{46}\)

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\(^{46}\) GATT 1994 op cit, Article VIII
The simplification and standardization of formalities and documentation requirements for import and export procedures is a key issue where trade facilitation is concerned. Estimates by the United Nations Conference on Trade and Development (UNCTAD) indicate that an average customs transaction involves anywhere between 20-30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60-70% of all data at least once. In that light it should come as no surprise to anyone that this area was among those considered an important target for the Trade Facilitation Agreement negotiations. When thinking in terms of anti-corruption the simplification of procedures, cutting out superfluous and repetitive requirements and cutting down on the number of parties involved in a transaction is an immediate benefit.

3.1.3 Article X: Publication and Administration of Trade Regulations

The text of Article VIII is as follows:

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

47 Quoted in Kassee and Bhunjun-Kassee „Will implementation of the WTO Trade Facilitation Agreement promote integrity in Africa?” OECD (2016 OECD Integrity Forum)
(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.48

The publication and review and appeal requirements set out in Article X of the GATT and further developed in the Trade Facilitation Agreement are a fundamental aspect in terms of ensuring a fair and equitable treatment of the parties involved in trade in goods. This holds true for all sides of the equation as it should be equally important for border institutions, traders and consumers that the rules that apply are clear and transparent and easily accessible. From the perspective of an anti-corruption this is absolutely essential as it ensures both transparency and predictability.

4 The Trade Facilitation Agreement: What is it and how does it relate to the WCO

4.1 General Overview

In short, the WTO Agreement on Trade Facilitation contains provisions regarding expedited and efficient procedures relating to import, export and transit (border/customs procedures). Increased speed and efficiency shall be achieved through effective cooperation between Customs administrations and other appropriate authorities regarding matters relevant to trade

48 GATT 1994 op cit, Article X
facilitation and Customs enforcement. Furthermore, the Agreement contains provisions relating to technical assistance and capacity building in the field.

The member states of the WTO agreed that the negotiations should clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with the aim in mind of expediting even further the flow, release and clearance of goods, including goods in transit. The final text agreed to at the MC9 in Bali (the “Bali Package”) includes a Preamble, three Sections and an Annex containing a Format for Notification under Paragraph 1 of Article 22.

The WTO claims that the Agreement will help improve transparency, increase possibilities to participate in global value chains, and reduce the scope for corruption.49 [emphasis added]. What is interesting about these particular claims regarding the foreseen effects of the Agreement is that out of the three potential benefits listed only one is trade related in the restricted, conventional sense. That the conclusion of and entry into force of the Agreement is expected to increase possibilities of individuals and businesses to participate in the global value chains is expected. The two other main benefits listed are a little less obvious - namely that improved transparency and reduced scope for corruption should be identified by the WTO as the main attendant benefits of the Agreement.

The Trade Facilitation Agreement deals almost entirely with Customs-related topics and Customs is a central government agency for its implementation in collaboration with other border agencies. According to information published by the WTO the objectives of the Trade Facilitation Agreement are to expedite the movement, release and clearance of goods, to improve cooperation between Customs and other authorities and to enhance technical assistance and build capacity50, all of which are an excellent match to both the objectives and capabilities of the WCO. The WCO, with its wide network of Customs administrations, is the centre of Customs expertise and practical information for trade facilitation and border management. Article 23 of the Trade Facilitation Agreement provides for the establishment of a Committee on Trade Facilitation and provides that the Committee shall maintain close contact with the WCO.51 Given its extensive experience in developing and implementing global Customs standards, the WCO is an important source of expertise on the practical implementation of trade facilitation measures as well as of the legal and philosophical 　　

49 http://www.tfafacility.org/trade-facilitation-agreement-facility
50 http://www.tfafacility.org/wto-assistance
51 Agreement on Trade Facilitation WTO Doc. WT/L/940 Article 23
foundations for the phenomena. Its standards and technical assistance delivery provide a
baseline for uniform implementation of the Trade Facilitation Agreement and support for
Customs administrations tasked with the practical implementation.

The WCO as an organization and the national Customs authorities that make up its
membership are in possession of valuable expertise in developing trade facilitation standards,
monitoring implementation and providing general Customs capacity building as well as
extensive expertise and resources in the field of promoting integrity in Customs and the fight
against corruption, all of which are basic tenets of the successful implementation of trade
facilitation worldwide. The WTO’s statement regarding the Trade Facilitation Agreement’s
potential to improve transparency and reduce the scope for corruption is in line with the
emphasis the WCO has put on integrity, transparency and the fight against corruption in
Customs and the fact that the Integrity Sub-Committee is one of the organisation’s permanent
governance structures.

Section II of the Agreement focuses on Special and differential treatment provisions for
developing country members and least-developed country members. While the inclusion of
Special and differential treatment clauses is not a novelty the fact that the Trade Facilitation
Agreement goes further and links the implementation commitments of developing and least
developed countries to their actual capabilities are a first for the WTO. Paragraph 2 of Article
13 further provides for assistance and support for capacity building in order to help
developing and least-developed country members implement the provisions of the
Agreement, in accordance with their nature and scope. Expecting developing, and
particularly least-developed, countries to implement the Agreement before their infrastructure
and capacity is ready is likely to result in mismanagement and poor performance. These
provisions are also of great importance in terms of the anti-corruption elements of the
Agreement. Ensuring full compliance of the Agreement through correct implementation is
key to not only the “technical” implementation of the trade facilitation measures but no less to
realising its anti-corruption spirit and entrenching its potential as a specific and targeted anti-

52 http://www.tfafacility.org/trade-facilitation-agreement-facility
53 The Integrity Sub-Committee is a permanent WCO technical committee acting under the direction of the Council and the Policy Commission. The committee had its first session in April 2001 and has met yearly since that time. The committee’s mandate is to guide the WCO’s work in the area of integrity. The Committee’s ToR is available on: http://www.wcoomd.org/en/about-us/wco-working-bodies/capacity_building/integrity_sub_committee.aspx
54 Agreement on Trade Facilitation WTO Doc. WT/L/940 Article 13
corruption instrument. Specific provisions for capacity building support for developing country and least-developed country Members are included in Article 21 of the Agreement.\textsuperscript{55} This indeed opens up a great array of possibilities for developing and least-developed Member countries to receive state of the art assistance from international organisations, donors and developed Member administrations. This assistance is most likely to be centred on best practice in terms of trade facilitation implementation as well as practical assistance on setting up programmes of work and the infrastructure necessary to achieve full implementation of the Agreement with the attendant benefits. Another important issue is the fact that in various Articles of the Agreement (e.g. Article 10.1.1, 10.1.2, 12.1.2) reference is made to “best practice” and the WTO Committee on Trade Facilitation is tasked with developing procedures for the sharing by Members of relevant information and best practices as appropriate.\textsuperscript{56} The placement of the “best practice” provisions in the Articles of the Agreement, rather than in the Preamble, is indication of the importance placed on best practice in terms of the implementation of the Agreement. What this could also mean is that given the binding nature of the Trade Facilitation Agreement and the hypothetical future use of the WTO Dispute Resolution Mechanism the hitherto voluntary standards and best practice instruments of the Annex D organisations could potentially become legally binding.

4.2 Cooperation is Key: the Trade Facilitation Agreement and importance of the WCO in the Implementation

As was briefly mentioned above, the WCO -along with the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the World Bank- is a so-called Annex D organization in respect to trade facilitation at the WTO. As was further noted above, the importance of the Customs perspective and by extension the expertise and cooperation of the WCO in the WTO trade facilitation agenda is clearly spelled out in Annex D. Moreover, paragraph 8 of Annex D states that:

\begin{quote}
In order to make technical assistance and capacity building more effective and operational and to ensure better coherence, Members shall invite relevant international organizations, including the IMF, OECD, UNCTAD, WCO and the World Bank to undertake a collaborative effort in this regard.\textsuperscript{57}
\end{quote}

\textsuperscript{55} Ibid, Article 21
\textsuperscript{56} Ibid, Article 23.1.4
\textsuperscript{57} Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579, Annex D paragraph 8
The cooperation of the WCO and the WTO however is by no means restricted to issues purely defined as trade facilitation and the two organisations enjoy a long established history of cooperation. A clear manifestation of the close cooperation between the two organizations is the fact that the WCO manages and hosts the technical committees of two important WTO Agreements, namely the WTO Valuation Agreement (formally known as Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (GATT) 1994)\(^\text{58}\) and the WTO Agreement on Rules of Origin.\(^\text{59}\)

The WCO has a key role to play in the implementation of the actual outcomes of the trade facilitation negotiations, namely the Agreement on Trade Facilitation itself - along with the rest of the WTO trade liberalisation rules. It is thus no surprise that the organisation places great emphasis on the importance of targeted capacity building for the effective implementation of the Trade Facilitation Agreement for the Customs authorities of its member states. As mentioned above the WCO manages the technical committees for the Customs Valuation and Origin Agreements of the WTO but the Committee on Trade Facilitation proper as stipulated in paragraph 1 of Article 23 of the Agreement proper will be managed by the WTO itself.\(^\text{60}\)

The WCO already in 2014 established a new working group dedicated to the preparations for and implementation of the Trade Facilitation Agreement. The WCO Working Group on the WTO Agreement on Trade Facilitation had its first session on 11-12 March 2014.\(^\text{61}\) The mandate of the Working Group is to provide advice on i.a. progress and issues relating to categorization of provisions according to the Trade Facilitation Agreement, tailor-made technical assistance, and future implementation of the Trade Facilitation Agreement by WCO Members. The Working Group operates at two levels: a level dealing with policy matters, and

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\(^\text{60}\) Trade Facilitation Agreement stipulates in paragraph 1 of Article 23 that „A Committee on Trade Facilitation is hereby established“ which literally interpreted would have meant that the Committee should have been up and running on the 22nd of February 2017 when the Trade Facilitation Agreement entered into force. The reality of complicated institutional procedures however, is such that in actual fact the Committee had its first meeting on May 16th 2017 and at the inaugural meeting the only point on the Committee’s agenda was the election of the Chairperson. The Committee elected Ambassador Daniel Blockert of Sweden as the first Chair of the Committee. See e.g. https://www.wto.org/english/news_e/news17_e/fac_16may17_e.htm

\(^\text{61}\) Document PT0001E1c available on the WCO Members website outlines the agenda and programme of work for the first meeting of the WCO Working Group on the WTO Agreement on Trade Facilitation which was held on 11-12 March 2014. The Working Group meets twice yearly and has to date convened for 8 Sessions with an 9th Session planned for March 2018.
a second level dealing with technical matters.\textsuperscript{62} The Working Group meets twice per year and is an important forum for coordinating the preparations and implementation of the Trade Facilitation Agreement by WCO Members as well as providing Members with information and establishing a forum for exchanges of opinion and dialogue regarding best practice etc.

Only a few days after the conclusion of the MC9 and the “Bali Package”, or on December 11\textsuperscript{th} 2013 at its meeting in Dublin, the WCO Policy Commission\textsuperscript{63} approved the Dublin Resolution on the Conclusion of an Agreement on Trade Facilitation by the World Trade Organization.” The fact that the WCO Policy Commission passed the Dublin Resolution as swiftly as it did serves to emphasise the importance the Customs community, spearheaded by the WCO, places on the issue of trade facilitation. In the Dublin Resolution emphasis is placed on the importance of the full implementation of the tenets of trade facilitation for the benefit of economic growth and recovery, improved revenue collection and the alleviation of poverty. The fundamental role of Customs in trade facilitation is highlighted and the full consistency of the WTO Agreement with WCO tools and programmes on trade facilitation and compliance is pointed out. The Policy Commission via the Dublin Resolution commits the WCO to the efficient implementation of the Trade Facilitation Agreement and pledges to provide its members with capacity building and technical assistance as well as pledging to base technical assistance and capacity building upon existing WCO tools and instruments.\textsuperscript{64}

The Dublin Resolution refers to the WCO as a centre of excellence in Customs matters\textsuperscript{65}, which is by no means an exaggeration, given the fact that the organisation oversees and coordinates a large body of agreements, conventions, rules and frameworks as well as organising a large and effective technical assistance and capacity building operation. The WCO currently represents 182 Customs administrations around the world, three quarters of which are developing countries. Collectively the Member countries of the WCO which

\textsuperscript{62} European Union: Vice Chair of the WCO Europe Region, ‘How the Europe Region can contribute to the work of the WCO TFA Working Group’ (June 2016) 2nd WCO Europe Regional Workshop. Unpublished workshop proceedings.

\textsuperscript{63} Within the organisational structure of the WCO the Council is the highest decision making body of the organisation. The Policy Commission may be described as a “steering group” for the Council as set out in its ToR. See http://www.wcoomd.org/en/about-us/wco-working-bodies/policy-commission.aspx


process about 98% of world trade and therefore is duty bound to take trade facilitation issues extremely seriously. The organisation has emphasised to its member states the importance of each administration examining thoroughly the effect the Trade Facilitation Agreement is likely to have in the respective states as well as paying special attention to the capacity building and technical assistance needs emanating from it. A close analysis of the Trade Facilitation Agreement performed by the WCO and published on the organisation’s website shows that there is a very high level of convergence between the provisions of the Agreement and the WCO’s Revised Kyoto Convention as well as convergence with over 40 different WCO instruments and tools.

A clear understanding of the responsibilities of Customs in relation to the Trade Facilitation Agreement is paramount in terms of Customs administrations being able to implement the agreement fully with the attendant benefits for international trade and by extension the world economy. The WCO and its Member administrations are aware of this fact and it is no exaggeration to say that the provisions of the Trade Facilitation Agreement and their implementation are one of the main points of emphasis at the organisation these days. This emphasis is reflected in the WCO Europe Region’s Stockholm Declaration which emanated from the WCO Europe Region’s 2nd Workshop on the Implementation of the WTO Trade Facilitation Agreement held in Stockholm, Sweden on 1-3 June 2016. The Stockholm Declaration touches upon a number of important aspects of the implementation of the Trade Facilitation Agreement, understandably focussing on the primacy of the Customs dimension stating that:

[c]onsidering the strong Customs dimension in the TFA, Customs should play a leading role in ensuring co-ordination and co-operation of all agencies and with business, to bring about the benefits and efficiency of trade facilitation. Trade

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68 The large number of instruments and programs the WCO has prepared and entered into is a testament to the importance the organisation places on trade facilitation issues. A complete section of the WCO website is dedicated to various aspects of trade facilitation, including a thorough analysis of Section I of the Agreement, an Implementation Guide for Section I, detailed information on National Committees on Trade Facilitation (as per paragraph 2, Article 23 of Section III of the Agreement). A full overview of the trade facilitation part of the WCO website is available here: http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf.aspx

facilitation and control are different sides of the same coin where each side can and should be applied in a coherent and complementary manner.\textsuperscript{70}

The emphasis on trade facilitation and trade control being different sides of the same coin reflects the understanding that trade facilitation issues should not deflect from the other core business of Customs, namely the security and safety of the international trade flow through enforcement of the relevant laws and regulations and customs control at the border as well as post-clearance. Another and no less important issue targeted by the Stockholm Declaration is the irretrievable link between trade facilitation measures and transparency and integrity:

\[\text{[a]n ambitious programme of implementation of the TFA will contribute to economic growth and prosperity. Trade facilitation measures also foster good governance by promoting transparency, predictability, standardisation and integrity.}\textsuperscript{71}\]

Transparency, predictability, standardisation and not least integrity are all indeed tenets that must be in place if the provisions of the Trade Facilitation Agreement are to be effective. The view taken here is that in and of themselves the Articles of the Trade Facilitation Agreement function as transparency provisions. The great emphasis placed in the Agreement on e.g. publication and availability of information along with many of the technical arrangements the Agreement contains, are indeed provisions on transparency, predictability and thus by extension a framework for anti-corruption and integrity. At the same time, extra emphasis on the creation and maintenance of an environment of integrity is of paramount importance if the provisions of the Agreement are to be fully effective. Implemented in an environment where transparency, integrity and a culture of anti-corruption is absent the danger that trade facilitation measures will at bests not work, and at worst be detrimental to the safety and security of the overall society are a real danger.

\section*{4.3 Synopsis of the Three Sections of the Trade Facilitation Agreement}

The WTO Trade Facilitation Agreement is divided into three sections. Section I, which forms the bulk of the Agreement, contains 12 Articles which encompass the spectrum of trade facilitation measures, both technical and more universal in nature. The Section contains the following Articles:

\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid.
As will be further developed in Section 7 below these Articles form the bulk of the trade facilitation measures proper. While detailed and technical in nature they also are the backbone of the pervasive anti-corruption spirit of the Agreement. Achieving a measurable result in terms of not only increased economic growth but also a decrease in corruption and bribery would be difficult (not to say impossible) without clear provisions laying out practical measures on how to achieve transparency in international trade through simplified and harmonized border procedures.

Section II consists of 10 articles on special and differential treatment (SDT) provisions for developing countries and Section III is composed of two articles on institutional arrangements and final provisions. As already mentioned above the Trade Facilitation Agreement is the first agreement of its kind to expressly link commitments to a country’s capacity to implement the Agreement. This is achieved through giving members the possibility to determine, via so-called A, B and C notifications, when they expect to be able and ready to implement the trade facilitation measures provided for in the Agreement. As already noted above, the Agreement contains a further novelty, namely the fact that Article 21 provides for specialised capacity building assistance for developing and least-developed countries in order to facilitate their implementation of the Agreement. The possibly revolutionary aspect here is that developing and least developed members will not be expected to implement the provisions without capacity building assistance provided by organizations such as the WTO itself, the World Bank and the WCO or directly by member states such as the EU, the USA, the UK, Japan,
Finland and Norway to name a few. No less revolutionary within the framework of international legal Agreements is the fact that these member states are given self determination to select the level of commitment they individually assume within the framework of the A, B and C notifications. In order to benefit from the SDT provisions member states must categorise the provisions of the Articles as shown below and inform the WTO Trade Facilitation Committee of the categorisations along with the estimated timelines for implementation in accordance with the timelines indicated in the Agreement itself.

<table>
<thead>
<tr>
<th>Category A</th>
<th>Provisions that the Member will implement by the time the Agreement enters into force (or in the case of a LDC Member within one year after entry into force).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category B</td>
<td>Provisions that the Member will implement after a transitional period following the entry into force of the Agreement.</td>
</tr>
<tr>
<td>Category C</td>
<td>Provisions that the Member will implement on a date after a transitional period following the entry into force of the Agreement and requiring the acquisition of assistance and support for capacity building</td>
</tr>
</tbody>
</table>

4.3.1 Trade Facilitation Measure Classification

A classification of the measures provided for in the Trade Facilitation Agreement shows that to all extents and purposes they fall into three main categories:

<table>
<thead>
<tr>
<th>Transparency and Appeals</th>
<th>Transit</th>
<th>Import/Export/Transit Fees and Formalities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publication/internet publication</td>
<td>Restrictions on fees and charges</td>
<td>Discipline on fees</td>
</tr>
<tr>
<td>Enquiry Point for trade information</td>
<td>Use of guarantee</td>
<td>Pre-arrival processing</td>
</tr>
<tr>
<td>Opportunity to comment</td>
<td></td>
<td>Risk management</td>
</tr>
<tr>
<td>Consultations</td>
<td></td>
<td>Post clearance audit</td>
</tr>
</tbody>
</table>

72 A full list of organisations and Member Countries providing funding and capacity building assistance in relation to the implementation of the Trade Facilitation Agreement is available on the WTO’s TFA Facility: http://www.tfafacility.org/implementation-support

73 See e.g. http://wto.org/english/tratop_e/tradfa_e/tradfa_e.htm; http://ec.europa.eu/taxation_CUSTOMS/Customs/policy_issues/trade_facilitation/index_en.htm

74 Trade Facilitation Agreement WTO Doc. WT/L/940 Article 14
Another way of looking at the intentions behind and potential of the measures of the Trade Facilitation Agreement is to see them as falling into the categories of transparency and fairness, good governance and modernization. What this classification shows is the extent to which the Agreement can be seen as an anti-corruption instrument. All those issues are indeed the cornerstones of a regime based on integrity and the absence of corruption and feature prominently in the WCO integrity instruments such as the Revised Arusha Declaration and the Integrity Development Guide discussed in some detail below.

### 5 ANTI-CORRUPTION AS A KEY PREMISE OF TRADE FACILITATION

#### 5.1 Legislative measures, best practice and the need for an emphasis on anti-corruption and integrity measures

The Trade Facilitation Agreement does contain a number of elements that serve as benchmarks for modernisation and reform based on measures aimed at simplifying and facilitating international trade. The fact that the obligations imposed by the Trade Facilitation Agreement are binding, as stipulated in Article 24.2, along with the provision in Paragraph 9 of the same Article where it is stated that no reservations may be entered in respect of the

<table>
<thead>
<tr>
<th>Advance rulings</th>
<th>Publish average release times</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right of appeal</td>
<td>Authorised operators</td>
</tr>
<tr>
<td>Border agency cooperation</td>
<td>Review formalities and documents</td>
</tr>
<tr>
<td>Single window</td>
<td>Eliminate use of Pre Shipment Inspection for tariff classification and Customs valuation</td>
</tr>
<tr>
<td></td>
<td>Separate release from clearance</td>
</tr>
<tr>
<td></td>
<td>Customs cooperation</td>
</tr>
</tbody>
</table>
provisions of the Agreement without the consent of other Members,\textsuperscript{75} gives the Agreement a certain weight it might not otherwise have enjoyed. This being said, it must also be kept in mind that the real life situation is that many of the provisions are written in such a way that the legal language used does to some extent detract from and weaken the commitment to real modernisation and full and effective trade facilitation. A case in point is the frequent use of the phrase “to the extent possible” and the fact that on certain key issues such as the “Use of International Standards” the Members are “encouraged” to use relevant international standards rather than being obligated to do so.\textsuperscript{76} What this means in practice is that purely legislative measures are not sufficient to achieve the aim of the Agreement and implement its provisions. This indeed refers to the discussion above on the effectivity of existing anti-corruption instruments and the opinion voiced by scholars that to date instruments that are non binding and specific have achieved more concrete results than e.g. the UNCAC.

Obviously the Agreement has to be ratified in the Member states and national legislation adjusted in order to pave the way for the implementation of its measures but this is not enough if success is to be achieved. No less important are the soft law and governance aspects, namely standards, best practices and organisational and governance based measures as well as practical solutions. Members do indeed have to take both legislative and non-legislative action, i.e. organisational or practical measures, in order to effectively implement the provisions of the Agreement.

In order to ensure the successful implementation of the Trade Facilitation Agreement both legal means and organisational measures have to be applied. This calls for consistency, transparency and predictability in the implementation process. If the Agreement is to be applied and implemented to the benefit of international trade and the societies involved, a culture of transparency, anti-corruption and integrity has to be fostered and achieved both at the organisational (i.e. Customs and other government and international institutions) and at the trade or business level. Article 8 of the Agreement provides that each Member shall ensure the cooperation of authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.\textsuperscript{77} What this should ensure is transparency of procedures and a clear division of tasks and responsibilities. The longer and

\textsuperscript{75} Agreement on Trade Facilitation, WTO Doc. WT/L/940 Article 24, paragraphs 2 and 9

\textsuperscript{76} Ibid, Article 10, paragraph 3

\textsuperscript{77} Ibid, Article 8, paragraph 1
more complicated the chain of command is and the more obfuscate the rules governing e.g. paperwork and provision of documents the more prone to corruption and lack of integrity the trade environment becomes. An awareness of exactly this fact informs the Trade Facilitation Agreement even if the language used does to some extent not go as far in practical terms as the overall spirit of the Agreement would indicate.

What is also important to keep in mind in this context is that the authorities involved in implementing the Trade Facilitation Agreement – and by extension making sure that the transparency, anti-corruption and integrity aspects informing both the actual measures provided for and the overall spirit of the Agreement are honoured – are not left alone with that task. It should be noted and emphasised that the legal basis for the fight for transparency, integrity and against corruption is strong and available. Both the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions\(^\text{78}\) and the United Nations Convention against Corruption\(^\text{79}\) do provide a regulatory framework for the fight against corruption and do indeed constitute a call to action in this regard.

The WCO’s mandate of securing and facilitating legitimate trade and the organisation’s promotion of the international movement of goods being based on certainty, predictability and security and its partnership with the WTO in terms of trade facilitation measures should ensure that an awareness of anti-corruption be built into the implementation of the Trade Facilitation Agreement.

### 5.2 Customs is a high risk sector in terms of corruption

While fostering and promoting a culture of anti-corruption and integrity is by default necessary and important in every sector of society – trade included - it is particularly important in Customs. This is due to the nature of the business of Customs and the tantamount importance of trust and cooperation involved in every aspect of trade facilitation.

Research and econometrics collected by the OECD indeed indicate that Customs is a high risk sector when it comes to dangers of and, propensity for, corruption. According to the 2014 edition of the OECD Foreign Bribery Report bribes were promised, offered or given most frequently to employees of public enterprises (27\% of cases), followed by Customs officials (11\%), health officials (7\%) and defence officials (6\%). It should, however, be noted that even if Customs officials feature as the second largest recipient group of foreign bribes the

\(^{78}\) OECD Convention, op cit  
\(^{79}\) UNCAC, op cit
total amounts of those bribes are merely 1.14% of the total estimated amount of bribes paid. According to the report this is indicative of the payments in question most likely being in the form of what has often been described as “facilitation payments”.  

Namely small payments of bribes paid to smooth the way and ensure that necessary processes are conducted in a timely manner or in some cases to do away with cumbersome paperwork or what has been referred to earlier as the “cutting of red tape”.

In the majority of cases referred to by the OECD, bribes were paid to obtain public procurement contracts (57%), followed by clearance of Customs procedures (12%). Even if there is a great gap between the percentage of bribes paid in the public procurement sector and Customs, the picture emerging from these figures is one that shows is the vulnerability of Customs in terms of issues of corruption and breaches in integrity. Given the absolute centrality of Customs and processes relating to import and export in all matters relating to trade facilitation the importance of transparency, anti-corruption measures and integrity in the preparation for and implementation of the Trade Facilitation Agreement should be clear.

Another issue that warrants attention in this regard, and which is of particular importance in terms of the implementation of the Trade Facilitation Agreement is the conclusion reached via the analysis presented in the OECD Foreign Bribery Report namely that:

...in foreign bribery cases concluded to date, corruption is not, as some would believe, the scourge solely of developing economies. With almost one in two concluded foreign bribery cases involving officials from countries with high to very-high HDI rankings, it is clear that this is a crime that takes place at all levels of development.

This should indeed be a warning signal in relation to the implementation of the Trade Facilitation Agreement as it is obvious that among of the main beneficiaries of the provisions of the Agreement are governments, institutions and private sector operators in the developed world.

Despite the figures cited above and the undeniable fact of the real-life situation that Customs, due to the nature of its work, is particularly exposed to the risks of corruption i.a. in the form of bribes, one should be wary about simplistically assuming that all Customs administrations or Customs in general is by default a corrupt institution. The situation in many parts of the world is such that corruption is endemic which in turn affects both public institutions and the

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81 Ibid 32.
82 Ibid 33
private sector and Customs is no exception. According to Gerard McLinden and Amer Zafar Durrani:

Of course, corruption in any country is rarely restricted to Customs. Public agencies like Customs are simply a microcosm of the society in which they operate. It’s rare to find an island of integrity in a sea of corruption. Corruption is a product of poor governance, not the other way around, and this fact needs to be understood in order to devise practical solutions.\textsuperscript{83}

In terms of the implementation of the Trade Facilitation Agreement, with its attendant emphasis on good governance and ant-corruption these issues need to be kept in mind. As already indicated the Agreement is to all intents and purposes an instrument that must be implemented by Customs and requires a great deal of cooperation with the private sector. In order for this to function it is absolutely vital to work on and emphasise the promotion of an environment based on integrity and zero tolerance for corruption.

\textbf{5.3 Customs and some definitions of corruption}

Many definitions of the phenomena of corruption exist. Transparency International defines corruption as “the abuse of entrusted power for private gain”\textsuperscript{84} and that is indeed a definition commonly used. Other definitions (used e.g. by the WCO) are that corruption involves a departure from, or contravention of, public duty What this basically means is that in order for an act to be considered corrupt, it would involve a breach of public duty, the receipt of some form of improper inducement, and occur in an environment of secrecy, or at the very least without official sanction.\textsuperscript{85} As indicated by Cecily Rose in the introduction to her book International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems these definitions may be one sided in the sense that their focus is too one sided. That is to say that the onus is put on the public official and the abuse of public power and the side of the private enterprise is left out. In order to rectify this imbalance a definition along the lines of corruption being the abuse of entrusted power for private gain or the exercise of of improper influence over those entrusted with power.\textsuperscript{86}

\textsuperscript{83} Gerard McLinden and Amer Zafar Durrani ’Corruption in Customs’ World Customs Journal 7:2, 6
\textsuperscript{84} Transparency International, http://www.transparency.org/what-is-corruption#define
\textsuperscript{85} This view is documented e.g in the WCO Integrity Development Guide as well as in in-house documents such as presentations used for WCO Capacity Building Missions in the field of Integrity.
\textsuperscript{86} Cecily Rose, International Anti-Corruption Norms: their Creation and Influence on Domestic Legal Systems, Oxford UP, 2015
Rose also mentions that a precise legal definition of corruption does not exist as the “...term represents an umbrella concept that encompasses a number of different criminal acts, each of which enjoys its own legal definition(s).” 87 There are many specific behaviours and combinations of behaviours generally regarded as corrupt. These typically fall under the broad headings of bribery, nepotism and misappropriation.

5.4 Customs is exposed to corruption in a particular way

In light of the substantive customs slant of the Trade Facilitation Agreement and the vulnerability of Customs to foreign bribery (and thus it may be deduced that by extension this would cover bribery and corruption in general) outlined in the OECD Foreign Bribery Report it is important here to look briefly at the particular ways Customs is exposed to corruption.

Many aspects of the core business of Customs are vulnerable to the various forms of corruption, particularly as Customs often has a monopoly power over certain services such as the release of cargo or the clearance of passengers. As has already been briefly mentioned Customs may be said to be exposed to corruption in a particular way due to the nature of its work. These specific circumstances may be summed up thus:

- Extensive direct contact with goods, people and money
- Customs officers make important decisions on duty/tax or admissibility of goods
- Customs personnel often work in remote border stations
- Clearance of many goods is time sensitive
- Extended informal social and business networks 88

McLinden and Durrani concur with this and state that:

[i]t’s a simple fact that customs officials, even at junior levels, enjoy extensive discretionary powers and interact daily with traders who have a strong incentive to influence their decisions. Moreover, the fact that many customs officials work in situations where careful supervision is practically impossible creates an environment ripe for corruption. Add to the mix the poor pay and difficult working conditions customs officials in many countries have to contend with as well as very little probability of getting caught and it is no real surprise that Customs continues to be perceived as amongst the most corrupt of government institutions. Complicating matters further is the fact that many corrupt transactions occur side-by-side with honest ones and are conducted between parties that are frequently part of the same extended informal social and business network. 89

87 Ibid
88 See previous footnote (no 75)
89 Gerard McLinden and Amer Zafar Durrani ‘Corruption in Customs’ World Customs Journal 7:2, 3-4
Add to this mix the fact that Customs officers often find themselves in the situation of having sole competence in situations where interpretation and implementation of complex and sometimes obscure and opaque Customs laws and regulations is called for and where the final result of such interpretations and implementations can make a great difference for the client both in monetary term as well as in terms of quick and easy access to markets. It is in situations of this sort where anti-corruption norms and trade facilitation have their convergence point. It should come as no surprise that economic operators faced with a situation where relatively small “facilitation payments” might mean that a container full of time-sensitive goods, e.g. foodstuffs, receives prompt and effective customs clearance would resort to corruption of that sort. The same could apply to situations where e.g. a certain classification of the goods in question would mean a sizeable difference in fees or tariffs to be paid. However, it must also be kept in mind that the danger of corruption in Customs is not a one way street. Customs officers obviously also find themselves in situations where they are at the receiving end of corrupt offers or even intimidation from traders and economic operators. Corruption is never a one-way street – for corruption to thrive there must be a supply side as well as a demand. Patricia Sourdin and Richard Pomfret, in their discussion of the issue of corruption and trade costs in their volume on Trade Facilitation take up exactly this issue of demand and supply in corruption with special reference to Custom. Referring to Pranab Bardhan’s 2006 essay “The Economist’s Approach to the Problem of Corruption” they state that:

. . . corruption can operate in both directions: bureaucrats can request bribes to do their jobs or accept bribes to do what they are not supposed to do. These two elements are nowhere clearer than in customs services, where there is much anecdotal evidence of extortion (with the treat of delay if a bribe is not paid) and evasion (e.g. allowing dutiable goods free passage, accepting under invoiced declarations or reclassifying imports to a lower tariff line in return for a bribe).

5.5 Anti-Corruption Measures in Customs and Trade Facilitation

The above discussion on Customs and the importance of an awareness of the corruption risks in Customs is a necessary prelude to a discussion on anti-corruption as a core concept related to the implementation of the Agreement. As the provision of assistance and support for capacity building for developing and least developed Members is written into the Agreement

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through the provisions contained in Articles 13, 21 and 22, it is relevant at this point to mention that Customs administrations around the world with the assistance of the WCO, and other Annex D institutions, such as the OSCE, the World Bank, the United Nations Development Programme (UNDP), do indeed emphasise capacity building as a cornerstone of customs reform and modernisation.\(^{91}\) Anti-corruption and integrity forms an important part thereof and is identified by the WCO in the “Customs in the 21\(^{st}\) Century” policy document as one of the ten building blocks integral to a modern, effective and efficient Customs administration.\(^{92}\) The other aspects pinpointed in the document as integral for the New Strategic Direction for Customs are: globally networked Customs; better coordinated border management; intelligence-driven risk management; customs-trade partnership; implementation of modern working methods, procedures and techniques; enabling technology and tools; enabling powers; a professional, knowledge-based service culture and capacity building.\(^{93}\)

The definition of integrity embraced by the WCO and put forth in instruments published by the organisation is one that describes integrity as “a positive set of attitudes which foster honest and ethical behaviour and work practices”\(^{94}\). In other words, integrity is more than simply the absence of corruption. Rather, it involves developing and maintaining a positive set of attitudes and values that give effect to the organization’s aims, objectives, and the spirit of its integrity strategy. Integrity challenges remain a major obstacle to effective reforms and have a detrimental effect on the overall pride, esprit de corps and professionalism of an organization. A key WCO instrument, the Integrity Development Guide further explains why this particular definition of integrity is relevant in the Customs environment and how it came to be meaningful in this scenario:

> [s]ome administrations have redefined the concept of integrity to not only include combating abuse of power or corruption, but also to conform to standards in service delivery as promulgated in documents such as service standards or client charters. In many administrations, the concept of integrity now means delivering services to meet the expectations of clients and stakeholders. In other words, integrity is more than

\(^{91}\) All these organisations, and many more, along with a number of nation states have set up and implemented extensive capacity building programmes for Customs and other border agencies where the fight against corruption and the promotion of a culture of integrity are the core content. The WCO has participated in programmes set up by e.g. EU Institutions such as FRONTEX, as well as initiatives under the aegies of OSCE, UNDP OECD etc.


\(^{93}\) Ibid, 7-8

\(^{94}\) WCO, ‘Integrity Development Guide’ p. 4
simply the absence of corruption. Rather, it involves developing and maintaining a positive set of attitudes and values which give effect to the organization’s aims, objectives, and the spirit of its integrity strategy.\textsuperscript{95}

It should come as no surprise to anyone that corruption and lack of integrity in a Customs administration has serious consequences, not only for the organisation but for trade, the supply chain and society in general. General wisdom backed by in-country observations and research shows that corruption and lack of integrity in a Customs administration can have some or all of the following consequences:

- Revenue leakage
- Distortion of economic incentives
- Reduction in public trust and confidence in government institutions
- Reduction in the level of trust and cooperation between customs and other government agencies
- Low personnel morale and “esprit de corps”
- Increased costs which are ultimately borne by the community
- Reduction in the level of voluntary compliance with Customs law and regulations
- Reduction in national security and community protection
- Creation of an unnecessary barrier to international trade and economic growth\textsuperscript{96}

5.6 Anti-corruption, capacity building and aid for trade

When theorizing about and discussing anti-corruption and integrity issues in the context of Customs and the implementation of the provisions of the Trade Facilitation Agreement the focus inevitably steers towards the capacity building aspect which is written into the Agreement. Modernisation and the attendant trade facilitation is unlikely, or one could even go as far as saying impossible, without a robust programme of capacity building, and in some instances technical assistance and training. An aspect of anti-corruption and integrity should be woven into all capacity building efforts in order to ensure maximum benefits to stakeholders at all levels as well as the efficiency of the aid in question. The fact that the Trade Facilitation Agreement not only provides for an in-built capacity building support via the provisions of Articles 13, 21 and 22 but furthermore for a categorisation of the implementation of the provisions as provided for in Article 14 lends the capacity building and technical assistance part particular important. It might be argued that this particular aspect of the Trade Facilitation Agreement makes it a development cooperation instrument at the same

\textsuperscript{95} Ibid 4-5

\textsuperscript{96} Ibid 3 (originating in Revised Arusha Declaration) and elsewhere, e.g. in house documents for WCO Integrity Missions.
time that it is a trade agreement. In that vein the anti-corruption and integrity issue turn up again as a corrupt environment and lack of integrity within societies, organisations and businesses is a well-known deterrent to the effectiveness of development aid, including the so called Aid for trade sector. In The Paris Declaration on Aid Effectiveness it is stated that:

Corruption and lack of transparency, which erode public support, impede effective resource mobilisation and allocation and divert resources away from activities that are vital for poverty reduction and sustainable economic development. Where corruption exists, it inhibits donors from relying on partner country systems.97

What is being conveyed in this statement about corruption and lack of transparency acting as a deterrent to donors and making it impossible for them to rely on the systems of partner countries is indeed the case. The interesting part for the discussion here is that the statement can easily be taken and applied to the implementation of trade facilitation measures. Expecting trade facilitation to fully work and provide the attendant benefits of i.a. a reduction in transaction costs, decreased trade restrictiveness and a boost in foreign direct investment in situations where there is little or no transparency and where corruption is rife is, to be blunt, unrealistic. Government institutions, economic operators and the general public are no less likely than the development aid donor community to distrust countries and regimes where corruption is rife and thus by extension are less likely to engage in business transactions in such places.

The Accra Agenda for Action, which was endorsed in Accra, Ghana on 4 September 2008 with the aim in mind to “strengthen and deepen the implementation of the Paris Declaration on Aid Effectiveness”98 puts an even stronger emphasis on issues of accountability, transparency and predictability and Article 24 of the Agenda is a clear statement to that effect with the title “We will be more accountable and transparent to our publics for results.”99

Point d) of that same Article brings to the surface the need for fighting corruption:

Effective and efficient use of development financing requires both donors and partner countries to do their utmost to fight corruption. Donors and developing countries will respect the principles to which they have agreed, including those under the UN Convention against Corruption. Developing countries will address corruption by improving systems of investigation, legal redress, accountability and transparency in the use of public funds. Donors will take steps in their own countries to combat

97 Paris Declaration on Aid Effectiveness (2005) OECD, point v. Article 4
98 Accra Agenda for Action (2008) OECD
corruption by individuals or corporations and to track, freeze, and recover illegally acquired assets.\textsuperscript{100}

In light of the aforementioned capacity building support obligation contain within the Trade Facilitation Agreement this discussion and the promises made by both development donors and aid recipients in terms of coming to terms with the need to combat corruption as it erodes public trust and ruins infrastructures and social development are important and shed further light on the need for the integrity aspect being incorporated into aspect of the implementation of the Trade Facilitation Agreement. In order to do so there is need for concerted effort by all stakeholders, government agencies and the private sector alike, and the requisite tools and instruments must be in existence and be used correctly at the operational level.

\section{Anti-Corruption and the Trade Facilitation Agreement}

\subsection{Section I of the Agreement}

Section I of the Trade Facilitation Agreement is the backbone of the instrument and contains the bulk of the technical provisions and measures that are intended to inspire and ensure the facilitation of international trade. The provisions of Section I focus on measures intended to expedite the movement, release and clearance of goods, including goods in transit as well as laying out detailed provisions regarding cooperation between customs authorities. It is thus through the Articles and provisions of Section I of the Agreement that the clarification and improvement of GATT articles V, VIII and X as mandated by the WTO General Council takes place as such.\textsuperscript{101} As indicated in Chapter 5 a rudimentary classification of Section I shows the provisions falling into the categories of transparency and appeals, transit and fees and formalities relating to import, export and transit. Below is a concise overview of the main Articles as regards issues of anti-corruption and integrity. While all the Articles of the Agreement have a bearing on those issues the ones dealing explicitly with enhancing impartiality, non-discrimination and transparency via measures to do with publications, consultations, appeals and advance rulings as well as Articles laying out trade facilitation measures directly related to the release and clearance of goods and customs and border agency cooperation will be highlighted.

\textsuperscript{100} Ibid, point d, Article 24.

\textsuperscript{101}Decision Adopted by the General Council on 1 August 2004, WTO Doc. WT/L/579, Annex D paragraph 1
6.1.1 Articles 1-5

The provisions of Articles 1 through 5 focus on issues of publication and the availability of information, the opportunity for traders and other interested parties to comment on laws, regulations and rules relating to import, export and transit as well as provisions regarding consultations, advance rulings, procedures for appeal or review and regimes regarding notifications when enhanced controls or inspections are deemed necessary at the border. The title of Article 5: other measures to enhance impartiality, non-discrimination and transparency neatly ties together the content of this first part of the Agreement as it indicates that the provisions of both Article 5 and the four preceding Articles are expected to formulate a system where border procedures (import, export and transit procedures) are based on a regime of impartiality, non-discrimination and transparency.

i. Article 1

The measures provided for in Article 1 concern the publication and availability of various types of information needed for the execution of import, export and transit transactions. The language of the first paragraph of Article 1 is assertive stating that “[e]ach Member shall promptly publish the following information in a non-discriminatory and easily accessible manner . . .” The use of “shall” and the absence of any qualifiers in paragraph 1 of Article 1 indicates the importance of the publication measure to the overall trade facilitation agenda and it is furthermore an issue of tantamount importance in terms of transparency, predictability and ultimately integrity. It is difficult, if not impossible to facilitate procedures that are not clearly demarcated and known to all parties involved and any obfuscation and lack of clarity opens up potentialities for corrupt activities. The information explicitly covered under the provisions of Article 1 includes procedures for importation, exportation and transit, rates of duties and taxes imposed in connection with import and export as well as government fees for the same purposes, rules relating to customs classification and valuation, laws, regulations as well as administrative rulings in the field of rules of origin, prohibitions in terms of import, export and transit as well as penalty provision relating to breaches of the same, all bi- and multilateral agreements (in whole or in part) relating to import, export or transit as well as procedures relating to tariff quotas.

102 Trade Facilitation Agreement, WTO Doc. WT/L/940 Article 1
103 Ibid
The availability of information on Customs matters to interested persons is one of the key elements of trade facilitation. Persons and legal entities alike often need specific information about a particular operation they intend to carry out. Sometimes the decision whether or not to proceed with the operation depends upon the information supplied by Customs. Lack of information may cause delays in the release of goods or cause substantial costs for traders and producers, many of which are SMEs located in developing countries. Provision of relevant information on customs matters is, furthermore, important in terms of good and transparent governance and likely to contribute to an atmosphere of integrity.

Paragraphs 2-4 of Article 1 set out in more detail the ways in which the information listed in paragraph 1.1 is to be, or could be published. The potential problem related to the provisions of paragraph 1.1 is that it simply states that the information shall be published but does not indicate in what way. Paragraph 2 refers to information available through the internet and paragraph 3 sets out requirements regarding enquiry points where reasonable enquiries of governments, traders and other interested parties are answered and necessary forms and documents as per subparagraph 1.1(a) are provided. Paragraph 4 then lays out the obligation of members to notify the Committee on Trade Facilitation on places of publication, resource locators of websites and contact information of the enquiry points set up in accordance with paragraph 3.1. 104 Paragraphs 2 and 3 of Article 1 can be said to “suffer” from what has been mentioned earlier, or an opaqueness of language which manifests itself in phrasings like “to the extent possible”, “whenever possible”, “within its available resources” and so on. 105 This does, to a large extent, detract from the usefulness of the Article, both in sense of the actual requirement to publish information in the interests of Trade Facilitation and no less in terms of the transparency aspect and the potential the Article could have on anti-corruption and integrity issues in terms of international trade.

ii. Article 2

Article 2 contains provisions on opportunity to comment, information before entry into force and consultations between border agencies, traders and other stakeholders. 106 The provisions of Article 2 are a clear indication to Members of the necessity of and need for a dialogue between the public and private sectors and that open communication and cooperation is the

104 Ibid
105 Ibid
106 Ibid, Article 2
way to go in a regime that is open and rule based. Article 2 contains provisions that are of key importance in terms of real trade facilitation based on mutual trust and cooperation. Here again the language is a bit shifty, that is to say, the obligations are worded in such a way that no one need feel threatened or pushed into a situation beyond their control. Paragraphs 1.1 and 1.2 are showpieces of this, using wording such as: “Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system . . .“ (emphasis added)\(^\text{107}\) That being said, the Article is still an important step in the direction of a transparent and cooperative relationship between the public and private sectors in terms of the border procedures relating to import, export and transit. It also needs to be kept in mind that most likely it would not have been possible to successfully conclude the negotiations for the Trade Facilitation Agreement without these kinds of modifications and accommodations being made.

**iii. Article 3**

Article 3 focusses on the issue of Advance rulings, which to all intents and purposes are rulings or binding decisions issued by a Customs administration at the request of a trader or other economic operator planning to participate in an export, import or transit operation. The benefit of an advance or binding ruling for the trader is generally the fact that it provides them with a certain legal guarantee that the decision published in the advance ruling will apply to the transaction at hand and other identical transactions within the lifespan of the ruling. Advance rulings are often requested in terms of e.g. tariff classifications of goods as well as in terms of origin. In subparagraph (a) of paragraph 9 the definition and scope of the advance rulings is defined as covering the “treatment 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.”\(^\text{108}\) Furthermore, in subparagraph (b) Members are encouraged to provide advance rulings on issues of customs value, relief or exemption from customs duties, application of requirements for quotas (including tariff quotas) and any additional matters for which a Member considers an advance ruling appropriate.\(^\text{109}\) Advance rulings are an excellent tool for providing clarity and predictability for traders and other economic operators conducting cross border business. Receiving an advance ruling on e.g. the origin of goods or the tariff classification provides the economic operator with a certain amount of stability for planning

\(^{107}\) Ibid
\(^{108}\) Ibid Article 3, paragraph 9(a)
\(^{109}\) Ibid, subparagraph (b)
and conducting her or his business and given the complicated nature of customs and border procedures it furthermore means that transactions that are conducted with time constraints are more likely to run smoothly and efficiently. The stability provided by binding/advance rulings does indeed improve transparency and predictability as it does, to the extent of the scope of the ruling, remove the strain of border officials/customs officers having to make potentially complicated rulings under time restraints and thus not only contributes to the facilitation of legitimate trade but also minimizes the potential for bribing and other forms of petty corruption at the border posts.

*iv. Article 4*

In Article 4 provisions are made for appeal and review procedures. Given the fundamental importance of the right to appeal and/or review of administrative and judicial decisions to an independent authority higher than the one originally issuing the decision at hand, the language of Article 4 leaves little room for maneuvering. The premise of the Article is that:

Each Member shall provide that any person to whom customs issues an administrative decision has the right, within its territory, to:

(a) An administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;

and/or

(b) A judicial appeal or review of the decision.\(^{110}\)

The provisions of the Article furthermore stipulate that the procedures for appeal or review are done in a non-discriminatory manner and that when a petitioner is not given a decision within set periods or without undue delay the right to further appeal or further review by the administrative authority or judiciary, and footnote 5 states that administrative silence on appeal or review may be recognized by Members as a decision in favour of the petitioner in accordance with the Member’s laws and regulations.\(^{111}\) In paragraph 6 of the Article Members are encouraged to also make the provisions applicable to administrative decisions issued by relevant border agencies other than customs.\(^{112}\) Given the importance of Customs in cross border trade and trade facilitation it is not surprising that the binding provisions of the Article focus on administrative decisions made by Customs authorities but at the same time it seems

\(^{110}\) Ibid, Article 4

\(^{111}\) Ibid, Article 4, footnote 5

\(^{112}\) Ibid, Paragraph 6
self-evident that the impact of the Article would be that much greater if the provisions of Paragraph 6 were binding as well.

The possibility of administrative and judicial appeal and review are of the utmost importance in terms of ensuring a level playing field for traders and other economic operators and provide a protection mechanism against potentially unlawful or decisions of Customs (or indeed other border agencies) as well as of acts of omission that may be onerous to economic operators and other customers who may have to depend on the decisions made by Customs and the various border agencies enforcing rules, regulations relating to import, export and transit operations.

v. **Article 5**

Article 5 focusses on trade facilitation measures that relate to the transparency and predictability of acts of enhanced controls and inspections, of the detention of goods for inspection by Customs or other competent authority as well as laying out a regime for test procedures in terms of samples of imported goods when the first testing shows an adverse finding. The measures of Article 5 are all in the vein of ensuring transparency in terms of proper notifications and publishing notifications so that those involved are at all times informed of controls, inspections, tests etc. that they will be subject to. Predictability and giving the economic operators the benefit of the doubt regarding test procedures is furthermore ensured via the provisions of paragraph 3. Article 5 thus complements and widens up the content of the preceding Articles as far as issues of impartiality, non-discrimination and transparency are concerned.

6.1.2 **Articles 7 and 10**

Articles 7 and 10 of the Agreement contain detailed provisions on the release and clearance of goods and formalities connected with import, export and transit. The provisions of those two Articles are the source of potentially major changes that need to be entered into by Customs authorities around the world – developed economies as well as those that are developing or least-developed – if real progress is to be made in terms of trade facilitation. The provisions of the Articles centre on the core business of Customs and are to a large extent concrete and practical in terms of measures that will enhance efficiency and competitiveness and lead to increased transparency and predictability of the supply chain and trade flows.
i. Article 7

Article 7 contains a number of practical measures aimed at modernising Customs processes with the goal in mind of simplifying, harmonising and standardising procedures and work processes leading to increased transparency and predictability in order to facilitate trade. The measures provided for in the Article are i.a. pre–arrival processing, electronic payment, risk management, post-clearance audit, trade facilitation measures for Authorized Operators (AEO Programmes) and rules relating to the release and handling of cargo containing perishable goods.

i.i. Electronic Payment

Paragraph 2 of Article 7 states that Members “. . .shall to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes fees and charges collected by customs incurred upon importation and exportation.”\(^{113}\) The use of “shall” indicates that this is indeed an important trade facilitation issue which Members are expected to implement, but the qualifier “to the extent practicable” does undeniably detract from the forceful start. However, given the real life situations that may exist in a number of Member states a qualifier of this sort is necessary, as one does not easily implement relatively complicated systems such as those required for electronic payments in situations where there is either no, or insufficient infrastructure. This is indeed the case with other electronic and/or IT solutions, which are an important factor not only of trade facilitation but also of integrity and anti-corruption efforts and initiatives. Handling of cash and cash-payments are indeed seen as a hotspot for corruption risks, especially in terms of the demand for so called small bribes and “facilitation payments”. Transparency International, among others has pointed out the risks involved with an organisational culture where the demand for small bribes and facilitation payments is allowed to flourish.\(^{114}\) While there is no single solution to the problem, the elimination or control of cash payments is indeed seen as at least a step in the right direction\(^{115}\) and the provisions of the paragraph in question certainly serve as a call to action for Members in this regard.

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\(^{113}\) Ibid, Article 7, paragraph 2

\(^{114}\) See e.g. Transparency International UK, Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes including Facilitation Payments. June 2014

\(^{115}\) Ibid, p.21
i.ii Risk Management

Customs risk management is a fundamental tenet of effective trade facilitation. Paragraph 4 of Article 7 provides for risk management to be used in customs control. This focus on risk management has grounding in e.g. the Revised Kyoto Convention where Standard 6.3 states that “In the application of Customs control, the Customs shall use risk management.” The SAFE framework also places great emphasis on risk management as without such a module it would be impossible to practically implement programmes such as the AEO. In general the adoption of a risk management framework into the working environment of a Customs authority means the introduction of “risk-based decision making and procedures into the organization that enable a balance between control, facilitation and supply chain security to be maintained.” Balancing the triple issues of control, facilitation and the security of the supply chain is exactly what needs to be achieved if Customs is to be able to fulfil its mandate of both facilitating trade and protecting society and securing state revenue. It seems self-evident that without the application of risk management of some sort in relation to customs and border procedures world trade would be extremely slow and cumbersome. UNECE points out in its Trade Facilitation Implementation Guide that:

In far too many countries, Customs still applies a 100% physical inspection regime, i.e. every shipment is stopped and physically examined (partially or completely), causing significant delays at border crossings, ports and airports. Such 100% inspection regime also creates an enabling environment for informal payments to speed up the process.

Which by extension means that the introduction of a risk management framework is likely to not only result in more streamlined border procedures that increase speed and facilitate trade but that it also will function as a transparency and predictability measure which in turn will curb corrupt practices e.g. in the form of small bribes and so called facilitation payments. In order for the risk management framework to have the desired effect, both in terms of facilitating trade and ensuring fair and equitable treatment it is necessary to make sure that the

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system/framework itself is correctly set up and applied. This issue is indeed alluded to in Paragraph 4.2 where it is stated that:

Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.\textsuperscript{119}

The avoidance of arbitrary and unjustifiable discrimination is very much a transparency issue, i.e. if the risk management system is worth its salt and properly set up and administered it should lead to an end result that will facilitate legitimate trade without compromising the security of the state and the safety of the public as well as ensure a regime that is based on fair and equitable principles. In order to facilitate the setting up of such a system and ensuring the transparency of the selectivity criteria Paragraph 4.4 indicates a list (non-exhaustive) of appropriate criteria, such as: “Harmonized System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of the traders, and type of means of transport.”\textsuperscript{120}

\textbf{i.i.iii Post-clearance Audit}

Paragraph 5 of Article 7 provides for the use of the methods of post-clearance audit with the aim in mind of “expediting the release of goods . . . [and] to ensure compliance with customs and other related laws and regulations.”\textsuperscript{121} The use of post-clearance audit is dependent on a risk management regime of some sort being in operation as Paragraph 5.2 provides that:

Each member shall select a person or a consignment for post-clearance audit in a risk-based manner, which may include appropriate selectivity criteria. Each Member shall conduct post-clearance audits in a transparent manner. Where the person is involved in the audit process and conclusive results have been achieved the Member shall, without delay, notify the person whose record is audited of the results the person’s rights and obligations, and the reasons for the results.\textsuperscript{122}

The Revised Kyoto Convention stipulates, in Standard 6.6, that “Customs control systems shall include audit based controls.”\textsuperscript{123} According to UNECE:

Post-clearance audit is a critical control methodology for Customs and other border regulatory authorities as it enables them to apply a multi-layered risk-based control

\textsuperscript{119} Trade Facilitation Agreement WTO Doc. WT/L/940 Article 7, paragraph 4.2
\textsuperscript{120} Ibid, Article 7, paragraph 4.4
\textsuperscript{121} Ibid, Article 7 paragraph 5.1
\textsuperscript{122} Ibid, Article 7, paragraph 5.2
\textsuperscript{123} WCO, Revised Kyoto Convention.
approach by moving from a strictly transaction-based control environment to a stronger audit-based administration.\textsuperscript{124}

As indicated above, too heavy a reliance by Customs on transaction-based control is prone to creating an environment where corruption is enabled via small bribes and facilitation payments aimed at speeding up transactions or gaining access for illegal or sub-standard goods. Furthermore, in order to be able to apply a number of trade facilitation measures, not least of which is the system of authorized economic operators (AEO) a robust system of post-clearance audit must be operational.

i.iv. Trade Facilitation Measures for Authorized Operators

Paragraph 7 of Article 7 provides for additional trade facilitation measures for operators who meet specified criteria, or so called Authorized Economic Operators, AEO for short. Even if sentence two of point 7.7.1 states that “[a]lternatively, a Member may offer such facilitation measures through customs procedures generally available to all operators and not be required to establish a separate scheme”\textsuperscript{125} the setting up of separate AEO schemes or programmes is what has been done in most western European states as well as in countries in various regions around the world. If authorities are serious about their trade facilitation commitments setting up an AEO programme cannot be avoided. What is at stake here is, at least to some extent, the competitiveness of a country in terms of world trade and as a credible investment partner. The primary implementation and subsequent day to day running of the AEO programme must be budgeted for and an understanding be achieved at the fiscal level that this is something that cannot be avoided if the country wants a competitive edge in world trade. Furthermore, it may be mentioned that establishing and maintaining an AEO programme is already one of the obligations a country undergoes by pledging to implement the WCO’s SAFE Framework of Standards. When looked at in terms of an integrity regime, AEO systems are extremely important as they are based upon a dialogue between Customs authorities and the private sector via the operator applying for certification as an AEO and thus provide an opportunity to review processes and procedures as well as establishing a regime based on cooperation and mutual trust. The trade facilitation benefits of an AEO programme are undeniable as the partnership is based on a commitment to voluntary compliance by the economic operator and a commitment by Customs to facilitate legitimate trade via a commitment to inspection based


\textsuperscript{125} Trade Facilitation Agreement WTO Doc. WT/L/940 Article 7, paragraph 7
on risk assessment and simplification and standardization of requirements based on international standards.

i.v. Perishable Goods

Paragraph 9 of Article 7 contains measures that relate specifically to perishable goods. The reasons for singling out this type of goods for specific mention in the Agreement is the importance of goods of this sort in the supply chain. It is obviously of fundamental importance that cargo containing e.g. fresh food stuffs not be delayed at the border due to risk of damage and decay. Perishable goods, because of their nature, need to be cleared through Customs and other relevant border agencies as fast as possible. Delays in the release and clearance of such goods reduce their shelf life and may affect their quality in an irreversible manner. Situations like that imply substantial costs for traders and producers, many of which are SMEs located in developing countries. This provision seeks to achieve some important objectives concerning the trade in perishable goods, such as: avoidance of unnecessary controls; expedited release and clearance; consideration to the need of appropriate storage and enhanced transparency. From a trade facilitation perspective perishable goods can be seen to epitomize the need for speedy and efficient handling at the borders and in the same vein this is no doubt one of the most vulnerable parts of the supply chain in terms of potential for corruption. It does not take a great leap of the imagination to foresee that a trader, importing a cargo of perishable goods, faced with the prospect of slow or inefficient service at a border crossing point will feel compelled to do what it takes to get his cargo cleared through Customs and processed by the relevant border agencies as quickly as possible. Thus there is a clear opportunity for the creation of an organizational regime based on a demand for bribes or other forms of corrupt activities unless the situation is tackled in appropriate ways. Clear procedures based on legal measures and best practice is needed and the provisions of Paragraph 9 are at least a step in the right direction in that regard.

ii. Article 10

The provisions of Article 10 aim at “minimizing the incidence and complexity of import, export, and transit formalities and decreasing and simplifying import, export, and transit documentation requirements . . . “126 The Article contains measures regarding:

• Formalities and documentation requirements

126 Trade Facilitation Agreement WTO Doc. WT/L/940 Article 10
• Acceptance of copies
• Use of international standards
• Single Window (a single entry point for traders to submit documentation to relevant authorities and agencies)
• Pre-shipment inspection
• Use of customs brokers
• Common border procedures and uniform documentation requirements
• Rejected goods
• Temporary admission of goods and inward and outward processing

While all the provisions of the Article are important in terms of trade facilitation the measures relating to the use of international standards and the establishment and maintenance of a so-called Single Window are especially important in terms of a regime of integrity and anti-corruption. Encouraging Members to make use of International Standards as is done in Paragraph 3 of Article 10 is an important step in ensuring uniformity of implementation of not only trade facilitation measures but no less so security and safety issues as well as increasing transparency and predictability which in turn should lead to an environment where corruption can be more easily tackled.

ii.i. Single Window

Paragraph 4 of Article 10 contains provisions relating to the establishment and maintenance of a Single Window “enabling traders to submit documentation and/or data requirements for importation, exportation or transit of goods through a single entry point to the participating authorities or agencies.” The paragraph on the Single Window is relatively short and simple which belies the real life complexity of the matter. In Paragraph 4.4 Members are encouraged “to the extent possible and practicable” to operate their Single Window by means of information technology. Given the Agreement’s focus on not expecting developing and least-developed Members the opportunity to implement the provisions to the best of their abilities and at a pace that they can sustain it is not surprising to see a provision of this sort regarding the Single Window. However, even if a Single Window the functions of which are not based on information technology are no doubt beneficial and an improvement on a situation where no heed is given to providing traders with some sort of hub where they can deposit documents and receive information, it seems clear that in order to provide maximum

127 Ibid, Article 10, Paragraph 4
128 Ibid, Paragraph 4.4
trade facilitation benefits the operation of a Single Window will have to be based upon the
tenets of information technology and provide traders and border agencies alike with electronic
access to documents and data. According to UNECE a Single Window (in whatever form,
whether purely a physical portal or an electronic one) can be:

...an important facilitation tool. If implemented effectively, it can simplify
procedures and formalities for document submission and data collection and can save
precious time and money. The following are the main benefits that key stakeholders of
a SW project can achieve:

Government: increase in government revenue, enhanced compliance with rules,
improved efficiency in resource allocation, better trade statistics,

Traders: faster clearance times, a more transparent and predictable process and less
bureaucracy,

Customs: improved staff productivity through the upgraded infrastructure, increase in
customs revenue, a more structured and controlled working environment, and
enhanced professionalism,

Economy as a whole: improved transparency and governance and reduced corruption,
due to fewer opportunities for physical interaction.\(^\text{129}\)

In terms of the anti-corruption and integrity agenda the potential benefits accorded to the
economy as a whole are quite important. As is the case with many other trade facilitation
measures such as e.g. electronic payment, to name an obvious one, the existence of a Single
Window will reduce physical interaction between traders and officials and thus reduce the
risk of petty corruption. A Single Window based upon clear legal provisions and operated
according to transparent procedures should also lead to a simplification and standardization of
work-procedures and requirements by border agencies or other government authorities thus
minimizing the risk of a complex environment where customers feel the need to resort to
bribing or engaging in corrupt practices in order to be able to go about their business in a
 speedy and efficient manner.

6.2 Sections II and III

Section II contains provisions regarding special and differential treatment provisions for
developing country members and least-developed country members. These provisions and

window-for-trade.htm
their potential implications have been discussed to some extent above. Section III contains text on institutional arrangements and final provisions. Paragraph 1 of Article 23 provides for the establishment of a Committee on Trade Facilitation which functions as a governing body for the Agreement and is tasked with affording members the opportunity to consult on any matters related to the operation of the Agreement or the furtherance of its objectives. Members are also encouraged to raise before the Committee questions relating to issues on the implementation and application of the Agreement.\(^\text{130}\) This would seem to make the Committee a first point of call in any potential disputes between Members relating to trade facilitation measures and the application of the Agreement. The existence of the WTO Dispute Resolution Mechanism lends an aura of seriousness to this function of the Committee. So far trade facilitation measures have not been subject to a mechanism as formal as this and the lack of a formal enforcement mechanism related to e.g. WCO instruments means that potential violations do not have the same repercussions.

The provision, in paragraph 2 of Article 23 for the establishment of a national committee on trade facilitation is in many ways significant. Members are obligated to establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of the Agreement.\(^\text{131}\) What this means in real terms is that Members must set up a formal forum for consultation on trade facilitation, even if the possibility exists to task an existing committee or body to take on those responsibilities. The benefits of this are that a dialogue between governments, relevant government institutions and the private sector is secured. This is not only a benefit in terms of conventional trade issues but no less in terms of ensuring transparency and providing stakeholders with a forum for having their voice heard. A forum such as this one has the potential to significantly improve cooperation between stakeholders in international trade, increase openness and transparency and contribute to the anti-corruption agenda.

\(^{130}\) Trade Facilitation Agreement WTO Doc. WT/L/940 Article 23, Paragraph 1

\(^{131}\) Ibid, Article 23, Paragraph 2
7 WCO Agreements and Instruments Relevant for the Implementation of the Trade Facilitation Agreement

The WTO provenance of the Trade Facilitation Agreement from Articles V, VIII and X of the GATT 1994 has already been the subject of discussion above. The objectives and provisions of the Trade Facilitation Agreement are, however also to a large extent based on existing conventions, instruments and standards, in particular the WCO’s Revised Kyoto Convention\(^{132}\) and the WCO’s SAFE Framework of Standards\(^{133}\). This should come as no surprise given the fact that the trade facilitation content proper almost exclusively relates to Customs matters and cooperation. In addition to the RKC and the SAFE Framework a number of related tools and instruments may safely be said to have informed the spirit and provisions of the Agreement. Among those are the WCO’s Time Release Study, the Coordinated Border Management Compendium, the Single Window Compendium, the Risk Management Compendium, Post-Clearance Audit Guidelines and many others embodied in the WCO Economic Competitiveness Package\(^{134}\). The WCO (and other organisations as well) have prepared detailed conversion charts that map the provisions of the Trade Facilitation and compare them to existing tools and instruments.\(^{135}\) The WCO conversion table clearly shows how the provisions and measures of the Trade Facilitation Agreement are based on and complement other WTO Agreements as well as instruments developed by the WCO. There is no need here to dwell extensively on the exact way in which particular provisions and paragraphs of the Trade Facilitation Agreement are based on existing tools and instruments, but a brief overview of the main instruments informing the Agreement is in order. This is important in order to understand the correlation and interoperability of the Agreement with Customs tools and instruments and to provide an insight into the best practice standards and

\(^{132}\) The Revised Kyoto Convention’s formal title is „The International Convention on the Simplification and Harmonization of Customs Procedures (as amended)“, the original incarnation of the Kyoto Convention was adopted by the WCO Council in Kyoto, Japan in 1973 and entered into force in 1974. The Revised version (Protocol of Amendment) was adopted by Council in 1999 and entered into force in 2006.


\(^{134}\) Information on the WCO Economic Competitiveness Package can be accessed on: http://www.wcoomd.org/en/topics/key-issues/ecp-latest-proposal.aspx

\(^{135}\) The WCO has made a very thorough analysis of Section I of the WTO Trade Facilitation Agreement which is published on the organisation’s website. See WTO AGREEMENT ON TRADE FACILITATION - Analysis of Section I (and Article 23) based on the WTO TF Toolkit and potential implications on WCO, available on: http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/wto-atf/analysis-of-section-i/analysis-of-section-i-november-2014_en.pdf?la=en
guidelines which inform it and which, as indicated above, may gain added importance due to their inclusion in the main body of the Agreement itself.

7.1 The Revised Kyoto Convention (International Convention on the Simplification and Harmonization of Customs Procedures)

The Revised Kyoto Convention functions as a roadmap towards a modernised, effective and efficient Customs administration. The Convention promotes trade facilitation and effective controls through provisions that detail the application of simple yet efficient Customs procedures. According to the WCO the RKC will, once it is widely implemented:

- provide international commerce with the predictability and efficiency that modern trade requires. The revised Kyoto Convention elaborates several key governing principles- chief among these are the principles of:
  - transparency and predictability of Customs actions;
  - standardization and simplification of the goods declaration and supporting documents;
  - simplified procedures for authorized persons;
  - maximum use of information technology;
  - minimum necessary Customs control to ensure compliance with regulations;
  - use of risk management and audit based controls;
  - coordinated interventions with other border agencies;
  - partnership with the trade.  

The Revised Kyoto Convention is the most important background document for the WTO Trade Facilitation Agreement. A quick look at the WCO’s very thorough document “Analysis of Section I (and Article 23) based on the WTO TF Toolkit and potential implications on WCO” shows that the Revised Kyoto Convention is indeed the basis for a great many of the provisions of the Trade Facilitation Agreement. Furthermore, accession to the Revised Kyoto Convention is considered to function as a certain benchmark signalling to the outside world that a Customs administration adheres to International Standards and best practices. According to Tadashi Yasui, of the WCO’s Research Unit, accession to the Revised Kyoto Convention produces what he terms an “announcement effect” namely that:

On many occasions it has been argued that RKC accession produces a positive “announcement effect” that an RKC Contracting Party is certified as having international Customs standards in place. A similar effect might apply to a certain


extent to economies which are making an effort towards RKC accession. While it is important to implement international Customs standards, it is difficult for governments to prove this without acceding to the RKC. Due to the legally binding nature of the RKC, being an RKC Contracting Party gives traders and other stakeholders inside and outside the country’s economy a firm message that the government promotes and maintains efficient and modern Customs procedures consistent with international standards, and ensures that legitimate trade is facilitated without compromising the Customs controls function. In addition, it assists an RKC Contracting Party to attract foreign direct investment (FDI).\textsuperscript{138}

Given the aims and contents of the Revised Kyoto Convention and its predecessor it is not surprising that it provides a sound and firm basis for the provisions of the Trade Facilitation Agreement. Furthermore, the Convention itself is a clear testament to the fact that the Customs community was aware of and involved in trade facilitation and the attendant modernisation efforts from the start.

\textbf{7.2 8.2 SAFE Framework of Standards to Secure and Facilitate International Trade}

The SAFE Framework of Standards to Secure and Facilitate International Trade was adopted by the WCO Council in 2005. The framework was intended to act as a deterrent to international terrorism, secure revenue collections and promote trade facilitation worldwide. In 2007 the addition of a major section on the conditions and requirements for Authorized Economic Operators (AEO) was added to the Framework.\textsuperscript{139} The SAFE Framework has been widely accepted and adopted by the members of the WCO.\textsuperscript{140} The SAFE Framework continues to be updated in order for it to answer to the needs of the Member states using it and to reflect the ever changing trade environment in terms of issues of safety, security and trade facilitation. In 2015, on the 10\textsuperscript{th} anniversary of the WCO Council’s adoption of the Framework, a new section, the so-called Pillar 3 on Cooperation between Customs and other Government and Inter-Government agencies was added.\textsuperscript{141} The two older pillars of the Framework are Pillar 1 focusing on cooperation between customs agencies themselves and Pillar 2 which focuses on cooperation between customs and business. The SAFE Framework

\textsuperscript{139} For more information on the SAFE Framework see e.g. http://www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package-for-new-site.aspx
\textsuperscript{140} Ibid
\textsuperscript{141} Ibid
draws on the Revised Kyoto Convention as well as other WCO instruments such as the
Integrated Supply Chain Management Guidelines. According to WCO Secretary General
Mr Kunio Mikuriya in his foreword to the 2015 revised edition of the SAFE Framework it is:

\[\ldots\] a dynamic instrument that balances facilitation and control, while promoting the
security of the global trade supply chain.\[143\]

There are obvious links between the Trade Facilitation Agreement and the SAFE Framework
as the above quotation indicates. Not least among which is the 2007 addition to the
Framework, namely the provisions regarding the requirements and conditions for Authorized
Economic Operators (AEO’s). The Trade Facilitation Agreement introduces the concept of
specific trade facilitation measures aimed at authorized operators in Paragraph 7 of Article 7.

\[144\] This section of the Agreement is indeed based on the tenets of the SAFE Framework and is
an excellent illustration of trade facilitation based on an awareness of the interplay of
facilitation measures and customs control and enforcement.

The Revised Kyoto Convention and the SAFE Framework of Standards do indeed form the
basis and backbone of the provisions that make up the Trade Facilitation Agreement and the
links between these instruments are a testament to the Customs slant of the Agreement.
However, as will be discussed below, these are not the only connections between the Trade
Facilitation Agreement and tools and instruments developed under the aegis of the WCO and
widely used by its membership. The Revised Arusha Declaration, as is indeed indicated in the
WCO Conversion Chart \[145\], is a definite influence in terms of the good governance and
integrity aspects of the Agreement.

8 **WCO Integrity tools and instruments and their link to the Trade Facilitation Agreement**

The WCO has developed a number of tools and instruments the purpose of which is to
promote and strengthen integrity in Customs and amongst its stakeholders. The instruments

\[142\] WCO, Integrated Supply Chain Management Guidelines (2004),

\[143\] Kunio Mikuriya ‘Foreword to the SAFE Framework of Standards’ (June 2015)

\[144\] Trade Facilitation Agreement WTO Doc. WT/L/940 Article 7, paragraph 7.

\[145\] WCO, ‘Analysis of Section I (and Article 23) based on the WTO TF Toolkit and potential implications on WCO’ (November 2014)
and tools cover a variety of topics related to the development of a Customs environment grounded in the principles of anti-corruption and integrity. The importance of these instruments in light of the Trade Facilitation Agreement is the groundwork that they provide in terms of providing examples of best practice in the field. Given the insistence in the Trade Facilitation Agreement on the use of best practice these instruments provide excellent guidance to those implementing the Agreement. The main integrity instruments are:

- The Revised Arusha Declaration (2003, original from 1993)
- Revised Integrity Development Guide (originally published in 2003, latest version from 2014)
- Model Code of Ethics and Conduct (2012)
- Transparency and Predictability Guidelines (2016)

Those instruments, in particular the Revised Arusha Declaration, inform the contents and reflect the spirit of the Trade Facilitation Agreement. The Integrity Development Guide functions as a practical guide for the implementation of the Revised Arusha Declaration and provides a developmental aspect to the integrity agenda. The Transparency and Predictability Guidelines are to all intents and purposes a direct by-product of the Trade Facilitation Agreement and testament to the emphasis the WCO has put on trade facilitation and the key role Customs administrations must assume related to the implementation of the Agreement.

### 8.1 Revised Arusha Declaration

The WCO’s Revised Arusha Declaration Concerning Good Governance and Integrity in Customs adopted at the 101st/102nd Council Session in 2003 is, as the title indicates, a revised and modernised version of the Arusha Declaration Concerning Integrity in Customs adopted at the 81st/82nd Council Session in 1993. The Revised Arusha Declaration is a...
central document as far as anti-corruption and integrity in Customs is concerned. It is a strong statement by the leaders of the world’s Customs Administrations where the critical importance of integrity for societies in general and Customs in particular is brought to the foreground and the detrimental effect corruption has on national security, foreign investment, international trade, customs and on societal infrastructure in general is emphasised. The negative consequences of corruption that are promulgated in the Revised Arusha Declaration were listed in the above discussion and the list clearly shows how the negative effects of corruption as they may manifest themselves in Customs are by no means limited to the Customs sector. Rather, corruption in any sector influences and affects societal infrastructure in a much larger sense, as no act or organisation for that matter, can be viewed as an island – but is rather always a part of a much larger whole. This is indeed accepted and recognised in the Revised Arusha Declaration as it is stated in the Preamble that “corruption can be combated effectively only as part of a comprehensive national effort”. It might furthermore be argued that given the prevalence and importance of international cooperation and international trade in an ever increasingly globalised world that a “comprehensive national effort” to fight corruption might not even be enough and that a globalised awareness and willingness to work across borders on the issue is needed. This is also, at least partly, recognised in the preamble to the Revised Arusha Declaration where it is affirmed that a firm political will and sustained commitment to the fight against corruption should be a priority for all Governments. The Declaration then pinpoints ten key factors that an effective national Customs Integrity Programme must address, namely leadership and commitment, regulatory framework, transparency, automation, reform and modernisation, audit and investigation, code of conduct, human resource management, morale and organisational culture and relationship with the private sector. Looking at the list through the lens of the Trade Facilitation Agreement clearly shows how relevant the Revised Arusha Declaration is in the context of the issues and challenges of effectively and successfully facilitating global trade.

Gareth Lewis from the Australian Customs and Border Protection Services does an excellent job of summing up the main issues related to the ten key integrity factors outlined in the

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150 WCO, The Revised Arusha Declaration: Declaration of the Customs Co-Operation Council Concerning Good Governance and Integrity in Customs (Done in 1993 and revised in 2003)
151 Ibid
Revised Arusha Declaration in his article “Integrity: an age-old problem for Customs that demands a new approach”:

1. **Leadership and Commitment**: As is the case with any major organisational issue, the prime responsibility for corruption prevention and the implementation of integrity measures resides with the Customs head and his/her executive. Beyond that, all managers and supervisors must accept an appropriate level of responsibility and accountability and set an example to staff consistent with the agency’s stated integrity program.

2. **Regulatory Framework**: ‘Customs laws, regulations, administrative guidelines and procedures should be harmonized and simplified to the greatest extent possible so that Customs formalities can proceed without undue burden. This process involves the adoption of internationally agreed conventions, other instruments and accepted standards. Customs practices should be reviewed and redeveloped to eliminate red tape and reduce unnecessary duplication. Duty rates should be moderated where possible and exemptions to standard rules be minimized. Systems and procedures should be in accordance with the revised International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention’).

3. **Transparency**: All parties involved with Customs should experience optimal predictability in their business interactions. Statutory law, procedures and administrative guidelines should be in the public domain, applied uniformly and consistently. The right to exercise discretion by officers must be clearly understood and simple appeal or administrative review mechanisms should be established. All of this ought to be set out in client service charters or similar mechanisms.

4. **Automation**: The adoption of modern IT systems to automate customs functions will improve efficiency and effectiveness while increasing accountability. IT systems provide audit trails that empower Customs to review discretionary decision-making by individuals at all levels.

5. **Reform and Modernisation**: Obsolete and cumbersome practices provide an ideal environment for incentives to circumvent official channels through bribes and other ‘unofficial fees’. Reform must focus on all aspects of customs operations and performance, that is, it cannot be simply outsourced to the application of modern IT.

6. **Audit and Investigation**: Monitoring and control mechanisms such as internal check, internal and external auditing and rigorous investigation/prosecution regimes will encourage an environment hostile to corrupt practices therefore fostering higher levels of corporate integrity.

7. **Code of Conduct**: This mechanism is now an established component of most national integrity programs. Successful examples must be very practical and unambiguous, explaining the behaviour expected of all customs officers.
8. Human Resource Management: The implementation of sound human resource management (and human resource development) including merit-based selection, adequate remuneration, staff rotation and appraisal systems are examples of the kinds of practice that should characterise a modern customs administration, thereby minimising the potential for corruption.

9. Morale and Organisational Culture: Experience has shown that corruption proliferates when staff morale is low and where there is little or no pride in work practices or organisational image. The obvious corollary is that customs administrations must work towards improvements in all of these elements by creating fair and rewarding workplaces.

10. Relationship with the Private Sector: It is important to have open and transparent dealings with the private sector at all levels of Customs. Industry players must also play their respective roles in this and be aware that bribing officials or other corrupt practices will attract severe penalties for those industry parties as well as for the customs staff involved.152

In a theoretical, as well as practical sense the Revised Arusha Declaration is a statement of political will. It is a document in which leaders of the world’s Customs administrations, via the Council of the WCO, have affirmed that a Customs free of corruption should be a priority issue for all Governments and that corruption can only be effectively fought as part of a comprehensive national effort. They then go on to define the key factors that a Customs Integrity Programme must address.153 The Revised Arusha Declaration coupled with the provisions of the UNCAC154 and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions155 provides Customs administrations and indeed other stakeholders with both a clear legal framework and the needed high level political will to work on combating corruption and ensuring integrity in their administrations.

8.2 Integrity Development Guide

The Integrity Development Guide (IDG) as was briefly alluded to above is a practical guide to the implementation of the Revised Arusha Declaration. It is a tool designed to assist WCO Member Administrations as they plan and implement customs modernisation projects that take a holistic approach to Customs reform and thus ensure that integrity and the fight against

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154 UNCAC op cit
155 OECD Convention op cit
corruption are centralised in all modernisation efforts. The IDG is a living document updated as the need arises to reflect new developments and the evolving needs of the Member administrations. The first issue of the IDG was published in 2003\(^\text{156}\) and the most recent version currently available on the WCO website was produced in 2014.\(^\text{157}\) The IDG is based on the ten tenets of the Revised Arusha Declaration and provides detailed information and guidance on how a regime of integrity may be reached through the integration and implementation of those points in the planning and strategic management phases of administrations as well as into the overall management and day to day running of a modern Customs administration.\(^\text{158}\)

The IDG is divided into 4 parts: Introduction to the Integrity Development Process, the Self-Assessment Process, The Action Planning Process and Action Plan Review, Evaluation and Redevelopment. A copy of the Revised Arusha Declaration is then provided in an Annex as well as relevant integrity case-studies from Member Administrations.\(^\text{159}\) Practical checklists are provided as well as lists of examples of possible good practices.

8.3 Transparency and predictability Guidelines

The WCO Transparency and predictability Guidelines are a relatively recent addition to the organisation’s arsenal of tools and instruments. The Guidelines were published in July 2016 following a developmental and writing phase which included both the WCO’s WTOTFA Working Group\(^\text{160}\) and the Permanent Technical Committee.\(^\text{161}\) In spite of the fact that integrity, transparency and predictability are, and always have been, high on the WCO agenda it may safely be deduced that the conclusion of the legal text of the Trade Facilitation Agreement and, at the time, the imminent entry into force of that same Agreement did serve

\(^{156}\) This edition is not available on the WCO website as newer versions have superseded it. Info on orginal publishing date in e-mail from Ms Patricia Revesz, Integrity Development Officer, WCO Secretariat.  
\(^{158}\) Ibid  
\(^{159}\) Ibid  
as a catalyst for the drafting of the Guidelines and the wide-reaching consultation process preceding their publication.

The Transparency and Predictability Guidelines draw inspiration from the Revised Arusha Declaration, in particular point 3 “Transparency” where it is stated i.a. that “[c]ustoms clients are entitled to expect a high degree of certainty and predictability in their dealings with Customs”. Further background is provided by e.g. the Revised Kyoto Convention (General Annex, Chapter 9 dealing with Information, Decisions and Rulings supplied by Customs) The background section of the Guidelines furthermore points to the WCO’s Recommendations on the use of World Wide Websites by Customs Administrations as well as to the Integrity Development Guide as sources of information on this topic.

The main aims and objectives of the Guidelines are stated thus:

[...] to provide Customs administrations with comprehensive and practical guidance on how to enhance and commit to their transparency and predictability, with a view to trade facilitation and integrity. The Guidelines are based on existing international standards introduced in the WTO TFA, the WCO RKC and other international agreements, and the operational practices and experiences of WCO Members.

The inclusion of operational practices and experiences of WCO members in terms of transparency and predictability requirements is an important aspect of the Guidelines and lends them an aura of hands-on practicability which is important in terms of providing the membership with ideas and guidance not only in terms of how best to implement the provisions of the Trade Facilitation Agreement but on a larger scale to ensure a working environment based on integrity and anti-corruption. Integrity and anti-corruption are indeed the guiding lights behind the production of the Guidelines. This is quite clearly spelled out in the document itself where it says:

Transparent and predictable Customs procedures are also essential elements for maintaining and increasing integrity, which is key for all nations and for all Customs

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162 WCO, The Revised Arusha Declaration: Declaration of the Customs Co-Operation Council Concerning Good Governance and Integrity in Customs (Done in 1993 and revised in 2003) point 3.
165 Ibid, 4
administrations in eliminating corruption. Transparency creates accountability and makes it harder to feign ignorance of the rules. In addition, it may be harder for a tempted Customs officer to try to ask for a bribe from a user who knows where he/she stands as far as the rules are concerned. Transparency also develops a climate of trust that fosters integrity between Customs and users.\textsuperscript{166}

The transparency and predictability topics the Guidelines address are: comprehensiveness, coordinated border management, promptness, accessibility, enquiry points, data protection and confidentiality along with freedom of information, information on appeals, publication management and charges. All these topics are of great importance where integrity and the fight against corruption are concerned as well as being key issues in terms of fulfilling the obligations contained in the Trade Facilitation Agreement, in particular the Publication and Availability of Information provisions of Article 1; the provisions on opportunity to comment and information before entry into force and consultations of Article 2; the advance rulings provided for in Article 3; the procedures for appeal or review in Article 4; the measures to enhance impartiality, non-discrimination and transparency of Article 5; the disciplines on fees and charges provided for in Article 6 and the formalities connected with importation, exportation and transit outlined in Article 10.

As mentioned in the section “Main objectives and coverage” the Guidelines are not of a legally binding nature but rather, as indicated by the title, guidelines which should guide the conduct of Member administrations and provide them with models on which to base their own practices and implementations.\textsuperscript{167} As mentioned earlier many of the provisions of the Trade Facilitation Agreements are written in such a way that the Members are given quite a large margin of discretion in terms of implementation and application which in turn means that administrative or governance based measures are important when it comes to the implementation of the provisions of the Agreement. What this means in real terms is that guidance and positive reinforcement through the adoption of best practices, standards, guidelines and other soft law instruments will be key to the successful implementation of the Agreement and absolutely necessary if the envisioned benefits of its full application, such as a significant reduction in trade costs, increased and more diversified trade flow, are to be realised – not to mention the WTO’s estimate of the Agreement becoming a catalyst towards

\textsuperscript{166} Ibid, 3
\textsuperscript{167} Ibid, 4
improved transparency, increased possibilities to participate in global value chains, and reduced scope for corruption. 168

9 Conclusion

The above discussion has focussed on a view of the WTO Trade Facilitation Agreement with an emphasis on the perspective of anti-corruption and integrity and the Customs orientation of the Agreement. The conclusion reached is that not only are both aspects an intrinsic part of the Agreement itself but they must also form an indispensable part of any successful implementation effort. Any discussion of the Trade Facilitation Agreement is bound to focus to a large extent on Customs and issues relating to Customs procedures and formalities due to the Agreement subject matter of trade across borders. The above discussion has outlined the ways in which both the WCO and Customs authorities in general are aware of and working in unison with the WTO on the successful implementation of the Agreement.

The conclusions reached are that the Trade Facilitation Agreement is not simply a trade agreement but perhaps no less an anti-corruption instrument that has the potential to play a leading role in combating bribery and curbing corruption. This is due to the special nature of the Agreement as an instrument that focuses on a well-defined and specialised field and hones in on issues of transparency, non-discrimination and impartiality in the converging point of public institutions (i.a. Customs) and international trade. This is what distinguishes the Agreement from earlier, more conventional anti-corruption instruments and conventions and kindles hope of a trade regime where bribery and corruption cannot thrive as processes are clear and transparent. While all three Sections of the Agreement do contribute to its anti-corruption content and spirit it is through the technical provisions of Section I that the groundwork is laid for the simplification, harmonization and transparency of measures relating to expeditiously moving goods across borders. It is through the correct implementation of these transparent measures that the potential to combat bribery and corruption lies. While more or less every Article of the Agreement has anti-corruption potential, the discussion in Chapter 7 above outlines key Articles that provide for the practical ways in which impartiality, transparency and simplification of procedures are to be effected in the interaction between government agencies (primarily Customs) and international trade

resulting in a facilitation of legitimate trade based on mutual trust where the scope for bribery and corruption is curbed.

The fact that the Agreement is built upon foundations laid by e.g. the WCO’s Revised Kyoto Convention and the SAFE Framework of Standards makes an understanding of those instruments an important prerequisite to its proper implementation and interpretation. The discussion in Chapter 8 above provides an exploration of just such an understanding furthermore the intrinsic links between the Agreement and governance standards and integrity instruments prepared by the WCO are also key to further entrench and facilitate its successful implementation at least in part because these are instruments that the Customs authorities know and trust. The significance of awareness and understanding of the content and spirit of instruments such as the ones discussed above and best practice and good governance materials is further accentuated through the fact that the body of the Agreement makes distinct reference to the use of best practice by international organisations.

These tools and instruments such as the WCO Model Code of Ethics, the Guide to Corruption Risk Mapping, the Guide to Prevent Procurement Corruption and many others provide guidance for practical implementation of anti-corruption and integrity in both Customs and trade as well strengthening and supporting the provisions of the Revised Arusha Declaration. The fact that these tools inform the provisions and spirit of the Trade Facilitation Agreement forges a link between the tools and creates a binary force where the advisory and guiding nature of the WCO instruments is given legitimacy through the binding nature of the WTO Agreement. The further fact that the utilization of best practice instruments is provided for in Articles of the main body of the Agreement further strengthens the ties between the instruments.

While this is cannot but be based on conjecture, I consider it likely that given the successful implementation of the Trade Facilitation Agreement it could well become a model for similar agreements in other fields. If future trade statistics and performance measurements will indeed show a marked decrease in the bribery of public officials and a decline in both the supply and demand side of corruption as a result of the implementation of the agreement, one cannot but theorize that similar agreements in various fields would be of societal benefit.

It is indeed the view taken here that the proper implementation of the Trade Facilitation Agreement will prove to be of great benefit for legitimate trade. Traders, other economic operators along with the government sector, Customs in particular, will be able to reap
substantial benefits both in terms of their own institutional culture as well as in terms of economic growth and development once the Agreement is widely implemented.
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