the doj & cd

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Mr L October
Director-General
Department of Trade and Industry
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Dear Mr October

Attention: Ms V Gilbert (Legal International Trade and Investment)

WORLD TRADE ORGANISATION AGREEMENT ON TRADE FACILITATION: YOUR UNNUMBERED MINUTE DATED 24 JULY 2015

INTRODUCTION

1. According to the submission received from the Department of Trade and Industry (the "Department") the Agreement on Trade Facilitation (the "TFA") was concluded at the 2013 Bali Ministerial Conference of the World Trade Organisation (the "WTO"). The TFA in short contains provisions for expediting the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It further contains provisions for technical assistance and capacity building in this area.

2. We are further informed that the Protocol of Amendment inserting the TFA into Annex 1A of the World Trade Organisation Agreement (the "WTO Agreement") was subsequently adopted by the General Council on 27 November 2014. This permitted Members to formally accept the TFA through their domestic legislative procedures. According to the Department efforts are now underway to formally accept the new TFA by many of the Member States who have commenced with the ratification process. A two-third majority of the WTO's Members will need to ratify the TFA in order for it to enter into force. It would appear that South Africa has now also embarked on the process of ratification of the TFA.

3. In view hereof the Legal International Trade and Investment Unit within the Department request our opinion on whether any of the provisions of the TFA is possibly in conflict with the domestic law of the Republic of South Africa.

4. In accordance with the request from the Department we have scrutinised the TFA in terms of *paragraph 5.20(a)* of the *Manual on Executive Acts of the President of the Republic of South Africa* (the "Manual") and with reference to *Chapter 5* of the *Constitutional Handbook for Members of the Executive*. Since the TFA is a multilateral document, which has already been agreed to, we have not made any changes to the drafting form and style thereof.

DISCUSSION

Article 1: Publication and Availability of Information

Ad paragraph1: Publication

5.1 According to this paragraph each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them:

(a) Procedures for importation, exportation, and transit (including port, airport, and other entry-point procedures), and required forms and documents;

(b) applied rates of duties and taxes of any kind imposed on or in connection with

importation or exportation;

(c) fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;

(d) rules for the classification or valuation of products for customs purposes;

(e) laws, regulations, and administrative rulings of general application relating to rules of origin;

(f) import, export or transit restrictions or prohibitions;

(g) penalty provisions for breaches of import, export, or transit formalities;

(h) procedures for appeal or review;

(i) agreements or parts thereof with any country or countries relating to importation, exportation, or transit; and

(j) procedures relating to the administration of tariff quotas.

5.2 As regards possible applications for access to certain information in accordance with the TFA it is important to note that our law does not provide for an unlimited right of access to information. Certain information may be withheld or prohibited from access to third parties. In this regard, we draw the Department's attention to section 32 of the Constitution of the Republic of South Africa, 1996, (the "Constitution') and the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), (the "PAI Act") and specifically to section 37 of the said Act, which section provides for mandatory protection of certain confidential information and protection of certain other confidential information of a third party. The said section 37 reads as follows:

37.(1) Subject to subsection (2), the information officer of a public body—

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party—

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information—

(a) already publicly available; or

(b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned."

***Ad* paragraph 2: Information Available through Internet**

5.3 Paragraph 2.1 of the TFA provides that each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:

(a) a description of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit;

(b) the forms and documents required for importation into, exportation from, or transit through the territory of that Member;

(c) contact information on its enquiry points.

It further provides that whenever practicable, the description referred to in paragraph (a) above shall also be made available in one of the official languages of the WTO.

This paragraph appears to be in order.

***Ad* paragraph 3: Enquiry Points**

5.4 In terms of this paragraph each Member shall, within its available resources, establish or maintain one or more enquiry points to answer reasonable enquiries of governments, traders, and other interested parties on matters covered by paragraph 1.1 of the TFA and to provide the required forms and documents referred to in subparagraph 1.1(a). It further provides that members of a customs union or involved in regional integration may establish or maintain common enquiry points at the regional level in order to satisfy this requirement for common procedures.

5.5 The Department's attention is drawn thereto that in terms of paragraph 3.3 Members are encouraged not to require the payment of a fee for answering enquiries and providing required forms and documents. However, it further provides that if Members do charge the payment of a fee, they shall limit the amount of their fees and charges to the approximate cost of services rendered. It is also provided that the enquiry points shall answer enquiries and provide the forms and documents within a reasonable time period set by each Member, which may vary depending on the nature or complexity of the request. It would appear that the enquiry points envisaged in paragraph 3.3 will be mechanisms separate from that contemplated in the PAI Act. If not, the Department must take cognisance of the provisions of, *inter alia,* Part 2 of that Act, which provides for access to records of public bodies.

_Ad_ paragraph 4: Notification

5.6 Paragraph 4 provides that each Member shall notify the Committee on Trade Facilitation established under paragraph 1.1 of Article 23 (the "Committee") of the official place where the items referred to in subparagraphs 1.1(a) to (j) have been published, the Uniform Resource Locators of the website referred to in paragraph 2.1, and the contact information of the enquiry points referred to in paragraph 3.1.

This paragraph appears to be in order.

Article 2: Opportunity to Comment, Information before Entry into Force, and Consultations

_Ad_ paragraph 1: Opportunity to Comment and Information before Entry into Force

5.7 Paragraph 1.1 of Article 2 provides that each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and

regulations of general application related to the movement, release, and clearance of goods, including goods in transit. Paragraph 1.2 further provides that each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit, are published or information on them made otherwise publicly available, as early as possible before their entry into force, in order to enable traders and other interested parties to become acquainted with them.

5.8 Public participation forms an integral part of the legislative process in South Africa and will be conducted in accordance with the existing legislative procedures (see in this regard *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) and *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC)). The publication of acts is furthermore provided for by section 81 of the Constitution, which reads as follows:

"A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.".

The Department's attention is further drawn to the case of *Central African Services (Pty) and Another v The Minister of Transport and Another, Case NO: 32238/2011 (North Gauteng)* where the court, per Makgoka J, dicussed certain requirements for the publication of regulations.

_Ad_ paragraph 2: Consultations

5.9 This paragraph provides that each Member shall, as appropriate, provide for regular consultations between its border agencies and traders or other stakeholders located within its territory. This paragraph appears to be in order.

Article 3: Advance Rulings

5.10 Paragraph 9 of Article 3 provides for the Definition and scope of the phrase "advance ruling". The mentioned phrase is defined as a written decision provided by a Member to an applicant prior to the importation of goods covered by the application that sets forth the treatment that the Member shall provide to the goods at the time of importation, specifically with regard to the good's tariff classification and the origin of the goods. An applicant is an exporter, importer or any person with a justifiable cause or a representative thereof.

5.11 It is further provided that Members are encouraged to provide advance rulings on-

(a) the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts;

(b) the applicability of the Member's requirements for relief or exemption from customs duties;

(c) the application of the Member's requirements for quotas, including tariff quotas; and

(d) any additional matters for which a Member considers it appropriate to issue an advance ruling.

5.12 A Member may require that the applicant have legal representation or registration in its territory. To the extent possible, such requirements shall, however, not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium-sized enterprises. These requirements shall be clear and transparent and not constitute a means of arbitrary or unjustifiable discrimination.

5.13 Paragraph 1 provides that each Member shall issue an advance ruling in a reasonable, time-bound manner to an applicant that has submitted a written request containing all necessary information. Should a Member, however, decline to issue an advance ruling, such Member shall promptly notify the applicant in writing thereof, setting out the relevant facts and the basis for its decision. A Member may decline to issue an advance ruling to an applicant where the question raised in the application:

(a) is already pending in the applicant's case before any governmental agency, appellate tribunal, or court; or

(b) has already been decided by any appellate tribunal or court.

5.14 In terms of paragraph 3 the advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts, or circumstances supporting that ruling have changed. If a Member revokes, modifies, or invalidates the advance ruling, it shall provide written notice to the applicant setting out the relevant facts and the basis for its decision. Where a Member revokes, modifies, or invalidates advance rulings with retroactive effect, it may only do so where the ruling was based on incomplete, incorrect, false, or misleading information. Furthermore, an advance ruling issued by a Member shall be binding on that Member in respect of the applicant that sought it. The Member may also provide that the advance ruling is binding on the applicant.

5.16 Paragraph 6 further provides that each Member shall publish, at a minimum-

(a) the requirements for the application for an advance ruling, including the information to be provided and the format;

(b) the time period by which it will issue an advance ruling; and

(c) the length of time for which the advance ruling is valid.

5.17 In terms of paragraph 7 each Member shall provide, upon written request of an applicant, a review of the advance ruling or the decision to revoke, modify, or invalidate the advance ruling. Each Member shall also endeavour to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.

With regard to Article 3 of the TFA the Department's attention is drawn to Chapter 10 of the Customs Duty Act, 2014 (Act No. 30 of 2014) (the "Customs Duty Act"), which contains extensive provisions concerning advance rulings. It must, however, be

borne in mind that, as far as we could ascertain, this Act has been assented to on 9 July 2014, but that the date of commencement is yet to be proclaimed.

Article 4: Procedures for Appeal or Review

5.18 Paragraph 1 of Article 4 provides 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.

It is further provided that the legislation of a Member may require that an administrative appeal or review be initiated prior to a judicial appeal or review. Each Member shall in accordance with paragraph 5 also ensure that the person referred to in paragraph 1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to procedures for appeal or review where necessary.

5.19 In terms of paragraph 4 each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1(a) is not given either-

(a) within set periods as specified in its laws or regulations; or

(b) without undue delay

the petitioner shall have the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.

5.20 It would appear that the decision by customs, as contemplated in Article 4 of the TFA will amount to an administrative action. Section 33 of the Constitution provides for just administrative action and reads as follows:

> "**33.**(1)Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.".

5.21 The national legislation envisaged in section 33(3) of the Constitution is the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), (the "PAJ Act"). Sections 3 and 5 of the PAJ Act respectively provide for procedurally fair administrative action affecting any person and reasons for administrative action. The said sections read as follows:

" **3. Procedurally fair administrative action affecting any person**

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (*a*) A fair administrative procedure depends on the circumstances of each case.

(*b*) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to—

(*a*) obtain assistance and, in serious or complex cases, legal representation;

(*b*) present and dispute information and arguments; and

(*c*) appear in person.

(4) (*a*) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(*b*) In determining whether a departure as contemplated in paragraph (*a*) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

5. Reasons for administrative action.—(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) (*a*) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(*b*) In determining whether a departure as contemplated in paragraph (*a*) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature, purpose and likely effect of the administrative action concerned;

(iii) the nature and the extent of the departure;

(iv) the relation between the departure and its purpose;

(v) the importance of the purpose of the departure; and

(vi) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6) (*a*) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(*b*) The Minister must, within 14 days after the receipt of a request referred to in paragraph (*a*) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.".

5.22 Section 6 of the PAJ Act deals with judicial review of administrative action and the relevant parts of subsections (1) and (2) thereof read as follows:

"**6** (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;".

5.23 From the above it is clear that a court may be approached to review an administrative action if, *inter alia*, an administrator took a decision not authorised by the empowering provision or if the administrative action was taken for a reason not authorised by the empowering provision. Although highly unusual, an administrator may approach the court to have its own decision reviewed. In this regard the court stated the following in the ***Pepcor Retirement Fund* and Another v Financial Services Board and Another** 2003 (6) SA 38 (SCA) at paragraph 14:

> "...The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the Act. Of course only a particular fund and the members of that fund may be directly affected by a particular decision of the Registrar under s 14(1)(c). But that does not derogate from the fact that the function the Registrar performs is performed in the public interest generally. In addition, **the interests of the very persons affected by the decision require the Registrar to perform his functions properly and to seek judicial review of his own decisions should he not have done so.**". (Our emphasis.)

5.24 Any administrative decision, such as that of a customs official, is accordingly regulated in terms of the relevant provisions of the PAJ Act as set out above. It

would, however, appear that the provisions of Article 4 of the TFA are in broad terms reconcilable with the provisions of the PAJ Act.

Article 5: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency

Ad paragraph 1: Notifications for enhanced controls or inspections

5.25 Paragraph 1 of Article 5 provides that where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages, or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination, or suspension:

(a) The Member may, as appropriate, issue the notification or guidance based on risk;

(b) the Member may issue the notification or guidance so that it applies uniformly only to those points of entry where the sanitary and phytosanitary conditions on which the notification or guidance are based apply;

(c) the Member shall promptly terminate or suspend the notification or guidance when circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade-restrictive manner; and

(d) when the Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

This paragraph appears to be in order.

Ad paragraph 2: Detention

5.26 In terms of paragraph 2 a Member shall promptly inform the carrier or importer in case of detention of goods declared for importation, for inspection by customs or any other competent authority. The provisions of this appear to be in

order.

Ad **paragraph 3: Test Procedures**

5.27 This paragraph provides that a Member may, upon request, grant an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding. Furthermore, a Member shall either publish, in a non-discriminatory and easily accessible manner, the name and address of any laboratory where the test can be carried out or provide this information to the importer when it is granted the opportunity. A Member shall consider the result of the second test, if any, conducted for the release and clearance of goods and, if appropriate, may accept the results of such test.

This paragraph appears to be in order.

Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties

Ad **paragraph 1: General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation**

5.28 This paragraph provides that the provisions of Article 1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with the importation or exportation of goods. It also provides that information on fees and charges shall be published in accordance with Article 1. This information shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made. Furthermore, an adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force, except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published. Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.

5.29 Sections 49 and 50 of the Customs and Excise Act, 1964 (Act No. 91 of 1964) (the "Customs and Excise Act") must be taken cognisance of by the Department with regard to this Article. Section 49 provides for agreements in respect of rates of duty lower than general rates of duty and other agreements providing for matters requiring customs administration, whilst section 50 provides for the disclosure of information in terms of agreements.

5.30 The amendment of customs tariff relating to imported goods and the amendment of customs tariff relating to goods destined for export from Republic are provided for in sections 8 and 9 of the Customs Duty Act respectively. The said sections read as follows:

"**8.** (1) The Minister must, by notice in the *Gazette*, amend the Customs Tariff in relation to imported goods—

(*a*) if the amendment is necessary for giving effect to—

(i) any international obligations on tariffs and trade binding on the Republic; or

(ii) an international agreement to which the Republic is a party, or any amendment to such agreement;

(*b*) if the Cabinet member responsible for trade and industry or the International Trade Administration Commission requests the amendment for implementing in accordance with the International Trade Administration Act duties or other measures to foster local economic activity; or

(*c*) if the amendment is necessary to give effect to any amendments to, and to any changes in terminology used in, international tariffs and trade instruments binding on the Republic.

(2) The Minister, acting in consultation with the Cabinet member responsible for trade and industry, may by notice in the *Gazette* amend the Customs Tariff in relation to imported goods where subsection (1) does not apply and the amendment is necessary—

(*a*) for implementing national financial and fiscal policies; or

(*b*) in the public interest.

(3) A request in terms of subsection (1) (*b*) must be—

(*a*) in writing; and

(*b*) accompanied by—

(i) a motivation of the reasons for the request; or

(ii) a report or ministerial minute in terms of the International Trade Administration Act, if the request is made in terms of that Act.

9.—(1) The Minister must by notice in the *Gazette* amend the Customs Tariff in relation to goods destined for export from the Republic if the amendment is necessary—

(*a*) for implementing an international agreement to which the Republic is a party, or any amendment to such agreement; or

(*b*) to give effect to any amendments to, and to any changes in terminology used in, international tariffs and trade instruments binding on the Republic.

(2) The Minister, acting in consultation with the Cabinet member responsible for trade and industry, may by notice in the *Gazette* amend the Customs Tariff in relation to goods destined for export from the Republic where subsection (1) does not apply and the amendment is necessary—

(*a*) for implementing national financial and fiscal policies or national economic policies; or

(*b*) in the public interest.

(3) If an amendment to the Customs Tariff in terms of subsection (2), is requested by another Cabinet member, the request must be—

(*a*) in writing; and

(*b*) accompanied by a motivation of the reasons for the request.".

***Ad* paragraph 2: Specific disciplines on Fees and Charges for Customs Processing Imposed on or in Connection with Importation and Exportation**

5.31 According to paragraph 2 fees and charges for customs processing-

(a) shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and

(b) are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.

***Ad* paragraph 3: Penalty Disciplines**

5.32 For purposes of this paragraph the term "penalties" is defined to mean those

imposed by a Member's customs administration for a breach of the Member's customs laws, regulations, or procedural requirements. It is further provided that each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the persons responsible for the breach under its laws, and that the penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.

5.33 In terms of this paragraph each Member shall further ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the persons upon whom the penalty is imposed specifying the nature of the breach and the applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed. When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.

This paragraph appears to be in order.

Aticle 7: Release and Clearance of Goods

***Ad* paragraph 1: Pre-arrival Processing**

5.34 In terms of this paragraph each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival. Each Member shall, as appropriate, also provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.

This paragraph appears to be in order.

***Ad* paragraph 2: Electronic Payment**

5.35 Paragraph 2 provides that each Member 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.

Ad paragraph 3: Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges

5.36 According to paragraph 3 each Member shall adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees, and charges, if such a determination is not done prior to, or upon arrival, or as rapidly as possible after arrival and provided that all other regulatory requirements have been met. As a condition for such release, a Member may require-

(a) payment of customs duties, taxes, fees, and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations; or

(b) a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations.

5.37 It is also provided that such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee. In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.
Nothing in these provisions shall, however, affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.

Ad paragraph 4: Risk Management

5.38 In terms of this paragraph each Member shall, to the extent possible, adopt or maintain a risk management system for customs control. 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. Furthermore, each Member shall concentrate customs control and, to the extent possible other relevant border controls, on high-risk consignments and expedite the release of low-risk consignments. A Member may also select, on a random basis, consignments for such controls as part of its risk management. Each Member shall base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, *inter alia,* the 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 traders, and type of means of transport.

This paragraph appears to be in order.

***Ad* paragraph 5: Post-clearance audit**

5.39 Paragraph 5 provides that with a view to expediting the release of goods, each Member shall adopt or maintain post-clearance audit to ensure compliance with customs and other related laws and regulations. Each Member shall further 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.

***Ad* paragraph 6: Establishment and Publication of Average Release Times**

5.40 In this paragraph Members are encouraged to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, *inter alia*, the Time Release Study of the World Customs Organization (the "WCO").Members are also encouraged to share with the Committee their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency.

This appears to be in order.

***Ad* paragraph 7: Trade Facilitation Measures for Authorized Operators**

5.41 In terms of paragraph 7.1 each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.

5.42 The specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures. Such criteria may include-

(a) an appropriate record of compliance with customs and other related laws and regulations;

(b) a system of managing records to allow for necessary internal controls;

(c) financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and

(d) supply chain security.

It is further provided that such criteria shall not-

(a) be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and

(b) to the extent possible, restrict the participation of small and medium-sized enterprises.

5.43 In terms of paragraph 7.3 the trade facilitation measures provided pursuant to paragraph 7.1 shall include at least three of the following measures:

(a) Low documentary and data requirements, as appropriate;

(b) low rate of physical inspections and examinations, as appropriate;

(c) rapid release time, as appropriate;

(d) deferred payment of duties, taxes, fees, and charges;

(e) use of comprehensive guarantees or reduced guarantees;

(f) a single customs declaration for all imports or exports in a given period; and

(g) clearance of goods at the premises of the authorized operator or another place authorized by customs.

5.44 In this paragraph Members are further encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfilment of the legitimate objectives pursued. In order to enhance the trade facilitation measures provided to operators, Members shall also afford to other Members the possibility of negotiating mutual recognition of authorized operator schemes and shall exchange relevant information within the Committee about authorized operator schemes in force.

***Ad* paragraph 8: Expedited Shipments**

5.45 According to paragraph 8.1 each Member shall adopt or maintain procedures allowing for the expedited release of at least those goods entered through air cargo facilities to persons who apply for such treatment, while maintaining customs control. It is furthermore provided that if a Member employs criteria limiting who may apply for such treatment, the Member may, in published criteria, require that the applicant shall, as conditions for qualifying for the application of the treatment described in paragraph 8.2 to its expedited shipments-

(a) provide adequate infrastructure and payment of customs expenses related to processing of expedited shipments in cases where the applicant fulfils the Member's requirements for such processing to be performed at a dedicated facility;

(b) submit in advance of the arrival of an expedited shipment the information necessary for the release;

(c) be assessed for fees limited in amount to the approximate cost of services rendered in providing the treatment described in paragraph 8.2;

(d) maintain a high degree of control over expedited shipments through the use of internal security, logistics, and tracking technology from pick-up to delivery;

(e) provide expedited shipment from pick-up to delivery;

(f) assume liability for payment of all customs duties, taxes, fees, and charges to the customs authority for the goods;

(g) have a good record of compliance with customs and other related laws and regulations;

(h) comply with other conditions directly related to the effective enforcement of the Member's laws, regulations, and procedural requirements, that specifically relate to providing the treatment described in paragraph 8.2.

5.46 Paragraph 8.2 further provides that subject to paragraphs 8.1 and 8.3, Members shall-

(a) minimize the documentation required for the release of expedited shipments in accordance with paragraph 1 of Article 10 and, to the extent possible, provide for release based on a single submission of information on certain shipments;

(b) provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;

(c) endeavour to apply the treatment in subparagraphs (a) and (b) to shipments of any weight or value, while recognizing that a Member is permitted to require additional entry procedures, including declarations and supporting

documentation and payment of duties and taxes, and to limit such treatment based on the type of goods, provided the treatment is not limited to low value goods such as documents; and

(d) provide, to the extent possible, for a *de minimis* shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods, bearing in mind that internal taxes, such as value added taxes and excise taxes, applied to imports consistently with Article III of the GATT 1994 are not subject to this provision.

5.47 Paragraph 8.3 provides that nothing in paragraphs 8.1 and 8.2 shall affect the right of a Member to examine, detain, seize, confiscate or refuse entry of goods, or to carry out post-clearance audits, including in connection with the use of risk management systems. Further, nothing in paragraphs 8.1 and 8.2 shall prevent a Member from requiring, as a condition for release, the submission of additional information and the fulfillment of non-automatic licensing requirements.

This paragraph appears to be in order.

***Ad* paragraph 9: Perishable Goods**

5.48 This paragraph provides that in order to prevent avoidable loss or deterioration of perishable goods, and provided that all regulatory requirements have been met, each Member shall provide for the release of perishable goods-

(a) under normal circumstances within the shortest possible time; and

(b) in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.

5.49 It further provides that each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required. Each Member shall either arrange or allow an importer to arrange for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorizations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and

consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities. In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay. This appears to be in order.

Article 8: Border Agency Cooperation

5.50 Article 8 provides that each Member shall ensure that its 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.

5.51 Furthermore, each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include-

(a) alignment of working days and hours;

(b) alignment of procedures and formalities;

(c) development and sharing of common facilities;

(d) joint controls;

(e) establishment of one stop border post control.

5.52 In this regard the Department's attention is drawn thereto that South Africa has already concluded one-stop border post agreements with some of its neighbouring countries.

5.53 We further wish to draw the Department's attention to the Border Management Agency Bill, 2015, which is currently in the process of being adopted. The Purpose of the Bill is to create a border management system under a single entity and coordinate government policies and the implementation of such policies in line with the retained functions of other organs of state. In other words, the Agency will exist primarily on the principles of cooperative governance since this process involves the mandate of several other organs of state and coordinating border law enforcement functions. The Agency will have a symbiotic relation with the other organs of state

that performs border law enforcement functions. The Agency will also perform border management functions.

Article 9: Movement of Goods Intended for Import under Customs Control

5.54 This Article provides that each Member shall, to the extent practicable, and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.

Article 10: Formalities Connected with Importation, Exportation and Transit

***Ad* paragraph 1: Formalities and Documentation Requirements**

5.55 With a view to minimizing the incidence and complexity of import, export, and transit formalities and to decreasing and simplifying import, export, and transit documentation requirements and taking into account the legitimate policy objectives and other factors such as changed circumstances, relevant new information, business practices, availability of techniques and technology, international best practices, and inputs from interested parties, this paragraph provides that each Member shall review such formalities and documentation requirements and, based on the results of the review, ensure, as appropriate, that such formalities and documentation requirements are-

(a) adopted and/or applied with a view to a rapid release and clearance of goods, particularly perishable goods;

(b) adopted and/or applied in a manner that aims at reducing the time and cost of compliance for traders and operators;

(c) the least trade restrictive measure chosen where two or more alternative measures are reasonably available for fulfilling the policy objective or objectives in question; and

(d) not maintained, including parts thereof, if no longer required.

This appears to be in order.

Ad paragraph 2: Acceptance of Copies

5.56 In terms of this paragraph each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities. Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document. Furthermore, a Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.

5.57 The relevant South African authorities will have to review their internal procedures in this regard in order to ascertain whether it is in line with the provisions of this paragraph.

Ad paragraphs 3 - 6

5.58 In these paragraphs Members are encouraged to use relevant international standards or parts thereof as a basis for their import, export, or transit formalities and procedures. It is also provided that Members shall endeavour to establish or maintain 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. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.

5.59 In terms of paragraph 6.1 Members shall from the entry into force of the TFA not introduce the mandatory use of customs brokers. Furthermore, each Member shall notify the Committee and publish its measures on the use of customs brokers. Any subsequent modifications thereof shall also be notified and published promptly. With regard to the licensing of customs brokers, Members shall apply rules that are transparent and objective.

Ad paragraph 7: Common Border Procedures and Uniform Documentation

Requirements

5.56 Paragraph 7.1 provides that each Member shall, subject to paragraph 7.2, apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout its territory. In terms of paragraph 7.2 nothing in this Article shall prevent a Member from-

(a) differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;

(b) differentiating its procedures and documentation requirements for goods based on risk management;

(c) differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;

(d) applying electronic filing or processing; or

(e) differentiating its procedures and documentation requirements in a manner consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.

This appears to be in order.

***Ad* paragraph 8: Rejected Goods**

5.61 This paragraph provides that where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter. When such an option is given and the importer fails to exercise it within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.

The provisions of this paragraph are made subject to the laws and regulations of Member states and therefore appear to be in order.

***Ad* paragraph 9: Temporary Admission of Goods and Inward and Outward Processing**

5.62 In terms of paragraph 9.1 Each Member shall allow, as provided for in its laws and regulations, goods to be brought into its customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are brought into its customs territory for a specific purpose, are intended for re-exportation within a specific period, and have not undergone any change except normal depreciation and wastage due to the use made of them.

5.63 Paragraph 9.2 further provides as follows:

(a) Each Member shall allow, as provided for in its laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be re-imported with total or partial exemption from import duties and taxes in accordance with the Member's laws and regulations.

(b) For the purposes of this Article, the term "inward processing" means the customs procedure under which certain goods can be brought into a Member's customs territory conditionally relieved, totally or partially, from payment of import duties and taxes, or eligible for duty drawback, on the basis that such goods are intended for manufacturing, processing, or repair and subsequent exportation.

(c) For the purposes of this Article, the term "outward processing" means the customs procedure under which goods which are in free circulation in a Member's customs territory may be temporarily exported for manufacturing, processing, or repair abroad and then re-imported.

The provisions of this paragraph are made subject to the laws and regulations of Member states and therefore appear to be in order.

Article 11: Freedom of Transit

5.64 In terms of paragraph 1 any regulations or formalities in connection with traffic in transit imposed by a Member shall not be-

(a) maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a easonably available less trade-restrictive manner;

(b) applied in a manner that would constitute a disguised restriction on traffic in

transit.

5.65 In terms of paragraph 2 of this Article traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered. It is not clear what exactly the meaning of this paragraph is. It is suggested that it be redrafted in clearer terms in order to be more understandable.

5.66 This Article further provides that, subject to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules, Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. Furthermore, each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member. It is also provided that formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to identify the goods and to ensure fulfilment of transit requirements.

5.67 Paragraph 7 provides that once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory. Members shall also allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.

5.68 This Article also provides that once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met. Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled. Once the Member

has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.

5.69 It is further provided that each Member shall, in accordance with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments. Each Member shall also make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee. Furthermore, each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.

5.70 It is also provided that Members shall endeavour to cooperate and coordinate with one another in order to enhance freedom of transit. Such cooperation and coordination may include, but is not limited to, an understanding on-

(a) charges;

(b) formalities and legal requirements; and

(c) the practical operation of transit regimes.

Each Member shall also endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

Even though the provisions of this Article is not in direct conflict with the existing domestic law it contains new provisions which will have to be implemented by the relevant authorities.

Article 12: Customs Cooperation

5.71 According to this Article Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders. Furthermore, Members are encouraged to share information on best practices in managing customs compliance, including through the Committee. Members are further encouraged to cooperate in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness.

5.72 In this regard we wish to draw the Department's attention thereto that the Customs and Excise Act, the Customs Duty Act and the Customs Control Act, 2014 (Act No. 41 of 2014) (the "Customs Control Act") contain provisions which create offences and penalty provisions.

5.73 It is further provided that upon request and subject to the provisions of this Article, Members shall exchange the information set out in subparagraphs 6.1(b) and/or (c) for the purpose of verifying an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy of the declaration. Each Member shall also notify the Committee of the details of its contact point for the exchange of this information. The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language.

5.74 In terms of paragraph 5 the requesting Member shall, subject to paragraph 5.2-

(a) hold all information or documents provided by the requested Member strictly in confidence and grant at least the same level of such protection and confidentiality as that provided under the domestic law and legal system of the requested Member as described by it under subparagraphs 6.1(b) or (c);

(b) provide information or documents only to the customs authorities dealing with the matter at issue and use the information or documents solely for the purpose stated in the request unless the requested Member agrees otherwise in writing;

(c) not disclose the information or documents without the specific written permission of the requested Member;

(d) not use any unverified information or documents from the requested Member as the deciding factor towards alleviating the doubt in any given circumstance;

(e) respect any case-specific conditions set out by the requested Member regarding retention and disposal of confidential information or documents and personal data; and

(f) upon request, inform the requested Member of any decisions and actions taken on the matter as a result of the information or documents provided.

5.75 Paragraph 5.2 referred to above provides that a requesting Member may be unable under its domestic law and legal system to comply with any of the subparagraphs of paragraph 5.1. If so, the requesting Member shall specify this in the request. The requested Member shall treat any request and verification information received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested Member to its own similar information.

5.76 As regards this Article the Department's attention is drawn to the provisions sections 21 and 23 of the Customs Control Act, which Act was assented to on 21 July, 2014, but with regard to which the date of commencement is still to be proclaimed. The said sections respectively provide for confidentiality and disclosures in terms of international agreements and read as follows:

"**21.** —No SARS official, customs officer or person referred to in section 12 (3) (*a*), and no person who was such an official, officer or person, may disclose any information acquired by him or her in the exercise of powers or duties in terms of this Act, the Customs Duty Act or the Excise Duty Act concerning the private or confidential matters of any person except—

(*a*) to the extent that such disclosure is necessary for, and made in, the exercise of those powers or duties, including for the purpose of any proceedings referred to in Chapter 37;

(*b*) if that official, officer or person is—

(i) summoned to give evidence as a witness before a court or tribunal and the Commissioner has authorised that official, officer or person to disclose the information; or

(ii) required to do so by a court;

(*c*) if the person that will be affected by the disclosure has consented to the disclosure;

(*d*) if there is a serious and imminent risk to public health or safety or the environment and the public's interest in the disclosure outweighs the official, officer or person's duty of confidentiality;

(*e*) to an authorised recipient, subject to section 22; or

(*f*) in accordance with—

(i) an international agreement in respect of customs cooperation to which the Republic is a party, subject to section 23 (1); or

(ii) any other international agreement to which the Republic is a party, subject to section 23 (2).

23.—(1) A disclosure in terms of section 21 (*f*) (i) may be made only—

(*a*) if authorised by the Commissioner; and

(*b*) for a purpose and on conditions as may be specified by the Commissioner.

(2) A disclosure in terms of section 21 (*f*) (ii) may be made only—

(*a*) in circumstances where the international, regional or national interest in disclosure outweighs any potential harm to the person affected by the disclosure; and

(*b*) for a purpose and on conditions as may be specified by the Commissioner.

(3) A disclosure referred to in subsection (1) or (2) may be made only to a person authorised to act on behalf of—

(*a*) a party to the relevant international agreement; or

(*b*) an international agency, institution or organisation established or recognised in terms of that agreement.".

5.77 Paragraphs 6 – 11 respectively provides for provision of information, postponement or refusal of a request, reciprocity, administrative burden, limitations and unauthorized use or disclosure. Paragraph 6.2 specifically provides that the requested member may require, under its domestic law and legal system, an

assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings, or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position to comply with this requirement, it should specify this to the requested Member. Subject to the above quoted sections, these provisions appear to be in order.

5.78 Paragraph 12 further provides that nothing in this article shall prevent a member from entering into or maintaining a bilateral, plurilateral, or regional agreement for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment. It also provides that nothing in this Article shall be construed as altering or affecting a Member's rights or obligations under such bilateral, plurilateral, or regional agreements, or as governing the exchange of customs information and data under such other agreements.

5.79 Section 16 of the Customs Control Act, which provides for customs co-operation with other countries, appears to be relevant in this regard and reads as follows:

"**16.**—(1) The Commissioner may, if authorised by the national executive, enter into an agreement with the customs administration of another country—

(*a*) to provide for customs co-operation, including the exchange of customs information between the Commissioner and that customs administration;

(*b*) to facilitate the customs processing of goods—

(i) exported to the Republic from that country; and

(ii) exported from the Republic to that country; and

(*c*) to allow—

(i) customs personnel of that customs administration to perform functions in the Republic necessary for the enforcement of the customs legislation of that country in respect of goods to be exported from the Republic to that country; and

(ii) customs officers of the Republic to perform functions in that country necessary for the enforcement of this Act, a tax levying Act or any legislation referred to in Chapters 35 and 36 in respect of goods to be exported to the Republic from that country.

(2) The Commissioner may make rules to give effect to any agreement in terms of subsection (1), including rules providing for customs officials of that country to perform the functions referred to in subsection (1) (c) (i) in the Republic.".

Section II: Special and Differential Treatment Provisions for Developing Country Members and Least-Developed Country Members

Article 13: General Principles

5.80 This Article provides that the provisions contained in Articles 1 to 12 of the TFA shall be implemented by developing and least-developed country Members in accordance with this Section, which is based on the modalities agreed in Annex D of the July 2004 Framework Agreement (WT/L/579) and in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC). It further provides that assistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of the TFA, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of the TFA shall be related to the implementation capacities of developing and least-developed country Members. Where a developing or least-developed country Member continues to lack the necessary capacity, implementation of the provisions concerned will not be required until implementation capacity has been acquired. Furthermore, least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

This appears to be in order.

Article 14: Categories of Provisions

5.81 This Article provides for the following three categories of provisions:

(a) Category A contains provisions that a developing country Member or a least-developed country Member designates for implementation upon entry into force of the TFA Agreement, or in the case of a least-developed country Member within one

year after entry into force, as provided in Article 15.

(b) Category B contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of the TFA, as provided in Article 16.

(c) Category C contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of the TFA and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 16.

5.82 Furthermore, each developing country and least-developed country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories A, B and C.

5.83 In terms of Article 15 each developing country Member shall upon entry into force of the TFA, implement its Category A commitments and those commitments designated under Category A will thereby be made an integral part of the TFA. Article 16 contains the process in accordance with which a developing country member, which has not been designated in Category A, may delay implementation. Article 17 further contains provisions regarding an early warning mechanism and extension of implementation dates for the provisions in Categories B and C. Article 18 provides for the implementation of Category B and C, whilst Article 19 provides for the shifting between Categories B and C.

This appears to be in order.

Article 20: Grace Period for the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes

5.84 Paragraph 1 of Article 20 provides that for a period of two years after entry into force of the TFA, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against a

developing country Member concerning any provision that the Member has designated in Category A. Each Member shall also, upon request, during the grace period allowed under this Article, provide adequate opportunity to other Members for discussion with respect to any issue relating to the implementation of the TFA.

This appears to be in order.

Article 21: Provision of Assistance and Support for Capacity Building

5.85 According to this paragraph donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least-developed country Members on mutually agreed terms either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least-developed country Members to implement the provisions of Section I of the TFA. Article 21 also contains principles for providing assistance and support for capacity building with regard to the implementation of the TFA.

5.86 It is further provided that the Committee on Trade Facilitation (the "Committee") shall hold at least one dedicated session per year to-

(a) discuss any problems regarding implementation of provisions or sub-parts of provisions of the TFA;

(b) review progress in the provision of assistance and support for capacity building to support the implementation of the TFA, including any developing or least-developed country Members not receiving adequate assistance and support for capacity building;

(c) share experiences and information on ongoing assistance and support for capacity building and implementation programs, including challenges and successes;

(d) review donor notifications as set forth in Article 22.

The provisions of this Article appear to be in order

Article 22: Information on Assistance and Support for Capacity Building to be Submitted to the Committee

5.87 Paragraph 1 of this Article provides that in order to provide transparency to developing country Members and least-developed country Members on the provision of assistance and support for capacity building for implementation of Section I, each donor Member assisting developing country Members and least-developed country Members with the implementation of the TFA shall submit to the Committee, at entry into force of the TFA and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:

(a) a description of the assistance and support for capacity building;

(b) the status and amount committed/disbursed;

(c) procedures for disbursement of the assistance and support;

(d) the beneficiary Member or, where necessary, the region; and

(e) the implementing agency in the Member providing assistance and support.

5.88 Furthermore, donor Members assisting developing country Members and least-developed country Members shall submit to the Committee-

(a) contact points of their agencies responsible for providing assistance and support for capacity building related to the implementation of Section I of the TFA including, where practicable, information on such contact points within the country or region where the assistance and support is to be provided; and

(b) information on the process and mechanisms for requesting assistance and support for capacity building.

Developing country Members and least-developed country Members intending to avail themselves of trade facilitation-related assistance and support for capacity building shall submit to the Committee information on contact points of the offices responsible for coordinating and prioritizing such assistance and support.

This appears to be in order.

Section III: Institutional arrangements and final provisions

Article 23: Institutional Arrangements

5.89 The Committee is established in this Article, which Committee shall be open for participation by all Members and shall elect its own Chairperson. The Committee shall meet as needed and envisaged by the relevant provisions of the TFA, but no less than once a year, for the purpose of affording Members the opportunity to consult on any matters related to the operation of the TFA or the furtherance of its objectives. The Committee shall carry out such responsibilities as assigned to it under the TFA or by the Members. The Committee shall establish its own rules of procedure. It is further provided that the Committee may establish such subsidiary bodies as may be required, which bodies shall report to the Committee.

5.90 The Committee shall further maintain close contact with other international organizations in the field of trade facilitation, such as the WCO, with the objective of securing the best available advice for the implementation and administration of the TFA and in order to ensure that unnecessary duplication of effort is avoided. The Committee shall also review the operation and implementation of the TFA four years from its entry into force, and periodically thereafter.

5.91 This Article further provides that each Member shall 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 TFA.

The provisions of this Article appear to be in order.

Article 24: Final Provisions

5.92 In terms of this Article the term "Member" is deemed to include the competent authority of that Member for purposes of the TFA. All provisions of the TFA are binding on all Members and Members shall implement the TFA from the date of its

entry into force. Developing country Members and least-developed country Members that choose to use the provisions of Section II shall, however, implement the TFA in accordance with Section II.

5.93 It is further provided that Members of a customs union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under the TFA including through the establishment and use of regional bodies.

5.94 Paragraphs 6 and 7 of this Article provides that notwithstanding the general interpretative note to Annex 1A to the Marrakesh Agreement Establishing the WTO, nothing in the TFA shall be construed as diminishing the obligations of Members under the GATT 1994. In addition, nothing in the TFA shall be construed as diminishing the rights and obligations of Members under the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures. Furthermore, all exceptions and exemptions under the GATT 1994 shall apply to the provisions of the TFA. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the WTO and any amendments thereto as of the date of entry into force of the TFA, shall apply to the provisions of the TFA.

5.95 It is also provided that the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under the TFA, except as otherwise specifically provided for in the TFA.

5.96 Reservations may not be entered in respect of any of the provisions of the TFA without the consent of the other Members.The Category A commitments of developing country Members and least-developed country Members annexed to the TFA in accordance with paragraphs 1 and 2 of Article 15 shall constitute an integral part thereof. The Category B and C commitments of developing country Members and least-developed country Members taken note of by the Committee and annexed to the TFA pursuant to paragraph 5 of Article 16 shall evenly constitute an integral part of this Agreement.

5.97 With regard to the implementation of international trade agreements in general we wish to draw the Department's attention to sections 181 and 182 of the Customs Duty Act, which pro vides as follows:

"**181. Steps to enforce international trade agreement in Republic.**—The Commissioner must take all reasonable steps, including the making of any necessary rules, to enforce an international trade agreement that has been enacted into law in the Republic as contemplated in section 921 of the Customs Control Act, or was in force prior to the date this Act took effect, to the extent that the agreement requires the performance of any acts in the Republic for the preferential tariff treatment of goods originating in—

(*a*) a country which is a party to the agreement and imported into the Republic; or

(*b*) the Republic and exported to such a country.

182. Rules to give effect to international trade agreement.—(1) The Commissioner may in terms of section 224 make rules—

(*a*) to enable the customs authority—

(i) to perform any customs duties required from it by an international trade agreement;

(ii) to collect information required by the customs administration of a country which is party to the agreement; and

(iii) to furnish reports to the customs administration of that country as and when required;

(*b*) to prevent any circumvention of the agreement by—

(i) transhipment or re-routing of the goods;

(ii) false declarations concerning quantities, content, description, classification, value or origin of the goods; or

(iii) falsification of documents relating to the goods; and

(*c*) to provide for—

(i) the conditional registration for purposes of the agreement of importers, exporters, producers and suppliers of goods to which the agreement applies;

(ii) any requirements to be complied with in respect of such registration; and

(iii) the refusal of applications for registration and the amendment, withdrawal or suspension of registrations, in circumstances as may be prescribed by rule;

(*d*) to exclude goods—

(i) imported into the Republic from preferential tariff treatment under the agreement—

(*aa*) if imported by a person not registered as an importer for purposes of the agreement; or

(*bb*) if the country of origin of the goods as established in terms of the rules of origin applicable to the agreement is not a party to the agreement; or

(ii) to be exported or exported from the Republic from preferential tariff treatment under the agreement—

(*aa*) if exported by a person not registered as an exporter for purposes of the agreement; or

(*bb*) if the goods are not of South African origin as established in terms of the rules of origin applicable to the agreement;

(*e*) to prescribe the keeping of books, accounts and other records by an exporter, importer, producer, supplier or other person concerning the origin of goods imported or exported under preferential tariff treatment in terms of the agreement; or

(*f*) regarding any other requirements which may be necessary for the enforcement or implementation of the agreement.

(2) Rules made in terms of subsection (1) may make applicable provisions of Chapter 28 of the Customs Control Act, with any modifications necessary for the enforcement or implementation of an international trade agreement, for regulating the registration of persons referred to in that subsection.

_Ad_ entry into force

5.98 The Department's attention is drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996, which section provides for international agreements and reads as follows:

"**231.** (1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

5.99 The Protocol of Amendment inserting the TFA into Annex 1A of the WTO Agreement was subsequently adopted by the General Council on 27 November 2014. This permitted Members to formally accept the TFA through their domestic legislative procedures.

5.100 As regards agreements requiring approval by Parliament, paragraphs 5.4, 5.6 and 5.7 of the *Manual* provides as follows:

"**5.4** Section 231(2) of the Constitution provides that all international agreements shall bind the Republic only after they have been approved by resolution of both Houses of Parliament. The exceptions are: (1) agreements of a technical, administrative or executive nature, or (2) those which do not require accession or ratification. The result is that Parliament is required to approve only agreements which require "ratification or accession" and which are not of a technical, administrative or executive nature.

5.6 Departments should not lightly determine that such agreements requiring ratification or accession are "technical, administrative or executive". Failure to allow Parliament to ratify an agreement might result in a defect in the conclusion of the agreement.

5.7 Although there is no rule as to which types of agreement require ratification or accession, this requirement is generally stated in the text of the agreement. As a

general guideline this applies normally to multilateral agreements, although in some cases such a procedure could also be required for bilateral agreements."
(Our emphasis.)

5.101 **J Dugard, International Law. A South African Perspective**, (3rd Ed), at pp. 408 -409 remarks as follows with regard to formal and multilateral agreements such as the TFA:

"**Formal agreements, particularly multilateral agreements, normally require ratification in addition to signature.** This requires the representative of the state subsequently to endorse the earlier signature. This provides the state with an opportunity to reconsider its decision to be bound by the treaty and, if necessary, to effect changes to its own law to enable it to fulfil its obligations under the treaty. In practice treaties generally indicate whether ratification is required, but where this is not done the intention of the parties will have to be ascertained from the surrounding circumstances. Although a state is not bound by a treaty that it has signed but not ratified, it is obliged to refrain from acts which would defeat the object and purpose of such a treaty until it has made clear its intention not to be bound by the treaty.

A state may later become a party to a treaty in whose negotiation it did not participate, and which it did not sign, by means of accession, provided that the original parties accept that such states may accede to the treaty. Multilateral law-making treaties that seek to achieve a large measure of universality generally include an accession clause. For instance, the International Covenant on Civil and Political Rights provides that it shall be open to accession, *inter alia*, by any member state of the United Nations.

While it is not difficult to identify an international agreement subject to ratification or accession, in practice, it may prove difficult to identify an agreement of a technical, administrative or executive nature which comes into force on signature alone. All will depend upon the intention of the parties which must be ascertained from the circumstances surrounding the conclusion of the treaty. The practice of the government law advisors is to treat agreements of a routine nature, flowing from the daily activities of government departments' as not requiring parliamentary approval. **Where, however, there is any doubt, the agreement is referred to Parliament.**". (Our emphasis.)

(With regard to the highlighted parts see also **M Olivier**, Informal international agreements under the1996 constitution, SAYIL Vol. 22, 1997, p63 at p 64.)

5.102 In view of our above discussion and taking into account that South Africa ratified the WTO Agreement, which ratification according to the WTO Agreement also applies to the Multilateral Trade Agreements in Annex 1, including the TFA, as well as the fact that both the TFA and the Protocol are multilateral agreements, we are of the opinion that the Protocol and the TFA fall within the purview of section 231(2) of the Constitution and will therefore bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.

5.103 We have also considered, *inter alia,* the following legislation:

. International Trade Administration Act, 2002 (Act No. 71 of 2002)

Special Economic Zones Act, 2014 (Act No. 16 of 2014)

- Public Finance Management Act, 1999 (Act No. 1 of 1999);
- State Liability Act, 1957 (Act No. 20 of 1957);
- South African Reserve Bank Act, 1989 (Act No. 90 of 1989)
- Marketing of Agricultural Products Act, 1996 (Act No. 47 of 1996)

and are of the view that the provisions of the TFA are not in conflict therewith.

6. Subject to our aforementioned remarks, no provision of the TFA is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.

Yours sincerely,

FOR THE CHIEF STATE LAW ADVISER

W J J NEL/E DANIELS

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PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION; PLUS ANNEX AGREEMENT ON TRADE FACILITATION

1. Your request for urgent legal advice received on 4 September 2015 under reference number 18/1/7/WTO/TFA bears reference.

2. The State Law Advisers (IL) are requested to scrutinize the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "Protocol" and the "WTO" respectively) and its Annex the Agreement on Trade Facilitation ("TFA"). The WTO General Council on 27 November 2014 adopted the Protocol (plus its Annex). We noticed that the Department of Justice & Correctional Services ("DoJ & CS") has given a legal opinion on 24 August 2014 which concluded that there is nothing in the draft Agreement in conflict with the domestic law of the Republic of South Africa. We wish to comment as follows from an international law angle:

3. We note that the WTO Agreements fall into a simple structure with six main parts: an umbrella Agreement (the Marrakesh Agreement Establishing the WTO); Agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property); dispute settlement; and reviews of Governments' trade policies. We note that this Protocol sets out the procedure for amending the Marrakesh Agreement Establishing the WTO by inserting the TFA (see Articles 1 and 4 of the Protocol).

4. Relevant International Law to assist

4.1 In modern treaty law practice, the name (designation) of an international instrument does not, in itself, determine the status of an instrument: What is decisive is whether the negotiating international actors, normally states or international/intergovernmental organisations, intended the international instrument to be legally binding or not, because of the definition of a treaty in the VCLT: *"An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."* In particular the requirement of *"governed by international law"* embraces the element of an intention to create obligations under international law amongst international actors (Aust A., Modern Treaty Law and Practice, 2004, University Press, p. 17, 20, and 26). An Agreement cannot be assessed solely on its title: The provisions of the Agreement, the particular circumstances in which it was drawn up and the intention of the Parties, may disprove any suggestion communicated by the designation (Dörr O & Schmalenbach K. (eds.) Vienna Convention on the Law of Treaties A Commentary, 2012, Para 35).

4.2 The following elements must be present in order to qualify as an international organisation (Sands P. & Klein P., Bowett's Law of International Institutions, (2009) Para 1-028 to 29; Brownlie I., Principles of Public International Law, 7th ed. (2008), p. 677):

a. A permanent association of States, with lawful objects, equipped with organs;
b. A distinction, in terms of legal powers and purposes, between the organization and its member States;
c. The existence of legal powers exercisable on the international plane and not solely within the national systems of one or more States; and
d. It must be established by Treaty or other instrument governed by international law such as a resolution adopted in an international conference.

4.3 The relationship between an international organisation and its members are complex. However, a Treaty does not create either obligations or rights for a third State without its consent (Art 34 VCLT; Aust p.207), therefore the VCLT rest on the sovereignty and independence of States: a Treaty cannot by its own force impose an obligation on a third state, nor modify in any way the legal rights of a third states without its consent.

4.4 The amendment of a multilateral Treaty can be complex and problematic: Due to the many States participating in a multilateral Treaty regime the process of agreeing on amendments and then bringing them into force can be nearly as difficult as negotiating and bringing into force the original Treaty; and because of their long life multilateral Treaties are more likely to need amendment (See Aust pp. 212-222). The basic rule for the amendment of Treaties is found in Article 39 of the VCLT, namely that a Treaty may be amended by *"agreement"* between the Parties. Article 39 also recognises that many Treaties, in particular multilateral, have their own built-in amendment mechanisms in order to avoid the problems inherent to amending a multilateral Treaty by means of another Treaty:

a. Non-automatic amendment procedures require consent from all the States party to the Treaty; and
b. Automatically binding amendment mechanisms require only that an amendment must be approved by a specified percentage of the States party to the Treaty after which it will be

binding on all members (essentially, once an amendment has entered into force, it also binds all those who did not vote for or ratify it).

Both mechanisms are acceptable in terms of Treaty Law and out diplomatic practice.

5. Status of the Protocol plus its Annex the TFA

5.1 The WTO is an international organization. It is our opinion that this Protocol plus its Annex the TFA are in Treaty format, that the language utilized is of a peremptory nature, and furthermore that is it between sovereign international actors. Consequently the Protocol plus its Annex the TFA are international Agreements and will bind the Republic of South Africa in terms of Section 231 of the Constitution of the Republic of South Africa, 1996 (hereinafter the "Constitution").

5.2 Section 231(2) of the Constitution states that all international Agreements shall bind the Republic only after it has been approved by resolution of both Houses of Parliament. The only exceptions to this rule are in Section 231(3): Agreements of a technical, administrative or executive nature, or Agreements which do not require accession or ratification. Consequently Parliament is only required to approve international agreements which require ratification or accession, *and* which are not of a technical, administrative or executive nature. In terms of Paragraph 5.5 of the Manual on Executive Acts of the President of the Republic of South Africa the terms technical, administrative and executive agreements refer to the following categories of international agreements: Agreements which are departmentally specific; Agreements not of major political or other significance; and Agreements with no financial consequences and which do not affect domestic law. It is clear that the Legislature's intention was to provide for an expedited way of dealing with the many minor everyday issues that can be the subject of agreement between two States, in other words for minor international Agreements.

5.3 The umbrella Agreement creating the WTO (the Marrakesh Agreement Establishing the WTO) is a major multilateral instrument. Furthermore Article 3 of the Protocol demands that the amendment thereof has to be accepted by members. Consequently this Protocol plus its Annex the TFA fall under Section 231(2) of the Constitution and Parliamentary approval is required.

5.4 Article 4 of the Protocol states that it shall enter into force in accordance with Para 3 of Article X of the Agreement Establishing the WTO, the relevant part of which determines:

> *"Amendments to provisions of this Agreement, ..., ... , of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it."*

This is a non-automatic amendment procedure and our Parliament will have to give its approval to this amendment.

6. Procedure to be followed

6.1 The Department is reminded that the following procedure will have to be followed:

a. For the Agreement to be signed:

i. The President's approval needs to be obtained **before** the agreement can be signed.
ii. As a President's Minute must be obtained regardless of whether or not the agreement falls within the ambit of section 231(2) or 231(3) of the Constitution, the procedure for obtaining approval of the National Executive, must be complied with. This entails the text of the draft Agreement must be submitted to the State Law Advisers at the DoJ & CS for scrutiny to ensure that it is consistent with domestic law (done) and to the State Law Advisers (IL) at the DIRCO through the relevant political desk, for scrutiny to ensure that it is consistent with international law (this opinion). The text of the draft Agreement must then be certified by the State Law Advisers (IL) at DIRCO.
iii. In order for the draft Agreement to be certified for signature by the President, the following documentation must be submitted to OCSLA (IL) in folder Z137: Two copies of the President's Minute; Two copies of the Explanatory Memorandum setting out the purpose of the Agreement and proposed date of signature; Two copies of the finally agreed text of the draft Agreement; Two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and OCSLA (IL); and a completed certification checklist.

b. To obtain approval for ratification:

i. Cabinet memorandum prepared in the normal manner and submitted through the relevant ministry to the cabinet secretariat;
ii. Note that the various Cabinet committees may have their own requirements.
iii. Once Cabinet recommended that the agreement should be approved by Parliament, the agreement needs to be tabled in Parliament: Tabling is the authority of the Presiding Officers; Letters requesting tabling should be addressed to the Speaker of the National Assembly and Chairperson of the National Council of Provinces; The letter must clearly indicate that the tabling is done in terms of Section 231(2) of the Constitution; The requesting letter must be signed and dated by the responsible Minister; An explanatory memorandum and a draft resolution must accompany the tabling of an international Agreement that has to be approved by Parliament; The explanatory memorandum must briefly set out the history, objective and implications of the agreement; Indicate recommendation of the cabinet; Include the legal opinions of the State Law Advisers of the DoJ & CS and of the State Law Advisers of DIRCO; State whether the agreement has self-executing provisions that will become law in the Republic upon the approval of the agreement in parliament; And give account of the projected financial and other costs of the agreement for the State and contain all information needed by Parliament to make an informed decision.
iv. Upon receipt of the request for tabling, the Clerk of the Papers immediately refers the request to the Presiding Officers for approval.

v. The paper (agreement) is tabled on the day in which it is recorded in the *Announcements, Tablings and Committee Reports*.
vi. The Agreement so tabled is referred to the relevant committees of Parliament for debate.
vii. The Agreement is considered by the relevant portfolio committees of both houses of Parliament.
viii. The committees will report on their decisions and the reports will be printed in the *Announcements, Tablings and Committee Reports*.
ix. The reports are then placed on the Order Paper for consideration in the National Assembly and the National Council of Provinces.
x. The reports of the committees are considered by the National Assembly and National Council of Provinces sitting separately.
xi. Both the National Assembly and the National Council of Provinces must adopt the reports. This approval is printed in the Minutes of Proceedings.
xii. A copy of the Minutes of both Houses reflecting the decision of the Houses must be submitted to the DIRCO and a draft Instrument of Ratification with the request that the Minister of DIRCO should sign the Instrument. The line function department may approach DIRCO/OCSLA with request for assistance in drafting an Instrument of Ratification and the deposit procedure.

(It should be noted that at least an 8 week period must be allowed for Agreements to be processed through Parliament; Departments must work through their Parliamentary offices and officers in Cape Town; Departments must ensure that the correct title of the Agreement is clearly written to avoid confusion; A copy of the originally signed copy of the Agreement is to be tabled; and Departments, through their Parliamentary officers, should liaise with the committee chairperson and secretary to ensure that the Agreement is considered and reported on by the committee.)

7. Comments on the Text of the Draft Agreement

7.1 Negotiations on this multilateral Protocol plus its Annex the TFA are closed and we will not comment on the text.

8. We trust these comments will be of assistance.

Theunis Kotzé
STATE LAW ADVISER (INTERNATIONAL LAW)

7 September 2015
PRETORIA