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# Natural Disasters, and Trade Research

Study II

**A legal mapping**

**Giovanna Adinolfi**

(University of Milan,  
Professor of International Law)



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# Executive Summary



1. This report surveys the scope that exists under World Trade Organization (WTO) Agreements for Members to take trade measures in support of:
  - Disaster response (i.e. in the immediate aftermath of a disaster event);
  - Disaster recovery (i.e. for the restoration of assets, systems and activities within a disaster-affected economy); and
  - Disaster resilience (i.e. actions to support the ability of an economy to withstand future shocks).

The analysis focuses on disasters arising from geological or geophysical hazards (originating from internal earth processes) and hydro-geological hazards of atmospheric, hydrological or oceanographic origin. Together these hazards are referred to as natural hazards or disasters in the text.

2. The analysis is informed by trade issues identified in accompanying [country research reports](#). The analysis that follows suggests that a wide range of actions can be taken across a broad cross-section of WTO Agreements dealing with trade in goods, trade in services and trade-related aspects of intellectual property rights. The author does not discuss if the scope of action is “sufficient”. That is a matter for WTO Members to decide. The intention is to shed light on the scope for action that is presently available under existing Agreements.
3. Analysis is given to the rights and obligations arising under the multilateral trading system, and to the “policy space” available to Members under the flexibilities (e.g. the waiver under Article IX:3 and IX:4 of the Marrakesh Agreement establishing the WTO – hereinafter, the Marrakesh Agreement – the exception clauses in the General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services (GATS) or the provisions on special and differential treatment included in WTO Agreements and decisions in favour of developing and least-developed Members) envisioned therein.<sup>1</sup> In parallel, the report highlights that trade issues arising from natural disasters are also addressed within a number of international legal instruments or recommendations on disaster law. Where scope exists to apply such disciplines and approaches under existing WTO Agreements, it is highlighted in the text.
4. The separation of issues into three phases of disaster risk management (i.e. disaster response, disaster recovery and disaster resilience) facilitates analysis for the purposes of this paper. In practice, these phases may tend to overlap or merge. For some readers, the humanitarian disaster response phase may appear as separate and distinct. Why

should disaster response measures be affected by measures designed with commercial transactions in mind? The answer given by the author is that trade measures that apply to regular cross-border commercial operations impinge on both commercial and non-commercial exchanges (e.g. those by humanitarian agencies). Furthermore, the goods and services provided in the course of regular commercial trade are essential for disaster response, recovery and resilience. Goods and services used for disaster risk reduction and resilience also involve private actors.

5. One central insight from the legal analysis is that there is significant potential to advance actions that will support preparedness in the face of specific, known hazards. Preparedness and *ex ante* action, including in the area of trade policy, have the potential to mitigate negative trade effects. When hit by a disaster, Members frequently find themselves in situations where they need urgently to approve temporary “derogations” from legislation in force to prevent trade issues arising. Such an exception-based approach is, by definition, both time-consuming and costly, for the government and the commercial and non-commercial actors concerned. With the number and economic burden of such events growing, improving legislation *ex ante*, including adapting measures dealing with trade policy to take account of the exigencies of disasters, should promote resilience.
6. The trading partners of disaster-affected Members can also give *ex ante* consideration to how best to support recovery and reconstruction through their trade policy regimes. In some cases, this may mean refraining from certain actions (e.g. measures that would otherwise restrict the trade of the disaster-affected Members). In others, it may involve taking positive actions to facilitate the trade of a disaster-affected Member (i.e. encouraging exports from that country).
7. A wide range of actions can be taken to support disaster risk reduction and resilience across a broad cross-section of WTO Agreements. However, such actions should be informed by WTO disciplines to ensure that Members remain within their legal commitments. Where relevant, the report highlights these obligations and how they may inform measures to address the trade issues identified in the country research.
8. The report identifies measures that Members can take, as well as those from which they should refrain. And it does so both from the perspective of:
  - Measures that can be taken by a disaster-affected Member towards the imports of foreign suppliers of goods and services;

<sup>1</sup> For a WTO Secretariat compilation of these provisions, see WT/COMTD/W/239 of 12 October 2018.

- Measures that can be taken by the trading partner(s) of a disaster-affected Member towards the goods and services exported by that Member.

These measures are briefly summarized in the following paragraphs and dealt with in detail in the three sections on disaster response, disaster recovery and disaster resilience. Measures taken by a disaster-affected Member and its trading partners can be trade facilitating, trade neutral or trade restrictive. In turn, such measures could be considered as promoting disaster recovery and reconstruction, be neutral or negatively impact recovery and resilience in the disaster-affected trading partner.

## Disaster response

9. In the disaster response phase, trade measures taken by a disaster-affected country are mainly focused on facilitating the availability of domestic and foreign relief goods, equipment, services and personnel. WTO Agreements can support these actions, particularly the Trade Facilitation Agreement (TFA), which addresses bottlenecks in the functioning of customs and other border agencies that can arise in disaster response, or the flexibilities under the GATT 1994 allowing (discriminatory) derogations from customs duties and other fees and charges. Domestic regulations on the quality and safety of products can slow the entry of relief items. Basing national measures on international standards (where they exist and are relevant) can help to strike a balance between control and facilitation. WTO Agreements and related decisions can help disaster-affected Members source food aid from domestic suppliers and through international food assistance. In the services sector, ex ante measures to facilitate the entry of foreign service suppliers may prove helpful. The same can be affirmed with respect to domestic regulatory measures to support money transfers from abroad (remittances and cash aid) and to regulation of the allocation of frequencies in view of the critical role of telecommunications in disaster response.
10. Actions can also be taken by trade partners to support disaster response. In the goods sector, compliance with provisions on traffic in transit will prevent unnecessary delays, as would enhanced cooperation between border agencies. Food aid to disaster-affected countries should be carried out in accordance with the relevant WTO provisions, the Food Assistance Convention, and the guidelines of other recognized international humanitarian entities. Consideration could also be given to the obstacles trade partners may (inadvertently) introduce on disaster response by disaster-affected countries, for instance with respect to measures aiming at promoting compliance with prudential financial regulation (potentially hindering money transfers) or with regulation on the quality and safety of products. The provision of technical

assistance under relevant WTO Agreements and relevant instruments could seek to improve the preparedness of Members in the face of natural disasters and the ability to enact trade measures that support effective disaster response.

## Disaster recovery

11. In many instances, disaster recovery by local businesses may require financial support or support channeled through general government services. In this regard, both the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture (AoA), provide for a considerable margin of action that could be exercised by disaster-affected Members, particularly developing countries. The latitude provided for subsidies to the service sectors is somewhat broader due to the structure of that Agreement. Governments may also receive requests for tariff protection from badly affected businesses or sectors. Some built-in flexibilities exist notably as regards any space between applied and bound tariff rates, where Members have made such commitments in their schedules. Volume safeguards and balance of payment provisions may also be invoked. Recovery though is likely to be hastened by market opening as for example concerns the importation of products necessary for the reconstruction of physical infrastructure (e.g. building materials). The same consideration can also be made for the supply of some essential services, crucial for recovery activities (e.g. engineering services). Public procurement policies also play an essential role in this respect.
12. Technical cooperation under the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) from trade and development partners deserve consideration, notably in cases where a prior determination of regulatory compliance is lost, and exports from a disaster-affected country are negatively affected. Taking account of natural disasters when designing preference schemes may also be conducive to export recovery in disaster-affected Members.

## Disaster resilience

13. The 2015 Sendai Framework on Disaster Risk Reduction has changed the focus of global attention to strengthening resilience to hazards before a disaster strikes. On trade matters, disaster risk management requires the adoption of specific regulatory measures addressing customs issues that may arise in the disaster response phase aiming at ensuring “continuity management” in customs operations. In these matters, the implementation of the TFA can be helpful for disaster-prone countries.



14. Resilience depends also on the quality of physical infrastructure. The TBT Agreement offers broad latitude to promote a “Build Back Better” approach using both domestic regulations and regulatory co-operation internationally. Flexibilities are also available under the AoA and the Ministerial Decision on General Services for the implementation of government-financed support schemes aiming at strengthening resilience to disasters. The burden of these events tends to fall disproportionately heavily on the agricultural sector.
15. In the services sectors, *ex ante* measures may include the conclusion of agreements on the mutual recognition of professional qualifications (or the adoption of domestic regulation in this regard) as it would facilitate the entry of foreign qualified personnel. Overall, the improvement of disaster resilience is highly dependent upon the availability of some services (e.g. environmental services, health services, engineering services, telecommunication and weather-related services). Liberalization in these sectors could have a positive impact, encouraging the growth of the private sector and, overall, enhancing the domestic capacity to supply services crucial for reducing vulnerability to disasters.
16. Trade and development financing partners can play a useful role in providing technical assistance to disaster-prone countries, in order to improve their “trade” preparedness for natural hazards. This assistance could support, for example, the participation in international standard-setting bodies, that would give vulnerable countries the opportunity to actively contribute to the elaboration of international standards (e.g. on building materials, coherent with a “Build Back Better” approach), or focus on the elaboration of domestic regulatory frameworks on critical services for resilience purposes (e.g. telecommunication services, data storage and data management services). To support economic development and the efficient use of resources to finance disaster resilience programmes, the strengthening of trade preferences could be considered, particularly for those developing or Least developed country (LDC) Members that have adopted a comprehensive domestic legislation on disaster risk management and disaster assistance. Trade measures that would help bridge the insurance protection gap and promote the global weather enterprise also merit consideration, including perhaps as part of discussions on environmental goods and services.

## Next steps

17. This report sheds light on the scope that exists under WTO Agreements for Members to take trade measures in support of disaster response, recovery and resilience. Such actions are the responsibility of WTO Members. It is also the responsibility of WTO Members to determine what further steps, if any, they may wish to take on the basis of analysis contained in this report.

# Introduction



18. This study explores the nexus between trade issues arising in a natural disaster from the perspective of World Trade Organization (WTO) Agreements together with other international legal instruments on “disaster law” having trade implications. It complements research that examines the trade effects of natural disasters and relevant trade issues in disaster risk management with a view to **mapping where trade issues arising are reflected in WTO Agreements.**<sup>2</sup>
19. The legal “mapping” conducted in this report is submitted as a contribution to the **research on natural disasters and trade being undertaken by the WTO Secretariat**, funded by the Permanent Mission of Australia to the WTO. It is premised on the preliminary findings of the research on the macro-economic impact of natural disasters and on the trade issues arising in a post-disaster scenario, which was submitted to Members on 10 May 2019 for their consideration and discussion. The presentation focused on the **research reports** on the natural disasters’ impact in Nepal, in Dominica and Santa Lucia in the Caribbean, and in Fiji, Tonga and Vanuatu in the Pacific region.
20. With a view to facilitate the analytical discussion, the study is organized around the **three phases of disaster risk management (DRM)**, and seeks to explore the trade dimension of the policies Members may adopt: (1) in the immediate aftermath of a natural disaster (e.g. a phase where meeting the basic needs of the affected population is a priority); (2) on a short/medium-term basis with the purpose of restoring or improving the health, social and economic conditions within the affected community and economy; (3) finally, according to a preventive approach, with the purpose of strengthening the ability of a community and economy to absorb and recover from future natural hazards. These phases correspond to different sections in this report, which consider the trade issues arising respectively in (1) **disaster response**, (2) **disaster recovery**, and (3) **disaster resilience**. Within each section, the trade issues identified in the project research are situated in the context of WTO Agreements covering (a) trade in goods and (b) trade in services and other relevant instruments. Intellectual property issues are also referenced where appropriate. Some disaster-related actions may cover more than one category.

### Box 1: Disaster risk reduction terms

**Disaster:** A serious interruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and developmental losses and impacts.

**Hazards:** A process, phenomenon or human activity that may cause loss of life, injury or health related impacts, property damage, social and economic disruption or environmental degradation.

**Response:** Actions taken directly before, during or immediately after a disaster in order to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected.

**Recovery:** The restoring or improving of livelihoods and health, as well as economic physical, social, cultural and environmental assets, systems and activities, of a disaster-affected community or society, aligning with the principles of sustainable development and “build back better”, to avoid or reduce future disaster risk.

**Resilience:** The ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management.

Source: United Nations<sup>3</sup>

<sup>2</sup> For a thorough analysis of WTO Agreements, see P Van den Bossche, W Zdouc, “The Law and Policy of the World Trade Organization. Text, Cases and Materials”, 4<sup>th</sup> ed. (Cambridge, Cambridge University Press, 2018).

<sup>3</sup> Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction, United Nations General Assembly, 1 December 2016 (A/71/644).

21. While the structure offers clarity, it is not without shortcomings. One failing is the fact that **while the different phases of DRM are definable, they are not necessarily distinct**. These phases may temporally overlap. Recovery typically starts alongside disaster response. Resilience is also integral to the recovery phase thanks to the focus on “Build Back Better”.<sup>4</sup> Furthermore, the same trade issue may arise in more than one phase. This recurrence of issues in different phases leads to some repetition in the textual analysis, trade facilitation being a case in point.
22. A further concern to note is that the term “**natural disaster**” is contentious. An emerging perspective is that, in general terms, a disaster occurs when a hazard overwhelms the capability of a vulnerable community or country to manage it. While an event may emanate from a *hazard*, the resulting disaster is a *failure* of risk management, i.e. a policy failure. Following this logic, while hazards may be natural, disasters are man-made. As such, the emphasis should be placed on reducing individual, community and economy vulnerabilities while strengthening their resilience.
23. The 2015 UN Sendai Framework for Disaster Risk Reduction (see below) seeks to place the focus of attention on investing in disaster risk reduction for resilience. Against this background, the Sendai Framework considers hazards through a multi-hazard lens, not limiting itself to hazards that are predominantly associated with natural processes or phenomena. As such, the Framework applies to the risk of small-scale and large-scale, frequent and infrequent, sudden and slow-onset disasters caused by natural or man-made hazards, as well as related environmental, technological and biological hazards and risks. The present study should be viewed as a window onto a larger landscape.
24. The study does not seek to define what constitutes a “natural disaster”, either in scope or in content. Where the term “natural disaster” is referenced in WTO law, for example in the SCM Agreement or in the AoA, the scope of hazards that would constitute a natural disaster is not defined. This study does not seek to offer interpretative clarity to the type of events that may constitute a “natural disaster” under WTO Agreements. That said, the present study needs a clear scope and a definable series of events to examine. Hence, for the purposes of this research, disasters arising from “geological or geophysical hazards” (originating from internal earth processes) and “hydro-meteorological hazards” of “atmospheric, hydrological or oceanographic origin” have been considered.<sup>5</sup>
25. An alternative formulation could have been to use the term “natural hazard” instead of “natural disaster”. This term is defined as natural “processes and phenomena” that “may cause loss of life, injury or other health impacts, property damage, social and economic disruption or environmental degradation” (see box 1 above). While useful, this formulation would have left open the question of which “natural processes and phenomena” to study. Furthermore, it would potentially expand the scope of the research to cover the relationship between trade and health arising from natural phenomena e.g. zoonoses.
26. There is already a robust body of work examining the relationship between trade and health.<sup>6</sup> This work is not repeated here. The present study cites this work where germane. The study has not included disease events within the scope of the hazards researched, i.e. geo-physical and hydro-meteorological hazards. This also explains why the focus on issues relating to trade-related aspects of intellectual property rights is limited to some specific aspects relevant to strengthen disaster resilience. Although the scope of the present study has been limited to geo-physical and hydro-meteorological hazards, many of the insights may also apply in respect of hazards or disasters emanating from other sources, such as conflict, anthropogenic hazards (“induced entirely or predominantly by human activities and choices”), or socio-natural hazards (“associated with a combination of natural and anthropogenic factors”).<sup>7</sup>
27. Caution has been exercised in respect of common terms used in DRM literature which also find reference in WTO Agreements. An example here is the term: **risk**. A common term in the DRM literature, it is used in different context-specific senses within various WTO Agreements. For example, a risk assessment underpinning a measure covered by the SPS Agreement is specific to risks covered by that Agreement (e.g. risks to animal, human, plant life or health emanating from specific sources – Annex A, para. 1(a)). The same term, (i.e. risk), is found in the TBT Agreement, but in a different context (e.g. risks created by the non-fulfilment of a regulation’s legitimate objective – Article 2.2) and with different process requirements to evaluate that risk. Care has been taken to ensure that commonly used DRM terms are used in the appropriate context-specific sense when referencing WTO Agreements.
28. In 2015 the UN General Assembly endorsed the **Sendai Framework on Disaster Risk Reduction**,

<sup>4</sup> “Build Back Better” is meant to refer to the “use of the recovery, rehabilitation and reconstruction phases after a disaster to increase the resilience of nations and communities through integrating disaster risk reduction measures into the restoration of physical infrastructure and societal systems, and into the revitalization of livelihoods, economies and the environment” (ibid.).

<sup>5</sup> See “[Terminology on Disaster Risk Reduction](#)” drawn up under the United Nations International Strategy for Disaster Reduction (UNISDR) (hereinafter, *UNISDR Terminology*).

<sup>6</sup> See for example the 2013 tripartite study from the WTO, the World Health Organization and the World Intellectual Property Organization “[Promoting Access to Medical Technologies and Innovation. Intersection between public health, intellectual property and trade](#)”.

<sup>7</sup> *UNISDR Terminology*, above.

approved at the end of the Third UN World Conference on Disaster Risk Reduction.<sup>8</sup> The Sendai Framework is a 15-year, voluntary, non-binding instrument which aims at “substantial reduction of disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries”.<sup>9</sup> The Framework recognizes that the State has the primary responsibility to prevent and reduce disaster risk, and that this responsibility should be shared with other stakeholders including civil society organizations, the business sector, academia and scientific and research entities. Seven targets for disaster risk reduction are included in the Framework, of which perhaps the most germane is to reduce direct disaster economic losses in relation to global gross domestic product (GDP) by 2030.

29. The present study seeks to add to the debate on implementation of the Sendai Framework. While the Framework discusses livelihoods, economic losses, assets and businesses, it does so without reference to trade or the multilateral trading system. Research undertaken in parallel with this legal mapping exercise underscores how trade issues arise in the context of natural disasters. As such, the contribution which this study seeks to make to Sendai Framework implementation is the **mapping of where trade issues arising in disaster response, recovery and resilience are reflected in WTO Agreements**, together with other international accords or instruments having trade effect. Thereafter, actions to these issues within the appropriate bodies, or to by applying the provisions of the legal agreements identified in this study, remain Members’ prerogative.
30. The intention of this study is to undertake a mapping; it aims to assist Members navigate a path through the identification and understanding of the implications of trade rules for disaster risk management. It is for WTO Members to design and implement relevant domestic policies. The purpose of the report is to set out how Members can advance disaster risk reduction and resilience within the ambit of existing WTO Agreements and other instruments, together with other legal instruments having trade effects.
31. The area of international disaster law has developed extensively in recent decades.<sup>10</sup> A number of international legal instruments has been adopted or concluded on a universal, regional or bilateral level. Some of these instruments introduce binding legal obligations upon States, but a growing body of soft law has also been developing, including on trade matters. The critical role of trade policies in a disaster context is expressly acknowledged in international treaties specifically addressing the access into a disaster-affected country of disaster relief items and equipment (e.g. the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, hereinafter Tampere Convention) (see Annex 5). However, the role of trade policy is also addressed in general treaties concerning cooperation in the aftermath of a disaster (mostly concluded on a bilateral basis) and in regional treaties for economic integration. The present study addresses trade issues from a broad perspective, considering all three phases of disaster risk management (response, recovery and resilience), and focusing on the multilateral trading system, with a view to determining where the legal rights and obligations enshrined give scope to Members to take trade measures aimed at reducing their vulnerability to disasters.
32. The mapping surveys the following WTO Agreements and related decisions: General Agreement on Tariffs and Trade 1994 (GATT 1994), AoA, SPS Agreement, TBT Agreement, Agreement on Import Licensing Procedures, SCM Agreement, Agreement on Safeguards, TFA, General Agreement on Trade in Services (GATS), Information Technology Agreement (ITA) and ITA Expansion, Revised Agreement on Government Procurement (Revised GPA).
33. It also refers to various other international instruments, including: United Nations Charter (1945), Convention on the Privileges and Immunities of the United Nations (1946), Convention on the Privileges and Immunities of the UN Specialized Agencies (1947), International Plant Protection Convention (1951), Istanbul Convention on Temporary Admission (1990; hereinafter, Istanbul Convention) (in particular, its Annex B.9 concerning goods imported for humanitarian purposes) (see Annex 3), UN Office for the Coordination of Humanitarian Affairs (OCHA) Model Customs Facilitation Agreement (1994), Tampere Convention (1998) (see Annex 5), Chapter 5 of Specific Annex J to the World Customs Organization (WCO) International Convention on the Simplification and Harmonization of Customs Procedures (as amended, known as the Revised Kyoto Convention) (see Annex 4), Food Assistance Convention (2012), International Organization for Standardization standard on business continuity management (2012) (and comparable national standards), Sendai Framework on Disaster Risk Reduction (2015).
34. As will be shown, some non-binding international documents provide useful guidance for the design of domestic policies on disaster risk management,

<sup>8</sup> UN doc. A/RES/69/283 of 3 June 2015.

<sup>9</sup> Sendai Framework, para. 16.

<sup>10</sup> See A De Guttry, M Gestri, G Venturini (eds.), “International Disaster Response Law” (The Hague, T.M.C. Asser Press, 2012); D Fisher, “The future of international disaster response law”, in German yearbook of international law 2012, 87-118; D C Caron, M J Kelly, A Telesetsky (eds.), “The International Law of Disaster Relief” (Cambridge, Cambridge University Press, 2016); R Lyster, R Vercick (eds), “Research Handbook on Climate Disaster Law. Barriers and Opportunities” (Northampton, Edward Elgar Publishing, 2018).

including the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance approved by the International Federation of the Red Cross and Red Crescent (IFRC) in 2007 (see Annex 1; hereinafter, IFRC Guidelines), followed in 2013 by the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (see Annex 2; hereinafter, IFRC Model Act).



# Disaster response





### 3.1 Introduction and overview

35. ***“Large influxes of foreign relief providers and donations may be necessary to save lives and restore dignity after a significant disaster. But they also pose a formidable challenge to affected governments, already occupied with the difficulties in coordinating the domestic response. Unfortunately, very few states have detailed rules, procedures and institutional frameworks for facilitating and managing international disaster assistance. As a result, entry barriers, such as those related to entry visas, customs clearance and duties, taxation, transport permissions and registration requirements, may lead to delays and greatly increased costs. Shortcomings in oversight hamper coordination and complementarity between international and domestic relief efforts and allow for the entry of irrelevant or poor-quality aid.”***<sup>11</sup>
36. Related project research on Nepal, Dominica, Saint Lucia, Fiji, Tonga and Vanuatu has identified a series of trade-related issues that arise in disaster response. The effect of these issues is **to significantly delay assistance in the immediate aftermath of a disaster, while increasing the associated costs** for relief providers, governments and the affected communities. These trade constraints mean that a dollar spent on natural disaster relief buys fewer goods and services for those communities and businesses affected by a disaster event.
37. One challenge for national governments is the **growing number of actors who may engage in relief actions**. National authorities may already interact, or may have established coordination mechanisms, with some relief actors: e.g. the United Nations and its specialized agencies (e.g. the World Food Programme), the IFRC and its national societies, and other operators (typically non-governmental organizations – NGOs). Established coordination mechanisms may already be in place as a result of past events or predictable hazards (e.g. seasonal flooding).
38. To these established organizations, a further set of less familiar (from the perspective of the national authority) actors may be added in the event of a disaster generating a broader response (e.g. one for which either the disaster-affected State may declare an emergency, or the UN may launch a donor appeal). These additional organizations may be official (e.g. bilateral donor agencies or the military of other nations), or from civil society. Indeed, a diverse range of NGOs may decide to respond to a specific situation (e.g., business, charity, or religious organizations).
39. Nationals of the disaster-affected State residing abroad are another important group in terms of the support they provide to disaster-affected family members, businesses and communities, in the form of goods, financing and other services, e.g. community action on social media. Relief assistance from expatriate populations may come in different forms, e.g. parcels sent to family members, transfer of funds and containers sent to community groups.
40. **Experience with responding to natural disasters** may differ significantly among and within these groups of actors, together with the knowledge and capacity to comply with customs regulations. Levels of logistical capability may differ significantly. Among some, familiarity or experience with the customs and other border agencies and procedures of the disaster-affected State may be minimal or non-existent. It is not a surprise that cross-border issues arise.
41. **Relief items may encounter a range of specific constraints**. Customs and other border agencies may be overwhelmed by the sudden arrival of relief consignments, many times the normal volume of commercial consignments which they typically process. Problems may arise because of damage to infrastructure, e.g. harbour docks, equipment to move and stack containers or scanning equipment. Power outages may disable IT systems used to clear goods. Relief consignments may arrive with no addressee or importing entity (so-called unsolicited bilateral donations), creating difficulties for customs and other border organizations in knowing who should complete **import procedures**. All of which may add to difficulties with the storage of containers and delays in clearing customs.
42. Furthermore, even where relief items are going through established channels (e.g. with an organization present in the Member with experience of providing support in past disaster situations), there may be a **risk associated with the entry of certain goods** (e.g. phytosanitary risks with entry of seeds or planting materials). Compliance with technical regulations and other measures enacted for public policy reasons (e.g. food safety, human or animal health) presents a further range of issues that relief providers must navigate. The ability of a Member to discharge these functions in the aftermath of a disaster may be compromised. **Inspection regimes** applied to commercial goods during regular normal operations (e.g. the visible inspection of all cargos passing through customs by different agencies) will slow the clearance of relief items even though with sustainable benefit in terms of safety and security. Non-risk-based border clearance systems will also slow the entry of commercial supplies needed for recovery.

11 “Progress in the implementation of the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance”, 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, 31C/11/5.5.1, Geneva, Switzerland, 28 November – 1 December 2011.

43. Clearance may also be slowed by overly burdensome **documentation requirements** and the actions of customs and other border agency officials. By the same token, organizations sending relief items may not be informed about customs and other border clearance requirements in the disaster-affected Member or may be unable to find this information. Additionally, some relief items may only be needed for the period of the disaster response (e.g. vehicles, telecommunications equipment). Issues can arise in respect of their temporary importation. **Transit of relief goods through third countries** (e.g. when a disaster occurs in a landlocked Member) adds another range of potential customs and other border clearance issues.
44. Finally, the entry of relief goods may also be hindered by the procedures needed to **exempt customs charges that would otherwise be due**. The suspension of these charges may lead to delays as humanitarian responders struggle to provide all the necessary documentary evidence ensuring associated procedures, if applied, are straightforward and will help facilitate response.
45. One area which is under-researched is that of the **entry of services**. This issue is dealt with along two dimensions. The first one pertains to the entry of natural persons providing services through mode 4 of the GATS. For instance, for **assistance by foreign health personnel** (e.g. rescue teams, doctors and nurses) difficulties may arise because of the inconsistency of professional qualifications with those required under the domestic legislation of the disaster-affected Member. The second dimension takes into consideration that various forms of **financial support** (e.g. vouchers, airtime, debit cards) are used by a cross-section of relief actors to support their assistance. This and a variety of other issues potentially arise related to trade in financial services under GATS mode 1.
46. **Various approaches are being tried to get around response issues**. As discussed later in this document, concerns about deviation from most-favoured nation treatment could arise in the case of the approaches b) and c) below:
- (a) Time-limited exemption of relief goods and services from some, or all, of the applicable laws and procedures;
  - (b) Approval and exemption of specific relief organizations from some, or all, regulations on access of foreign goods and services;
  - (c) Identification and separate treatment of relief goods;
  - (d) Moving to relief in the form of cash, not goods.
47. Trade issues arising in the aftermath of a disaster can be complex, often highly technical in nature and not amenable to simple solutions. Nor are these trade issues the responsibility of any one stakeholder group. Solutions may be better found through **preventive actions**, mindful also that the primary responsibility for disaster response lies with the national authorities of the country in which a natural disaster occurs. Minimizing trade issues in future disaster response is an investment in resilience and can be considered an action in support of the 2015 Sendai Framework.
48. Indeed, the efficacy of response operations is strictly collated with the existence of **domestic legislation and regulations specifically addressing disaster situations** or, more generally, states of emergency. The adoption of a domestic law addressing these issues is suggested by the 2015 Sendai Framework, whereby disaster preparedness in the form of the enactment of a comprehensive legislation is a crucial factor in lowering the negative impact of natural disasters, particularly in disaster-prone countries.
49. A core element of domestic legislation is the definition of appropriate procedures and competent authorities on the declaration of a “state of emergency” and, on its basis, the determination of both national (central or local) institutions vested with specific responsibilities and the ad hoc legal regimes to be applied, with the purpose of providing immediate assistance. In sum, the success of response operations is closely connected with activities addressing disaster resilience.
50. According to the IFRC, domestic disaster laws and regulations should also address the entry of foreign goods, equipment and personnel. They would contribute to the establishment of a clear and predetermined legal framework, to be rapidly implemented, smooth the entry of all materials and personnel needed to cope with the emergency.
51. However, even in situations where domestic emergency legislation has been enacted, **there may not be legal clarity** as to which goods or which organizations should be designated as relief suppliers and, therefore, enjoy the special regimes for the entry of their goods, equipment and personnel.
52. Most of the issues discussed below would easily come under the scope of domestic disaster legislation. The overall purpose of the following analysis is also to assess to what extent trade issues in disaster response are addressed within the multilateral trading system.
53. This section of the study examines **how trade issues arising in disaster response could be addressed through relevant WTO Agreements and other relevant instruments**. This section discusses the following Agreements and instruments: GATT 1994, AoA, SPS Agreement, TBT Agreement, SCM Agreement, TFA, ITA and ITA Expansion, GATS.

54. It also refers to these other international instruments: United Nations Charter, Convention on the Privileges and Immunities of the United Nations, Convention on the Privileges and Immunities of the UN Specialized Agencies, International Plant Protection Convention, Istanbul Convention (see Annex 3), Tampere Convention (see Annex 5), WCO Revised Kyoto Convention, WCO Immediate Release Guidelines, IFRC Guidelines (see Annex 1), IFRC Model Act (see Annex 2), Automated System for Custom Data (ASYCUDA) and Automated System for Relief Consignments (ASYREC) developed by the United Nations Conference on Trade and Development (UNCTAD), World Animal Health Organization (OIE) Terrestrial Animal Health Code, UN OCHA Model Customs Facilitation Agreement, and Food Assistance Convention.
55. **The analysis is organized as follows:** Issues affecting the **entry of goods** are discussed first. Under this heading, **customs processes and procedures** for the entry of merchandise goods are discussed first. Next, the difficulties due to compliance with non-tariff measures are examined. The focus is on the implications of domestic disciplines concerning the **quality and safety** requirements that are applied on the entry of relief items. The analysis concludes by considering the burden of imposing normal **customs duties, fees and other charges** on relief goods, and the options available to waive them under existing WTO rules. A sub-section is devoted to the **access to goods of primary necessity** in relation to the rights and obligations established by WTO law. The second part of this section discusses services which may be helpful in the response phase as well as some of the restrictions that may impinge on the provision of such services, such as restrictions on the **entry of foreign services and service suppliers** or the **supply of foreign financial services**.
56. Lastly, section 3.4 summarizes the discussion in a checklist of “do’s and don’ts” with regard to the trade measures that can be taken by both disaster-affected Members and their trading partners.

### 3.2 Issues affecting the entry of goods (relief items and equipment)

57. The entry of goods into the territory of an importing Member is conditional on compliance with the applicable domestic laws and procedures. The power to enact such measures is implicitly recognized as part of the common institutional framework for the conduct of trade relations between the 164 Members of the World Trade Organization. These measures though are conditioned by the obligations found in the Agreements that constitute the multilateral trading system.
58. In general, the work of the WTO is focused on “the substantial reduction of tariffs and other barriers to trade” and on “the elimination of discriminatory treatment in international relations”.<sup>12</sup> In so doing, the Agreements that constitute the multilateral trading system impose obligations on WTO Members in the conduct of their trade relations and confer rights to question or challenge the actions of others.
59. Unless otherwise provided, the entry of foreign goods for disaster relief purposes comes under the scope of the same rules that apply to regular commercial transactions. Having established that, WTO Agreements are a useful starting point for an examination of whether or not the cross-border issues arising in the immediate aftermath of a disaster can be addressed within existing rules.

#### 3.2.1 Customs processes and procedures

60. As trade obstacles stemming from import procedures can be considerable, attention is given to them within the WTO legal regime. A general provision is set in Article VIII:1(c) of the GATT 1994, whereby Members “recognize the need for minimizing the incidence and complexity of **import and export formalities** and for decreasing and simplifying **import and export documentation requirements**”. While acknowledging the trade effects of customs administrative procedures, Article VIII:1(c) merely refers to the need to reduce their impact on trade flows, without establishing any specific obligations upon WTO Members.
61. As for customs process and procedures, commitments on the **notification, publication, transparency and administration of trade regulations** are introduced by Article X of the GATT 1994, and in the agreements concluded at the end of the Uruguay Round on import licences, customs valuation and pre-shipment inspection. Among others, these agreements all contain transparency obligations, whose value is undisputed for relief providers to become acquainted with measures that may affect the entry of relief goods. Such transparency should also facilitate the work of initiatives such as the Logistics Cluster established under the UN Inter-Agency Standing Committee.<sup>13</sup>
62. The entry into force of the **TFA** on 22 February 2017 promises to simplify customs processes and procedures for regular commercial trade, but also for the purposes of ensuring a timely and effective assistance in a post-disaster scenario. The purpose of the TFA is to expedite the movement, release and clearance of goods, including goods in transit. It does so by clarifying and improving the relevant aspects of Articles V, VIII and X of the GATT 1994, incorporating disciplines on customs cooperation,

<sup>12</sup> Marrakesh Agreement, preamble, third recital.

<sup>13</sup> The Logistics Cluster provides coordination and information management to support operational decision-making and improve the predictability, timeliness and efficiency of the humanitarian emergency response. The World Food Programme hosts the Global Logistics Cluster support team at its headquarters. For more information, see: <https://logcluster.org/about-us>

taking also into consideration the work undertaken by other international organizations, including the WCO and the WCO Revised Kyoto Convention.<sup>14</sup>

63. As of 31 October 2019, the TFA has been accepted by 147 WTO Members, including 26 least-developed countries (LDCs). The TFA binds from its date of entry into force those WTO Members having deposited their formal instrument of acceptance. Developing and LDC countries have the option to avail themselves of the special and differential treatment provisions outlined in Section II of the TFA, which permit them to autonomously determine their specific timelines for implementation, as

well as the technical assistance and support for capacity building that would be required for such purposes.<sup>15</sup>

64. Box 2 provides an overview of TFA articles and outlines how they may facilitate the entry of goods during situations of natural disasters. The text that follows the box examines several provisions in more detail. An important point to underline is that nothing prevents a Member from adopting measures to further expedite the time and reduce the costs associated with imports in case of an emergency.

## Box 2: Trade Facilitation Agreement and clearance of relief items

### Article 1: Publication and Availability of Information

Publication requirements should help address the lack of information about procedures for import, export and transit, together with the required forms and documents and applicable duties, fees and charges among suppliers of relief goods. Enquiry points and making information available through the internet should also support transparency. *Ex ante* publication of information about procedures and forms that should be completed in the event of a disaster would support continuity of border clearance functions if electronic clearance systems are no longer operational in the aftermath of a disaster event.

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

Allowing relief providers to become acquainted with new rules governing the movement, release and clearance of goods, including those in transit, in advance of their entry into force would help them to adapt their operations to changing legal requirements during disaster response.

### Article 3: Advance rulings

The TFA encourages Members to provide advance rulings on the applicability of the Members' requirements for relief or exemption from customs duties. Such rulings could prove useful in operations such as pre-positioning of relief stocks.

### Article 4: Procedures for Appeal or Review

Ensuring the right to an administrative or judicial appeal of a customs decision may help relief providers challenge arbitrary or discriminatory treatment.

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

Prior notifications of enhanced controls in respect of goods, beverages or feedstuffs, for the protection of human, animal, or plant health, (e.g. such as when the declaration of a national emergency expires) should assist relief providers ensure compliance with new import controls. Prompt notice of detention of goods may help reduce costs (e.g. storage charges) for both the non-compliant relief provider and the disaster-affected government.

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

Publication of fees and charges applicable, the reason for such fees and charges, the responsible authority and when and how payment is to be made should enhance transparency. *Ex ante* publication of the arrangements that would apply in the event of a natural disaster would give an opportunity to review the number and diversity of these charges. Measures covering penalty disciplines for breach of the Member's customs laws, regulations, or procedural requirements should provide greater certainty and minimize scope for arbitrary or discriminatory treatment. Article 6 includes a requirement to provide an explanation in writing to the person(s) 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.

### Article 7: Release and Clearance of Goods

Provisions allowing for pre-arrival processing may help expedite the release of goods upon arrival. Likewise, electronic payment may facilitate the settlement of duties, fees and charges without the need to incur the cost of local banking relationships. Provisions permitting the separation of release from final determination of customs duties, taxes, fees

<sup>14</sup> For an overview of the alignment between trade facilitation under WTO and the Revised Kyoto Convention, see WTO doc. G/C/W/407 of 29 July 2002.

<sup>15</sup> Further details on implementation can be found at the Trade Facilitation Assistance facility website: <https://www.tfadatabase.org/implementation>.

and charges may prove useful, notably in the immediate aftermath of a disaster. Research highlighted delays by disaster-affected governments in determining lists of relief items eligible for tariff exemption. Releasing goods that meet all other regulatory requirements (e.g. sanitary controls) subject to the lodging of a bond or surety to cover such fees could speed up clearance while the scope of exemptions is decided. Ex ante publication of applicable procedures would be another way to address this risk. The use of risk management to concentrate controls on high-risk consignments and expedite the release of low-risk consignments is another way that disaster-affected governments can ensure that arbitrary delays do not arise.

Additional trade facilitation measures for “authorised operators” could apply to humanitarian relief actors meeting specified, published criteria. The TFA indicates that such criteria may include an appropriate record of compliance with customs and other related laws and regulations; a system of managing records to allow for necessary internal controls; financial solvency, including, where appropriate, provision of sufficient security or guarantee; and supply chain security. The authorised operator schemes themselves 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. Provisions for the development of international standards on authorised operators and mutual recognition of authorised operator schemes could also be used to develop provisions to cover natural disaster and other relief situations.

Provisions for expedited shipments could also be adapted for use in the situation of response to a natural disaster. These TFA provisions allow for the expedited release of “at least those goods entered through air cargo facilities”. It also provides for minimization of the documentation required for the release of expedited shipments and, to the extent possible, release based on a single submission of information on certain shipments.

The TFA makes provision for the release of perishable goods outside of the business hours in exceptional circumstances. Giving appropriate priority to perishable goods (including medicine) when scheduling any examinations of goods entering may also help minimize spoilage when relief goods arrive, and appropriate storage facilities are either damaged or destroyed.

#### **Article 8: Border Agency Cooperation**

The TFA encourages cooperation between border agencies. For customs agencies sharing a common border, the Agreement encourages the coordination of procedures at border crossings to facilitate cross-border trade. Such procedures for the alignment of working days and hours, procedures and formalities; development and sharing of common facilities; joint controls; and establishment of one stop border post control.

#### **Article 9 Movement of Goods Intended for Import under Customs Control**

One mechanism that could be used when a disaster is localized to a specific city or region is movement under customs control. Using this provision would take pressure on the main port of entry and allow release and clearance of goods through a temporary customs control office established to clear relief goods close to the disaster-affected zone.

#### **Article 10: Formalities Connected with Importation, Exportation and Transit**

This Article encourages Members to review their formalities and documentation requirements so as to ensure the rapid release and clearance of goods (particularly perishable goods), reduce the time and cost of compliance for traders and operators, apply the least trade restrictive alternative when other possible approaches could be used, and suspend or withdraw them if no longer required. Members could include the formalities and documentation requirements set for situation of natural disaster within such a review.

A further provision of utility for relief organizations when responding to a sudden on-set emergency is for the obligation upon Members to allow, where appropriate, the acceptance of paper or electronic copies of supporting documents required for import, export, or transit.

The establishment of single windows should also enable relief providers to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single-entry point to the relevant national authorities or agencies. Such a system should facilitate entry, but only when electronic systems are operational. Business continuity planning to ensure that such systems can still operate when, for example, electricity outages interrupt functionality, may be necessary to ensure that such systems do not themselves become a barrier when non-operational.

#### **Article 11: Freedom of Transit**

The provisions of this Article are of particular relevance for landlocked developing countries. The Article seeks to ensure that regulations and formalities applied on traffic in transit are not be applied in a discriminatory way or constitute a disguised restriction. To give effect to this objective, the Article provides for capping transit fees at cost and ensuring that other restraints are not applied. It seeks to ensure that Members treat transit traffic no less favourably than non-transit goods. Provisions exempting transit goods from the technical regulations and conformity assessment procedures of

the transit Member and allowing for advance processing of transit documentation prior to arrival may also speed up transit consignments, together with provisions on guarantees. Where Members appoint national transit coordinators, these persons may be of particular utility for relief actor in ensuring the regular flow of relief items through transit countries. Provisions allowing for the cooperation and coordination between Members with a view to enhancing the practical operation of transit provide an opening for relief organizations to engage with governments to promote ex ante cooperation.

#### Article 12: Customs Cooperation

Measures promoting compliance and cooperation provide a basis for ex ante action by Members prone to natural hazards to engage with the relief community so as to ensure that they are aware of their compliance obligations so as to encourage voluntary compliance. Sharing of information on best practices in managing customs compliance could also be considered as including experience gained in natural disaster situations. The Article further encourages Members to cooperate in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness. Again, this provision could be read to include situations such as those pertaining after a natural disaster.

Provisions setting exchange of information where there are reasonable grounds to doubt the truth or accuracy of a customs declaration could also provide a basis to enhance cooperation with regard to illicit or other undesirable goods (e.g., expired medicines). The Article provides for the notification to the WTO Trade Facilitation Committee of the details of a contact point for the exchange of customs information. Cooperation between the customs authorities in Members providing assistance and the customs service in the disaster-affected country would enhance clearance and ensure that illicit or other undesirable goods are rejected.

65. Article 7 of the TFA includes specific provisions aiming at reducing the time required for the **release and clearance of goods**. Members are due to adopt procedures for the pre-arrival submission of import documentation (para. 1) and for the release of goods prior to the final determination of customs duties, taxes, fees, and other charges to be paid (para. 3). Article 13 of the Agreement on Customs Valuation already indicates that Members shall make provisions for circumstances where it is necessary to delay the determination of the customs value. In such circumstances, importer must be given the possibility to withdraw the goods from customs, provided sufficient guarantees are given for the payment of the customs duties, once determined. Article 7.3 of the TFA provides further guidance in terms of the guarantees to be required and their operation. Furthermore, it states that the separation of determination from clearance and its corresponding guarantees may also cover taxes, fees and charges, in addition to customs duties.
66. Article 7.7 of the TFA binds Members to provide "additional trade facilitation measures" to the benefit of "**authorized operators**". The envisaged additional measures include softer documentary and data requirements, low rate of physical inspection and examinations, rapid release time, deferred payment of duties and other charges, flexibilities on accepted guarantees for release, the possibility to submit customs declarations effective for a given period of time, and clearance of goods in places different from customs premises (Article 7.7.3).
67. Authorized operators' schemes should be established in domestic law by WTO Members themselves, based on criteria pertaining exclusively to compliance (or risk of non-compliance) with laws, regulations and procedures. These regulatory schemes have to be determined and applied without arbitrarily or unjustifiably discriminating between operators where the same conditions prevail.
68. A disaster-vulnerable country could include under the scope of its domestic authorized operators schemes foreign civil protection authorities (for example those with which the national emergency management organization has signed a cooperation agreement) or regional emergency management institutions, other governmental agencies, non-governmental organizations participating in relief operations, as well as relevant intergovernmental organizations. To the extent that private sector actors active in logistics and international transport activities have obtained "authorized operator" status, their involvement in relief consignments transport and delivery could also expedite the provision of humanitarian assistance. This is already happening through initiatives like the Connecting Business Initiative, launched at the World Humanitarian Summit in May 2016. Its purpose is to strengthen the private sector's engagement before, during and after emergencies, in view of increasing the scale and effectiveness of response in a coordinated manner.<sup>16</sup>
69. Furthermore, nothing in WTO Agreements would prevent Members from going beyond the authorized operators' schemes. For example, Members could define actors permitted to operate in case of a state of emergency, exempting them from pre-import documentary requirements and relying in their regard solely on post-importation controls.

<sup>16</sup> Further information available at: <https://www.connectingbusiness.org/about>.

70. Furthermore, TFA Article 7.8 provides for the introduction of procedures for **expedited shipments**. In this case, trade facilitation includes the softening of documentation requirements and the speedy release of goods entered **through air cargo facilities**, at least. Beneficiaries could again include relief providers. These TFA provisions envisage the possibility of customs clearance and release of express shipments on the basis of air cargo documents or a simplified declaration alone, as well as release followed by a subsequent completion of clearance procedures. It is further envisaged that countries may limit the use of these simplifications to authorized persons or entities, such as express delivery operators, to ensure proper conduct of the operations and enable customs supervision. As with authorised operator schemes, the provisions require some form of prior registration and accreditation. Again, these schemes could be made open to relief providers from both the public and private sector.
71. Expediting custom procedures for **perishable goods is provided for by** TFA Article 7.9. Perishable goods are defined as goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions. Noteworthy in this regard are reported issues in disaster relief related to the spoilage of pharmaceuticals because of cold storage limitations. Under normal circumstances, their release has to take place “within the shortest possible time”; release “outside business hours of customs and other relevant authorities” is mandated “in *exceptional circumstances* where it would be appropriate to do so” (emphasis added), as clearly in the event of a natural disaster.
72. Disaster-prone countries, and in particular land-locked Members, may face particular difficulties due to the customs laws and procedures of **transit Members** that can have deleterious effects on the pace and availability of relief assistance. The trade discipline on this issue is set forth in Article V of the GATT 1994, as further elaborated by Article 11 TFA.
73. Article V of the GATT 1994 sets the basic obligations on “traffic in transit”, i.e. the passage across a territory being “only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes” (para. 1). As acknowledged in the panel report in the case *Colombia – Ports of Entry* (see box 3 below), “Article V of GATT 1994 ... generally addresses matters related to ‘freedom of transit’ of goods. This includes protection from unnecessary restrictions, such as limitations on freedom of transit, or unreasonable charges or delay (via paragraphs 2-4), and the extension of the Most-Favoured-Nation (MFN) treatment to Members’ goods which are ‘traffic in transit’ (via paragraphs 2 and 5) or ‘have been in transit’ (via paragraph 6)”.<sup>17</sup>

### Box 3: The panel reports in Colombia – Ports of Entry and Russia – Traffic in Transit

In *Colombia – Ports of Entry* the WTO has been called for the first time to settle a dispute concerning Article V of the GATT 1994. Even though the circumstances of the case do not relate to a post-disaster situation, the panel’s findings can provide some guidance over the behaviour expected under Article V, whose proper implementation could be of considerable importance for land-locked Members in order to receive international assistance in the wake of a disaster.

In the case at issue, Panama challenged, among others claims, the Colombian measures whereby certain products arriving from Panama (or the Colon Free Zone) were subjected to restrictions on the port of entry, thereby violating Article V:2 and V:6 of the GATT 1994.

In acknowledging the inconsistency of this measure with Article V:2 of the GATT 1994, the panel affirmed that this provision “requires extending unrestricted access via the most convenient routes for the passage of goods in international transit ... Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third countries” (para. 7.401, emphasis added). It further added that Article V:2 “prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods”: “goods from all Members must be ensured identical level of access and equal conditions when proceeding in international transit” (para. 7.402).

The scope of this provision has been further clarified in the Panel report established in the case *Russia – Traffic in Transit*, on the restrictions applied by Russia to the transit within its territory of traffic from Ukraine. According to the Panel, “[t]o establish inconsistency with the first sentence of Article V:2, it [is] sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from another Member, or exiting its territory to any other Member, via the routes most convenient for international transit (para. 7.173).

<sup>17</sup> Panel Report, *Colombia – Ports of Entry*, 27 April 2009, para. 7.387.

74. Against this background, under Article 11 TFA, WTO Members are encouraged to make available physically separate infrastructures for traffic in transit (para. 5), while customs offices for the exit of transit goods have to terminate promptly the transit operations, once the goods have reached such customs offices (para. 10). Regulations and formalities must be neither more burdensome than necessary to identify the good and to ensure the fulfilment of transit requirements (para. 6) nor “applied in a manner that would constitute a disguised restriction on traffic in transit” (para. 1(b)). Furthermore, traffic in transit shall not be subject to any fees or charges, except those for transportation or those commensurate with administrative expenses or with the costs of services rendered (para. 2), or to any customs charges or unnecessary delays or restrictions during the movement within the country of transit (para- 7). Pre-arrival filling and processing of transit documentation is mandated (para. 9).
75. Under Article 11 of the TFA, goods in transit destined to a disaster affected country do not enjoy any special treatment, since the TFA is meant to be applied according to the most-favoured nation obligation. However, there could be scope for consideration by Members for allowing lessening the requirement and prioritizing transit of goods needed to provide post-disaster assistance, in particular for goods provided following a declaration of emergency by the affected country or an appeal for assistance by the country, the United Nations or any other relevant international organizations.
76. Furthermore, the TFA helps in speeding up relief consignments by providing that a transit Member shall exempt transit goods from its technical regulations and conformity assessment procedures within the meaning of the TBT Agreement (Article 11(8)).
77. An area where transit problems may arise is in respect of the measures taken by Members to prevent risks to animal or plant life or health from consignments transiting through their territory. Box 4 looks at how this issue is handled under the aegis of the International Plant Protection Convention (IPPC).

#### Box 4: Transit provisions in respect of plant health

International Standard for Phytosanitary Measures (ISPM) 25, adopted in 2006 by the Commission on Phytosanitary Measures established under the IPPC, lays down some guidelines on the implementation of Article VII:4 of the Convention, whereby phytosanitary measures may be applied to consignments in transit only where they are “technically justified and necessary to prevent the introduction and/or spread of pests”. ISPM 25 applies with respect to the regulated pests of the country of transit or to those pests that are under emergency action in that country. According to the Standard, competent national authorities of the country of transit may decide that consignments in transit do not pose any potential pest risk (“for instance when no pests regulated by the country of transit are associated with the consignments in transit”), or only a negligible potential pest risk (for example, for conveyances or packaging which are fully enclosed, sealed and secure, or when pests are regulated by the country of transit and are unlikely to escape from the consignment in transit): in these cases, their movement may occur without phytosanitary procedures being applied. If potential phytosanitary risks are ascertained, risk assessment is needed in order to identify the necessity and technical justification of any phytosanitary measure. A requirement on non-discrimination is also established, whereby “consignments in transit should not be subject to more restrictive phytosanitary measures than those applied to consignments of the same phytosanitary status imported into that country of transit”. ISPM 25 then continues to elaborate requirements on pest risk assessment, establishment of a transit system, measures for non-compliance and emergency situations, and cooperation.

Source: International Plant Protection Convention website<sup>18</sup>

78. Also of interest in respect of traffic in transit is the trade concern raised by the Dominican Republic about the conditions set by Haiti in 2015 on the importation of a series of goods, required to be imported by sea or air, and through two specific ports (Port aux Princes and Cap Haitian). In the view of the Dominican Republic, these measures implied that importation was subject to a double restriction. First, it is not possible by land. Secondly, within the authorized means of transport, only two ports could be used. Therefore, it was argued that these measures were in violation of Article XI:1 of the GATT 1994 and of the obligations on freedom of transit under Article V of the GATT 1994.
79. In reply, Haiti claimed that the measure had been adopted on a provisional basis and were justified by the destruction wrought by the 2010 earthquake to Haiti infrastructure, the considerable losses in the public treasury and the problems with customs and damage to customs infrastructure at the border with the Dominican Republic. Furthermore, the measure had been taken with a view to fighting smuggling and to minimize customs tax losses. The two ports selected for customs clearance were those that had the necessary infrastructure and that would ensure Haiti’s capacity to control the quality of imported products, irrespective of where they came from. These measures would be in place until customs authorities had the necessary

18 Full text of ISPM 25 can be accessed here: <https://www.ippc.int/en/core-activities/standards-setting/ispms/>



infrastructure in other places and would be applied on an MFN basis.<sup>19</sup>

80. The related research on natural disasters and trade highlighted the role that **consignments of goods from family and diaspora groups** can play in providing material support in the aftermath of disasters. Small parcels, frequently the medium in which support is provided, are an increasing area of focus due to the expansion of ecommerce. However, their accumulation at customs could delay the

timely clearance of relief items, placing additional pressure on the response system. Furthermore, unsolicited food consignments may expire before being cleared, exacerbating the difficulties for customs officials and adding new costs for the government for their destruction.

81. Of relevance here are the Immediate Release Guidelines adopted by the WCO. These are set out in box 5 below.

### Box 5: WCO Immediate Release Guidelines

The WCO guidelines are recommendations to customs administrations to assist in development of their national procedures to cope with the increasing volumes of smaller consignments crossing borders. They are intended as possible "solutions" to enable administrations to combine the immediate release of such goods with relevant and appropriate controls. The Guidelines on Immediate Release were first developed in 1990. According to the more recent 2018 version, they aim to: facilitate the pre-arrival processing and risk management of the consignments based on advance electronic information; streamline and expedite the handling of the consignments upon arrival; assist customs administrations in determining data requirements and the exact procedure to be applied.

The guidelines recommend that consignments may be separated into four categories, each with suggested release treatment and data and documentary requirements.

Category 1: Correspondence and documents

- Goods cleared and released simultaneously (i.e., no post-release documents or procedures)
- Goods released on basis of a "consolidated declaration" such as a manifest or waybill
- Minimal data required

Category 2: Low value consignments for which no duties and taxes are collected (de minimis threshold)

- Goods cleared and released simultaneously
- Goods released on basis of a "consolidated declaration" or a simplified declaration
- Individual items in shipment reported

Category 3: Low value dutiable consignments (simplified declaration)

- Goods cleared and released simultaneously, if a simplified or full declaration submitted prior to arrival and any duty and tax is assessed and paid;
- Otherwise, goods immediately released on basis of manifest/waybill or provisional declaration, subject to provision of a guarantee and obligation to submit simplified (including periodic) declaration following release and pay duty and tax

Category 4: High Value consignments (full declaration)

- Normal clearance and release procedures apply

Under any category, customs may perform documentary checks and/or physical examination of the goods based on risk management. The guidelines include an indicative list of data elements required under categories 1 to 3.

Source: WCO website<sup>20</sup>

82. The simplifications described by Category 2 apply to goods which are exempted from duties and taxes because of their low value. In their regard, a further simplification may be provided with respect to the procedure and documentation required for clearance and release. It could be meaningful to facilitate the entry of the material support provided by nationals abroad to disaster-affected families and communities. As the WCO Guidelines indicate, however, it is up to the country concerned to design these simplifications and define conditions of their

use in a manner appropriate to their particular needs and environment.

83. Outside WTO, several existing agreements address the need to speed up custom procedures with the specific purpose of facilitating the entry, exit or transit of relief consignments. For instance, the Chapter 5 of Specific Annex J to the **WCO's Revised Kyoto Convention** (see Annex 4) recommends the use of simplified goods declarations. In alternative, the parties are invited to allow clearance in case the required declarations are provisional or incomplete

<sup>19</sup> G/MA/M/62 of 14 April 2016, paras. 78-87.

<sup>20</sup> <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/immediate-release-guidelines/immediate-release-guidelines.pdf?db=web>

(provided they will be completed within a specified deadline). Parties are also encouraged to check declarations before relief consignments' arrival and to proceed with clearance as a matter of priority and outside usual business time (irrespective of their country of origin or destination).

84. In 2007 the IFRC adopted the "**Guidelines for Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance**" (see Annex 1). The document sets a number of recommendations on how governments can prepare disaster legislation addressing all relevant issues that arise in international disaster assistance. The Guidelines suggest some legal facilities that could be recognized to relief organizations in order to facilitate the entry of the goods and equipment necessary for their assistance. On the basis of these Guidelines, 2013 the IFRC prepared the **Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance** (see Annex 2), intended to serve as a more detailed reference tool for law-makers in developing legislation on the management of international assistance. Relevant parts of both the Guidelines and the Model Act concern the simplification of customs procedures.
85. Inspired by the 2007 IFRC Guidelines, in 2010 the WCO signed a Memorandum of Understanding with the IFRC and with UN OCHA and created an ad hoc working group of its members to develop an action plan to promote effective customs treatment of relief consignments in situations of disaster.
86. In 2011, the WCO's Council adopted a resolution on "the role of customs in natural disaster relief",<sup>21</sup> which refers to the IFRC Guidelines and sets out a series of steps for the WCO secretariat and member States to coordinate with IFRC and OCHA to improve their preparedness for future disasters, including national reviews of existing rules and procedures, the development of global reference materials, and the convening of regional dialogues between customs administrations and humanitarian organizations.
87. OCHA and IFRC are currently supporting discussions among member States of the 1990 Istanbul Convention (see Annex 3) and the WCO Revised Kyoto Convention concerning updating provisions of these two instruments related to disaster situations drawing on the IFRC Guidelines.
88. One approach being tried to facilitate customs clearance is the **Automated System for Custom Data** (ASYCUDA) developed by the United Nations Conference on Trade and Development (UNCTAD). It has been adopted in more than 90 states by customs administrations and involves the migration of customs procedures online, speeding them up

and facilitating clearance. Within this programme, a special new module has been designed in coordination with OCHA for the **Automated System for Relief Consignments** (ASYREC).

89. The purpose of ASYREC is to support customs administrations to prioritize relief consignments, distinguishing them for regular commercial traffic and, as a result, accelerating their clearance and release. ASYREC is activated on the basis of a decision of customs authorities, implementing a declaration of emergency issued by the competent governmental authorities. It is based upon both the pre-definition of an "exhaustive list of emergency relief items" and applicable simplified procedures, and the pre-registration of organizations involved in relief operations that could take advantage of the simplified procedures.

### 3.2.2 Product quality and safety standards

90. WTO Agreements include specific texts concerning domestic disciplines on the quality and safety of products that may be traded in Members' national markets. These can be found in GATT 1994 and, more in detail, in the TBT Agreement and in the SPS Agreement.
91. In general terms, these texts recognise Members' right to adopt and implement domestic disciplines in order to achieve legitimate policy objectives (e.g. the protection of human, animal or plant health or life or the protection of the environment). At the same time, they seek to ensure that the exercise of Members' regulatory functions does not lead to the introduction of obstacles to trade which are unnecessary, or which create a unjustifiable or arbitrary discrimination or a disguised restriction on trade.<sup>22</sup>
92. Both the SPS and TBT Agreements encourage the use of international standards. As such, they encourage the diffusion of best practices and transfer of technology embedded in international standards developed by the Codex Alimentarius Commission, the International Plant Protection Convention and the World Organization for Animal Health. They also recognize the right of Members to pursue legitimate objectives and to set their own appropriate level of sanitary and phytosanitary protection within their territory, subject to the requirement that these measures (e.g. technical regulations or quarantine controls) are not applied as disguised restriction on trade or arbitrary or unjustified discriminate between Members.
93. The interest of disaster-affected countries in technical regulations and standards and in SPS measures may arise from different perspectives. One perspective refers to the need to ensure that goods and products reach affected populations

<sup>21</sup> [http://www.wcoomd.org/en/about-us/legal-instruments/~/\\_media/A0C1DEE96F944E08BCD48FFDD1A7D4B7.ashx](http://www.wcoomd.org/en/about-us/legal-instruments/~/_media/A0C1DEE96F944E08BCD48FFDD1A7D4B7.ashx).

<sup>22</sup> With regard to the TBT Agreement, see the considerations developed by the Appellate Body in *US – Clove Cigarettes*, 4 April 2012, paras. 92-96. For the SPS Agreement, see Appellate Body Report, *US/Canada – Continued Suspension*, 16 October 2008, para. 522.

as swiftly as possible. With regard to the need to speed the entry of relief items, the **application of procedures on the assessment of conformity with established regulations** (CAPs) may become an issue.

94. Article 5.2.1 of the TBT Agreement requires WTO Members to ensure that “conformity assessment procedures are undertaken **as expeditiously as possible**”. If time is required to determine that the mandatory requirements are fulfilled, in a post-disaster scenario the second sentence of Article 5.2.1 of the TBT Agreement may become relevant. Indeed, it provides that CAPs shall not be undertaken and completed “in a less favourable order” for products originating in other Members than for like domestic products. This provision justifies granting a preference to foreign goods, with the purpose to expedite the delivery and use of relief consignments.
95. SPS Agreement obligations in Annex C on control, inspection and approval procedures similarly require that such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for domestic products (para. 1.a). Speeding SPS control, inspection and approval processes for foreign relief goods are thus appear consistent within the ambit of Annex C.
96. Another perspective refers to the duty of the disaster-affected government to ensure that relief **goods are appropriate and not a potential risk** for the protection of human, animal or plant life or health, or for the environment. A concern identified in the country research was the entry of so-called “unsolicited bilateral donations” or UBDs (see box 6 below).

### Box 6: Unsolicited Bilateral Donations

The term “unsolicited bilateral donations” is typically referred to in-kind donations which are the result of a proactive offer from a donor, without previous consideration of the needs of the disaster-affected community. They often share some characteristics: they arrive unannounced or with a very short notice, have incomplete or faulty paperwork, are non-standard items and have an incorrect packaging. While often donated by well-meaning individuals and groups, UBDs may not be appropriate for the climate and culture of the receiving country, or to meet the needs of those affected. They can put pressure on an already-stretched humanitarian supply chain system and incur many thousands of dollars in storage and handling fees. They can also have a substantial environmental impact if they need to be destroyed and become landfill in a region where safe waste management options are scarce.

Of the UBDs sent to Vanuatu, 50% of food items were expired and were destroyed at the cost of the government. Moreover, a significant volume of the used clothes, bedding and other such items received in this way were inappropriate for the Vanuatu culture, living conditions and climate. These included high heels, heavy blankets, handbags and woollen knitwear amongst others.

Similar situations arose also in Haiti after the 2010 earthquake and in Japan in 2011. The domestic authorities of these two countries have reported that 60% of the donations sent to them were not needed, and that only 5-10% satisfied their urgent needs. Furthermore, half of the in-kind donations to Haiti had no consignee address.

Source: Australian Red Cross and OCHA<sup>23</sup>

97. A further concern raised concerns medication. “Experience has shown that oftentimes large amounts of inappropriate or out-of-date medication arrives after disasters. Other common problems are that the medicines are not legal in the affected State, labelled in a foreign language, past their expiry date, or not relevant to the actual needs (or a combination of all four of these problems)”.<sup>24</sup>
98. **Laws and regulations concerning the quality and safety of products** could be applied to solve these issues. However, this presupposes the ability of the national authorities to enforce such regulations in a post- disaster context. As such, national authorities may find themselves in a position where they are unable to enforce statutory functions and conduct inspections or to ensure that relief items demonstrate compliance with the full provision of the relevant mandatory measure. One solution proposed by the humanitarian community is to prefer cash donations – a point considered later in this section in relation to financial services.
99. The two examples cited above highlight the contrasting imperatives on disaster-affected countries. They are at the same time required to hasten entry procedures to deal with a sudden influx of disaster relief and to ensure that the relief does not itself create secondary risks e.g. the entry of diseases. An example of the challenge of

23 “The challenges of Unsolicited Bilateral Donations in Pacific humanitarian responses and how to overcome them”, 2016, Australian Red Cross. Available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/161220%20Report%20-%20Challenges%20of%20UBD%20in%20Pacific.pdf>; P Boulet-Desbareau, “Unsolicited in-kind donations & other inappropriate humanitarian goods (OCHA 2013), available at [https://emergency-log.weebly.com/uploads/2/5/2/4/25246358/ubd\\_report\\_eng\\_-\\_final\\_for\\_printing\\_2.pdf](https://emergency-log.weebly.com/uploads/2/5/2/4/25246358/ubd_report_eng_-_final_for_printing_2.pdf).

24 IFRC, WHO, “The Regulation and Management of Emergency Medical Teams” (June 2017). Available at [http://www.ifrc.org/Global/Publications/IDRL/newsletters/December 2015/EMT Report HR.PDF](http://www.ifrc.org/Global/Publications/IDRL/newsletters/December%202015/EMT%20Report%20HR.PDF).

reconciling these contrasting imperatives concerns the entry of **rescue dogs**.

100. The entry of search and rescue dogs is subject to animal health controls in order to prevent the spread of rabies and other zoonoses. Rabies infection is the cause of tens of thousands of deaths each year. In 2018, domestic dogs were estimated to contribute up to 99% of all rabies transmissions to humans.<sup>25</sup>
101. Chapter 8 of the Terrestrial Animal Health Code of the World Organisation for Animal Health (OIE Terrestrial Code) provides international guidelines to mitigate and prevent the spread of rabies to protect human and animal health.<sup>26</sup> As such, the entry into a disaster-affected country of rescue dogs is frequently made conditional upon the presentation of an international veterinary certificate attesting that the animals being imported show no clinical sign of rabies “the day prior to or on the day of shipment” and were kept since birth or at least six months prior to shipment in a rabies-free country. This second requirement may be substituted by an attestation that the animals were vaccinated in accordance with relevant recommendations or were kept in quarantine for six months prior to shipment.
102. Used in search and rescue operations, rescue dogs are highly trained and closely monitored by the handlers who deploy them. Deploying a rescue dog showing clinical signs of rabies would be counterproductive to the purpose of such missions. Nevertheless, the entry of such animals has been refused on the grounds of the potential risk of rabies transmission, on the animals required first to be quarantined before entry.
103. This issue has been taken up by are also explored by the INSARAG (International Search and Rescue Advisory Group), a network of countries and organizations dealing with search and rescue issues, coordinated under the UN. In 2015, INSARAG adopted an updated version of its methodology and guidelines for urban search and rescue operations.<sup>27</sup> They cover also rescue dogs with the purpose to guarantee their quick deployment and safe involvement in humanitarian operations. Their guidelines suggest that search and rescue dogs should enter only in case they possess a valid rabies vaccination. However, some jurisdictions do not accept vaccination and require disease freedom.

104. Another example where the contrasting objectives of rapid release of relief to alleviate suffering and the need for controls arose refers to the use of **genetically modified (GM) material in food aid** in August 2002 in Southern Africa. While several governments accepted this donated food, other expressed reservations. Concerns were expressed about the unintentional introduction of GM maize varieties into the region as a result of planting or spillage of the whole kernel maize provided as food aid. With the ultimate responsibility and decision regarding the acceptance and distribution of food aid containing GMOs resting with the importing governments, the United Nations agencies were not able to supply such aid to the concerned countries.<sup>28</sup>

### 3.2.3 Custom duties, other duties, fees and charges

105. One of the purposes of the WTO is the “substantial reduction of tariffs” applied on trade in goods.<sup>29</sup> The term “tariffs” commonly refers to **custom duties** applied on, or in connection with, importation and exportation. **Other duties, fees and charges** may also be applied at import. Box 7 below gives an overview.

25 <https://www.who.int/rabies/news/RUA-Rabies-launch-plan-achieve-zero-rabies-human-deaths-2030/en/>.

26 [http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre\\_certification\\_general.htm](http://www.oie.int/index.php?id=169&L=0&htmfile=chapitre_certification_general.htm).

27 <https://www.insarag.org/methodology/guidelines>.

28 United Nations Statement Regarding the use of GM Foods as Food Aid in Southern Africa, 23 August 2002, Available at: <https://documents.wfp.org/stellent/groups/public/documents/newsroom/wfp076534.pdf>. Restrictions on the use of GMOs in food aid was one of the factors motivating the WTO disputes brought by the US and Canada in the EC – Approval and Marketing of Biotech Products case. Food aid in itself was not the object of litigation. The dispute started some time after the decision taken by the African governments to refuse maize food aid likely to contain GMOs. See the European Commission 2003 press release entitled “European Commission regrets US decision to file WTO case on GMOs as misguided and unnecessary” in which it is stated that “The US is blaming the EU for the African refusal of the US maize” ([https://europa.eu/rapid/press-release\\_IP-03-681\\_en.htm?locale=en](https://europa.eu/rapid/press-release_IP-03-681_en.htm?locale=en)).

29 Marrakesh Marrakech Agreement, preamble, third recital.

### Box 7: Charges due on merchandise goods at import

#### Article II:1(b) – Ordinary customs duties (or tariffs)

The expression “ordinary customs duties” in Article II:1(b) of the GATT 1994 refers to duties collected at the border which constitute “customs duties” in the strict sense of the term.<sup>30</sup> For a charge to constitute an ordinary customs duty, the obligation to pay must accrue as the moment and by virtue of or, in the words of Article II:1(b) “on”, importation.<sup>31</sup> An essential feature of ordinary custom duties is that any change in them is discontinuous, unrelated to an underlying scheme or formula and requiring a separate legislative or administrative action.<sup>32</sup>

#### Article II:1(b) – Other duties and charges

Any fee or charge that is in connection with importation and that is not an ordinary customs duty, nor a tax or a duty as listed in Article II:2 of the GATT 1994 (i.e. internal tax, antidumping duty, countervailing duty, and fees and charges commensurate with the cost of the services rendered) would qualify for a measure as an “other duty or charge” under Article II:1(b), second sentence.<sup>33</sup> In fact, this category of charges is a residual one, since it includes charges other than those within the purview of other GATT 1994 provisions.<sup>34</sup>

#### Article II:2(a) – Charges equivalent to internal taxes

A “border tax adjustment measure” may be applied on the importation of a product, provided it is equivalent to an internal tax imposed consistently with Article III:2 in respect of a domestic like product or of an article from which “the imported product has been manufactured or produced in whole or in part”. Consistency with Article III:2 implies a comparison between a border charge and an internal tax “in order to determine whether one is in excess of the other”.<sup>35</sup> According to Ad Article III, border tax adjustment measures have to be regarded as “internal measures” subject to the disciplines of Article III:2, even if they are levied in a different manner.

#### Article II:2(c) and Article VIII – Fees or other charges commensurate with the cost of services rendered

Members may also impose the payment of fees and charges commensurate with the cost of government services closely connected to the process of customs entry that they may be deemed to be services rendered to the importer. These services include, for instance, statistical services, exchange control, quarantine, sanitation or fumigation, analysis or inspection (Article VIII:4).

#### Article III:2 – Internal taxes

The term “internal taxes or other internal charges” under Article III:2 may be referred to pecuniary burdens triggered because of an internal factor, that is a factor that occurs after the importation of a product.<sup>36</sup>

106. Members’ **schedules of concessions** are annexed to the GATT 1994, where the tariff commitments accepted by each of them are set. These schedules are integral part of the GATT 1994 (Article II:7), and the prohibition is established for each Member to impose ordinary custom duties or other duties and charges in excess of those set forth in its own schedule (Article II:1(b)). Border charges equivalent to an internal tax (e.g. sales tax or valued added tax) may be applied at import, provide the former is not in excess of the latter (Article II:2(a)). With regard to fees and charges commensurate to services rendered to the importer (e.g. statistical services, exchange control, quarantine, sanitation or fumigation, analysis or inspection), WTO Members recognize the need to reduce them in number and diversity (Article VIII:1(b)). They may be applied to the extent they relate to a service rendered to an individual importer,<sup>37</sup> for an amount equivalent to

the costs of the related service and avoiding they represent an indirect obstacle to trade or a taxation for fiscal purposes (Article VIII:1(a)).

107. In broad terms, relief consignments destined to post-disaster assistance may include goods for immediate consumption (e.g. foodstuff and medicines), goods capable of being reused (e.g. tents and blankets) and equipment, i.e. vehicles, telecommunication equipment or medical equipment. Since the payment of regular charges on their entry in the disaster-affected country could slow the deployment of assistance operations and increase the costs supported by humanitarian agencies and organizations, the issue arises as to whether it would be suitable to allow derogations. Indeed, in practice it is commonplace for countries hit by a disaster to **temporary suspend on the entry of relief consignments the payment of**

30 Panel Report, *Dominican Republic – Safeguards*, 31 January 2012, para. 7.85.

31 Appellate Body Report – *China Auto Parts*, 15 December 2008, para. 158.

32 Appellate Body Report, *Chile – Price Band System*, 23 September 2002, para. 233.

33 Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, 26 November 2004, para. 7.113-7.114.

34 Panel Report, *Dominican Republic – Safeguards*, 31 January 2012, para. 7.79.

35 Appellate Body Report, *India – Additional Import Duties*, 30 October 2008, para. 170.

36 Appellate Body Report – *China Auto Parts*, 15 December 2008, para. 163.

37 See Panel Report, *Argentina – Textiles and Apparel*, 25 November 1997, para. 6.74, referring to the previous GATT panel report in *US – Customs User Fee*.

- regular customs charges.** Depending on the scale of the disaster and the policy objectives of the government, this suspension may encompass relief items and/or regular commercial imports.
108. The suspension of customs tariffs may be adopted in view of implementing international agreements. For instance, UN-led humanitarian operations come under the scope of the 1946 and 1947 general conventions on the privileges and immunities of the **United Nations and of its specialized agencies**.<sup>38</sup> Both treaties envisage the exemption from custom duties for the relevant organizations, their assets and property provided that they are used in the performance of official duties. Therefore, according to UN law, equipment and relief materials to be used by the UN and its agencies during relief operations may move freely across frontiers without being hindered by customs duties.
109. The proper implementation of commitments accepted under the two UN conventions could be facilitated by the conclusion of bilateral agreements between the UN and disaster-prone countries according to of **Model Customs Facilitation Agreement**, devised by UN OCHA in 1994 and approved in 1996 by the WCO.<sup>39</sup> According to the proposed Article 3.3, a waiver from customs duties (as under the 1946 and 1947 conventions) as well as from import taxes or charges having an equivalent effect is envisaged to the advantage of the organizations involved in UN relief operations. These organizations may include the UN itself, its specialised agencies, and other governmental, intergovernmental and non-governmental organizations certified by the UN as bona fide participants in the operations.
110. Other international treaties provide for similar entitlements, to be granted on the occasion of the entry of an agreed set of items. Unlike the above referred international legal instruments, the beneficiaries of the legal facilities envisaged under these texts are not defined. Chapter 5 of Specific Annex J to the Revised Kyoto Convention (see Annex 4) recommends that relief consignments received as gifts to be used by or under the control of approved organizations, or to be distributed free of charge by them or under their control, should be admitted free of import duties and taxes and free of economic import prohibitions or restrictions. Similarly, an exemption from import duties, taxes and restrictions of an economic character is established by the Annex B.9 to the 1990 Istanbul Convention (see Annex 3) concerning the importation of goods and equipment for humanitarian purposes, and by the 1998 Tampere Convention (see Annex 5). Likewise, the suspension of customs duties is may also be laid down in bilateral treaties on post-disaster assistance.
111. Following a systematic approach, Members may establish under domestic law a separate regime, distinguishing the entry of relief items within the framework of post-disaster assistance from regular commercial transactions, with a view to exempt relief items from the payments of customs duties and other charges. This could be done by creating a category of “disaster-related goods” and a category of operators entitled to import them under a duty-free regime. In case a Members has implemented the UNCTAD’s ASYREC module, concerning the facilitation of customs procedures, authorized goods and operators for charges exemption purposes could match the scope of the ASYREC national module, thereby easing international assistance.
112. The prior adoption of an exemption scheme is encouraged under the IFRC Model Act (see Annex 2). Among the legal facilities enumerated in this document, the suspension of import duties and taxes and of import restrictions of economic character is envisaged (Article 32). The IFRC Model Act extends the exemption also to the payment of internal taxes, including value-added, income, property and asset taxes and other similar taxes (Article 51-53). As stated by the IFRC, the overall purpose is not to exclude other actors from disaster relief operations, but rather to facilitate the entry and the use of needed goods and equipment and to guarantee that it is prioritized by customs officials.
113. The IFRC Model Act suggests also the pre-definition of the authorized operators eligible to enjoy these legal facilities. On this basis, eligibility should be recognized for other States, the UN and other relevant intergovernmental organizations, the domestic and foreign Red Cross/Red Crescent societies, and any other entity deemed eligible (Article 21). Further actors wishing to be granted the same status may be qualified as beneficiaries on the basis of a discretionary determination by the competent national authority (Article 22).
114. **Domestic measures** envisaging the temporary suspension of customs payments at the entry of relief items may follow different alternatives. As to their **material scope**, they could envisage the suspension of ordinary customs duties, internal taxes, other duties and charges, and fees and charges in any possible combination. A common feature of the above-mentioned legal instruments is that they all provide for the suspension of ordinary custom duties; some also envisage the exemption from other charges applied at import.
115. The **beneficiaries** may not be specifically identified, as in the case of a general regime on solicited donations for relief items: in this regard, the scope of the domestic laws and regulations would depend on the definition of the term “solicited donations”.

38 Convention on the Privileges and Immunities of the United Nations (13 February 1946), Section 7.b, 1 UNTS 15; Convention on the Privileges and Immunities of the Specialized Agencies (21 November 1947), Section 9.b, 33 UNTS 61.

39 See [https://www.unocha.org/sites/dms/Documents/Model\\_en\\_2011.pdf](https://www.unocha.org/sites/dms/Documents/Model_en_2011.pdf).

- This could be linked to the determination by competent national authorities of the existence of a state of emergency, followed by assessment of the relief items needed from international assistance and, thereby, the compilation of a list of the required relief goods and equipment. In alternative, it may be provided that the legal facilities apply to “authorized humanitarian operators” already identified (as under the IFRC Model Act or as suggested by the OCHA Model Agreement) or only for some of them (the UN and its agencies, other international organizations, other States or group of States, non-governmental organizations). As a third variation, domestic measures may provide the suspension of customs payments on the entry of specific relief items solely at benefit of defined operators. Finally, the suspension of payments due at customs could be applied to both solicited donations and to goods imported for commercial use, or exclusively on the entry of solicited donations.
116. The **suspension of charges levied at import is not prohibited** under WTO law. Indeed, GATT 1994 does not preclude Members from putting into operation customs duties and other duties and charges under Article II:1(b) lower than their bound level, provided that no discrimination on the basis of origin is applied, consistently with Article I:1 of the GATT 1994. The application of other fees and charges and of internal taxes is similarly governed by the MFN principle, and accordingly their suspension, if deemed appropriate, has to be made effective always on an MFN basis. However, in a post-disaster scenario, the feasibility of the suspension of the fees and charges covered by Article VIII of the GATT 1994 would deserve closer attention, as they can constitute payments to third parties allowed under government contracts to supply, and charge for, customs services (e.g. storage or inspection).
117. Depending on the design and structure of domestic provisions on the suspension of customs payments, issues may arise as to their discriminatory character and therefore as to their **conformity with Article I:1 of the GATT 1994**. The premise of any analysis under the MFN clause is that it prohibits discrimination among “**like products**”. The traditional criteria defining likeness are the properties, nature and quality of the products; consumers’ tastes and habits in respect of the products; the tariff classification of the products; and the end-uses of the products.<sup>40</sup> Against this background, it could be questioned whether donations from the UN and its agencies clearly marked as such, or donations arriving from Members that can be undoubtedly identified as relief consignments under a request of international assistance by the disaster-affected Member, could be qualified as “like products” to goods destined for commercial use.
118. Under Article I:1 of the GATT 1994 any **advantage** granted with respect to customs duties and other charges has to be applied on an MFN basis. The term advantage has been interpreted as referring to measures creating more favourable competitive opportunities or affecting the commercial relationships between products of different origins, which on imports must be accorded immediately and unconditionally to all like products concerned, irrespective of their origin.<sup>41</sup>
119. Provided that a preferential treatment prohibited under the terms of Article I:1 is granted, the question arises as whether there is a legal basis in WTO law that could be invoked as **justification**. The following analysis explores possible justifications **on the basis of different typologies of donors**.
120. As to the **privileges granted to the United Nations**, a justification could be inferred by way of interpretation from Article XXI(c) of the GATT 1994. According to its text, nothing in the GATT 1994 prevents WTO Members “from taking any action in pursuance of [their] obligations under the United Nations Charter for the maintenance of international peace and security”. The provision was drawn up in 1947 with the purpose of avoiding that GATT contracting parties incurred in their international responsibility when complying with the obligation, accepted under Articles 25 and 41 of the UN Charter, to apply the economic sanctions adopted by the Security Council. Since an *obligation* is established under the UN Charter and compliance with it is necessary for the UN to carry out its main *function*, i.e. the maintenance of international peace and security, pursuant to Article XXI(c) any inconsistency with the liberalization commitments accepted under GATT would be justified.
121. A functionalist, extensive interpretation of Article XXI(c) could be put forward for the purpose of this analysis. To the extent they join the UN, Members have accepted the further *obligation*, on the basis of Article 105 of the UN Charter, to grant the United Nations all privileges and immunities necessary for the fulfilment of their purposes, including the suspension of import duties envisaged under the 1946 Convention. At present, humanitarian assistance is one of the main *functions* of the UN, carried out and coordinated by OCHA also in case of natural disasters, as determined by the General Assembly’s resolution 46/182.<sup>42</sup>
122. Compliance with the obligation to exempt the UN from the payment of customs duties may be deemed a necessary precondition for the deployment of humanitarian assistance. It is indispensable for the effective exercise by the United Nations of a function, which, even though not expressly

40 Appellate Body Report, *Japan – Alcoholic Beverages II*, 4 October 1996, p. 21.

41 Panel Report, *EC – Bananas III*, 22 May 1997, para. 7.239. See also Appellate Body Report, *Canada – Autos*, 31 May 2000, para. 79 and Appellate Body Report, *EC – Seal Products*, 22 May 2014, para. 5.87.

42 UN doc. A/RES/46/182, 19 December 1991 [“Strengthening of the coordination of humanitarian assistance of the United Nations”].

mentioned in Article XXI(c) of the GATT 1994, is as important as the maintenance of international peace and security. Indeed, it also contributes to fulfil the purpose, as set under Article 1.3 of the UN Charter, of achieving “international cooperation in solving international problems of an economic, social, cultural, or humanitarian character”.

123. The legal justification for the preferential exemption from customs tariffs applied on the import of **solicited relief items from other Members or private organizations** could be found in the general exceptions clause established under Article XX(a) or (b) GATT 1994. As well-known, this provision allows to adopt measures “necessary” for the protection of public morals or for the protection of human, animal or plant life or health, subject to the conditions that they are not applied in a manner constituting a disguised restriction on trade or a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

124. In the case law, the “necessity” requirement has been interpreted as requiring “a process of weighing and balancing a serious of factors”.<sup>43</sup> These factors include the relative importance of the common interests or values at stake,<sup>44</sup> with the protection of human health being recognised of “highest importance”.<sup>45</sup> “[t]he more vital or important these common interests or values are, the easing it would be to accept as ‘necessary’ a measure ...”.<sup>46</sup> Other relevant factors include the extent to which the measure contributed to the realization of the end pursued (“the greater the contribution, the more easily a measure might be considered to be ‘necessary’”), and the restrictive impact of the measure on international trade:<sup>47</sup> “such trade restrictiveness weighs heavily against considering a measure necessary. Depending on the circumstances, however, a material contribution made by the measure [to the end pursued] may still outweigh that trade-restrictiveness”.<sup>48</sup> A last step in the assessment is the comparison of the challenged measures with reasonably available less trade-restrictive alternatives, i.e. alternative measures that the respondent is capable of taking, that does not impose an undue burden, and that would safeguard to the right of the respondent to fulfil its purposes.<sup>49</sup>

125. In the immediate aftermath of a disaster, it could be affirmed that a discriminatory measure satisfies the “necessity” requirement under Article XX(a)

or (b), in view of the prevailing interest at stake and that, given the peculiar circumstances of the case, granting a preferential treatment to donors contributes to the achievement of the pursued aim, notwithstanding its discriminatory content. Alternative measures could be imagined. Clearly, an exemption applied on an MFN basis would qualify as a less-trade restrictive measure than an exemption only to a sub-group of importers (i.e. organizations importing solicited relief consignments). Furthermore, it would contribute even more to the protection of human life or health as it would make available a higher volume of relief items. However, alternative measures must be “reasonably available”, that is not merely theoretical in nature, “for example, because the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties”.<sup>50</sup> In a post disaster scenario, the affected Member could invoke that an exemption on an MFN basis is not feasible, as it would surpass the technical capacities of customs offices.

126. Besides the requirements laid down in Article XX(a) or (b), any suspension of customs charges has also to meet the criteria set out in the *chapeau* of Article XX, whereby measures have not to be applied in a manner that would constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade. According to the Appellate Body, “analysing whether discrimination is ‘unjustifiable’ will usually involve an analysis that relates primarily to the cause or rationale of the discrimination”<sup>51</sup> in the application of a measure inconsistent with GATT 1994: “[t]he assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure”.<sup>52</sup> Accordingly, a discriminatory application arises when its justification “bear no rational connection” to the objective of the measure or would go against that objective.<sup>53</sup> Keeping in mind the need to provide immediate relief, this argumentation would help justifying a discriminatory application of a preferential treatment in favour of relief items imported from some Members, in the place of other Members willing to provide assistance or exporting for regular commercial transactions. This notwithstanding, some potential problems could arise in case the affected country has selected the countries eligible to the duty-free regime on the basis of criteria that are not linked with its assistance needs.

43 Appellate Body Report, *Korea – Various Measures on Beef*, 11 December 2000, para. 164

44 Ibid., para. 162.

45 Panel Report, *Indonesia – Chicken*, 17 October 2017, para. 7.225.

46 Appellate Body Report, *Korea – Various Measures on Beef*, 11 December 2000, para. 162.

47 Ibid., para. 163.

48 Panel Report, *Indonesia – Chicken*, 17 October 2017, para. 7.227.

49 Appellate Body Report, *US – Gambling*, 7 April 2005, para. 308. This dispute concerned the “necessity test” under the general exceptions clause in GATS. However, the statement made by the Appellate Body are based upon previous claims involving Article XX of the GATT 1994.

50 Appellate Body Report, *US – Gambling*, 7 April 2005, para. 308.

51 Appellate Body Report, *Brazil – Retreated Tyres*, 3 December 2007, para. 229.

52 Ibid., para. 227.

53 Ibid., and Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5)*, 20 November 2015, para. 7.136.



127. The suspension of custom duties and other charges on relief items from other Members could potentially also be justified under Article XXI(b)(iii) of the GATT 1994. Under this norm, Members may take otherwise GATT inconsistent measures “in time of war or other emergency in international relations”. In the case *Russia – Traffic in transit*, the panel acknowledged that, on the basis of dictionary definitions, the term “emergency” may be interpreted also as encompassing a “pressing need ... a condition or danger or disaster through a region”,<sup>54</sup> while the term “international relations” refers to the “global political interaction among sovereign States”.<sup>55</sup> These considerations led the panel to conclude that an “emergency in international relations” would also include “a situation of ... heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interest for the Member in question, i.e. ... maintenance of law and public order interests”.<sup>56</sup>
128. In a post-disaster situation, providing immediate relief to victims is a critical concern for the public authorities. In so far as other Members, governmental and non-governmental organizations are available to join a coordinated effort to support the disaster-affected country, an “emergency in international relations” could exist pursuant to Article XXI(b)(iii). Hence, the privileges granted on the access of relief foreign goods and equipment would be justified. Moreover, Article XXI does not include an introductory clause similar to the chapeau of Article XX.
129. A third category of potential actors also has to be taken into account, i.e. nationals of the disaster-affected country living abroad (**diaspora**). The economic analysis accompanying this legal mapping exercise highlights that donations to family members living in a disaster-affected country can be substantial in value and volume. However, their border clearance and release could congest customs operations, while at the same time imposing upon local recipients an unreasonable financial burden due to the payment of tariffs. In this regard, the WTO TFA offers a remedy to these obstacles. Indeed, under its Article 7.8.2(d), Members are bound to “provide, to the extent possible, for a de minimis shipment value or dutiable amount for which customs duties and taxes will not be collected”. Donations from abroad with a value lower than the de minimis threshold set at domestic level could thus enjoy an exemption from import duties and other fees and charges. The exemption could be conceived as a permanent measure, or as a temporary waiver aiming at supporting donations of relief items from diaspora.
130. The disciplines set out in the TFA could also be helpful to facilitate the entry of **equipment** necessary for relief operations. The notion of “equipment” is generally referred to items that are not destined for immediate consumption and not donated to local authorities. For instance, vehicles, medical devices or telecommunication devices could come under this definition. In their regard, domestic legislation or relevant international treaties (as the 1990 Istanbul Convention and its Annex B.9) (see Annex 3) provide for the application of a **temporary admission regime**, whereby equipment enters on a tariff-free basis, but on the condition that it will be re-exported within a given deadline and sometimes also with payment of a surety.
131. These measures come under the scope of Article 10.9.1 of the TFA covering precisely the “temporary admission of goods”. On this basis, a Member “shall allow, as provided for in its laws and regulations” the entry of goods “conditionally relieved, totally or partially from payment of import duties and taxes”. In particular, the tariff exemption may apply when the goods enter “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”. The notion of “specific purpose” could comprise assistance to disaster victims. Hence, acceptance of the TFA and a proper implementation of Article 10.9.1 by disaster-prone countries would support response when the necessary equipment is lacking.
132. However, it is worth underlining that the TFA does not cover all customs operations related to the temporary admission of equipment. Indeed, nothing is established on the application of other regulations (concerning, for instance, the technical characteristics the equipment must possess to enter the disaster-affected country) or on the re-exportation, where export tariffs could be applicable. The GATT 1994 does not encompass specific commitment in this last regard, but the prohibition to discriminate among countries of destination pursuant to the MFN clause. Therefore, should export tariffs be suspended by the disaster-affected country, on the basis of its autonomous decision or in view of implementing international treaties on post-disaster cooperation, the legitimacy of any preferential treatment needs to find a legal basis.
133. For the entry of telecommunication resources, it should also be recalled that according to the ITA concluded in 1996 and ITA Expansion of 2015 the schedules of concessions of some Members have been revised to include the complete removal of tariffs and other fees and charges on a list of

54 Panel Report, *Russia – Traffic in Transit*, 5 April 2019, para. 7.72.

55 Ibid., para. 7.73.

56 Ibid., para. 7.76.

information and telecommunication products (including telecommunication equipment) imported from all Members.<sup>57</sup> Therefore, relief organizations may be able to import IT equipment into Members participating in the 1996 ITA and 2015 ITA Expansion without shouldering any costs for customs clearance and release. Clearly, tariffs may be levied by a country that is not a signatory to the ITA or ITA expansion.

134. An additional constraint highlighted in the country research is the use of **non-automatic import licensing for telecommunications equipment**. The issue may be relevant for the entry of other items, but it may give rise to important concerns in the case of telecommunication resources for disaster relief operations. Some governments consider the import of these items as sensitive on security grounds and may therefore be subjected to licensing requirements. Interesting to note in this respect that the IFRC Model Act suggests the temporarily lifting of such measures so as to speed up the entry of foreign equipment and allow telecommunication companies to repair or rebuild damaged networks and facilities. Additionally, issues may also arise with respect of conformity assessment procedures for electromagnetic compatibility and electromagnetic interference.
135. Under WTO law, neither the ITA nor the ITA Expansion offer any suitable ground to ease the impact of non-automatic licences applied on import of IT products. Reference can be made to the general regime set in the Agreement on Import Licensing Procedures. This text lays down some general obligations on the neutral application and fair and equitable administration of procedures and on the publication of all relevant rules and information. Specific provisions are added on non-automatic licences, which shall have no more trade-restrictive or trade-distortive effects than those caused by their imposition. Overall, the decision to lift licensing requirements in the aftermath of a disaster is left to the discretion of the Members, on condition that it is applied on an MFN basis pursuant to Article I:1 of the GATT 1994.

### 3.2.4 Trade in agricultural products and access to goods of primary necessity

136. According to a 2018 report by the Food and Agriculture Organization,<sup>58</sup> agriculture is among the most vulnerable sectors to natural disasters. The impact is particularly significant in developing countries, where agricultural livelihoods contribute significantly to the economy. According to a post-disaster need assessments carried out for 53 developing countries between 2006 and 2016, it

has been estimated that agriculture absorbed 23% of all damages and losses caused by natural disasters, notably in terms of production declines and destruction of facilities, machinery tools and key infrastructure. Therefore, appropriate measures may be needed to address the vulnerabilities of the agricultural sector under disaster risk management policies. The purpose of this section is to explore those measures against the background of WTO law, with a particular focus on food security policies.

137. Following a natural disaster, one of the most urgent tasks is to ensure the availability of, and access to, food supplies by the affected population. This demand will be typically met by **international food aid** and/or from **domestic programmes**. The balance between these two sources will change depending on the nature and severity of the disaster encountered. The rest of this section discusses WTO Agreements as they affect both international food aid and domestic food aid.
138. WTO Agreements do not restrict the access of disaster-affected Members to **international food aid**. They impose obligations on donor Members as to the modalities they use to ensure that the provision of international food aid does not circumvent the export competition disciplines laid out in Part V of the AoA and in the 2015 Ministerial Decision on Export Competition.<sup>59</sup>
139. Based on the premise that the progressive liberalization of agricultural trade, while generally increasing trade opportunities and economic growth, could have some negative spill-overs, a Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food Importing Developing Countries (NFIDCs; hereinafter, NFIDCs Decision) was approved as part of the Uruguay Round results. The Decision recognises the need to safeguard LDCs and NFIDCs' access to commercial imports of basic foodstuffs at affordable prices, or on reasonable terms and conditions, including as regards availability of appropriate technical and financial assistance, particularly in the context of aid programmes, designed to improve agricultural productivity and infrastructure in LDCs and NFIDCs.

140. As regards international food aid, with the NFIDCs Decision Ministers agreed to review the level of food aid established periodically under the 1986 Food Aid Convention, and in line with its provisions, ensure that it is mostly provided in fully grant form and/or on appropriate concessional terms. At the behest of the WTO, the 1986 Food Aid Convention was renegotiated and is now superseded by the

<sup>57</sup> At present, 82 Members participate in the 1996 ITA. Under the 2015 ITA Expansion, 50 Members have accepted to eliminate tariffs on imports of a further 201 products.

<sup>58</sup> FAO, "2017. The impact of disasters and crises on agriculture and food security" (Rome, 2018), 16.

<sup>59</sup> For a comprehensive overview of the WTO disciplines on agricultural products, see WTO, "The WTO Agreements Series. Agriculture", 3<sup>rd</sup> ed. (Geneva, 2016).

- Food Assistance Convention (FAC) since 2013.<sup>60</sup> The FAC adopted guidelines to ensure that food assistance is preferably cash-based, increasingly provided in fully grant form or on appropriate concessional terms. In terms of implementation of the NFIDCs Decision, an annual notification-based review mechanism was established under the Committee on Agriculture in the course of which Members review the level of food aid, the availability of technical and financial assistance to LDCs and NFIDCs particularly in the context of aid programmes designed to improve agricultural productivity and infrastructure
141. The Decision on Export Competition adopted at the 2015 Ministerial Conference in Nairobi sets out specific provisions on international food aid.<sup>61</sup> In its text, the prohibition of agricultural export subsidies (paras. 6-11) is followed by the acknowledgement that international food aid must be “needs-driven”, provided in fully grant form, not tied directly or indirectly to commercial exports, or to market development objectives of donor Members. The prohibition to tie food aid to commercial exports to the recipient country is also established under paragraph 4 of Article 10 of the AoA, on “circumvention practices”. In the *US – Upland Cotton* case, the Appellate Body affirmed that this provision sets the basic requirements Members have to abide by in the exercise of their freedom to grant “as much food aid as they wish”.<sup>62</sup>
142. Furthermore, according to the Nairobi 2015 Decision on Export Competition food aid must also take into account the local market conditions of the recipient country for the same or for substitute products. Members should refrain from providing in-kind food aid due to possible adverse impacts on national production. With a view to stimulating local production and trade, Members are encouraged to provide food aid with purchases from local or regional suppliers. The Decision takes also into consideration that food aid is provided through different modalities: in-kind, cash or through monetization.<sup>63</sup> While it does not bind Members to adopt any of these modalities, it introduces specific requirements for the use of monetization, i.e. “the sale of food aid and the use of the revenues to support program-related costs and development activities”.<sup>64</sup>
143. In a proposal submitted to the General Council in 2011<sup>65</sup> (whose spirit was echoed in a further submission in November 2018),<sup>66</sup> a group of Members called for the elimination of export restrictions and prohibitions or extraordinary taxes applied on food purchased by the World Food Programme (WFP) for non-commercial purposes. A similar commitment was politically endorsed by G20 Agriculture Ministers to facilitate WFP’s humanitarian activities.<sup>67</sup>
144. The Revised GPA includes specific provisions that can be applied by the 48 members having accepted it willing to provide international food aid. Indeed, a notable exemption from the transparency, impartiality and non-discrimination commitments under the Revised GPA is set in Article 1:3(e). According to this provision, the Revised GPA does not apply to “**procurement conducted: ... for the specific purpose of providing international assistance**, including development aid”, and “... under the particular procedure or condition of an international organization, or funded by international grants, loans, or other assistance where the applicable procedure or condition would be inconsistent” with the Revised GPA. From the perspective of WTO Members wishing to participate in post-disaster operations in a foreign country, these clauses exclude from the scope of the Revised GPA the procedures followed for purchasing goods and equipment to be distributed to the beneficiary country for immediate post-disaster assistance (or within the context of “development aid”, which could presumably address also the structural weakness of disaster-prone countries). Similarly, the exemption applies also in case of participation in post-disaster humanitarian operations led by the UN or by any inter-governmental relief agency.
145. The analysis now turns to the second situation, i.e. the provision of **food aid under domestic programmes**. In this respect, WTO Agreements do not restrict Members’ ability to supply domestic food aid to sections of the population in need. Relevant provisions are set out in paragraphs 3 and 4 of Annex 2 of the AoA, respectively dealing with “public stockholding for food security purposes” and “domestic food aid”. As part of the on-going negotiations, Members are exploring options to exempt subsidized stockholding operations for traditional staple food crops from certain

60 For more information, see: <https://www.foodaidconvention.org/en/index/aboutthefac.aspx> and <https://www.foodassistanceconvention.org/en/about.aspx>

61 WT/L/980 of 21 December 2015, paras. 22-32.

62 Appellate Body Report, *US – Upland Cotton*, 3 March 2005, para. 619. The modalities for negotiations drafted in 2008 within the framework of the Doha Development Round envisaged a new text of Article 10.4 for a revision of international food aid allowed under the AoA Agreement on Agriculture (TN/AG/W/4/rev.4, Annex L). The proposal introduced a new “box” under the Agreement (“Safe box”) dealing with food aid transactions in emergency situations deemed as consistent with the prohibition of circumvention practices under Article 10. In particular, the box would have included food aid provided following either a declaration of emergency by the recipient country or the UN Secretary General, or a declaration of appeal from a country, the UN and its agencies, the IFRC, a relevant intergovernmental organization or an NGO of recognized standing. Food assistance would have to follow a positive needs assessment and could have lasted until an emergency occurred and a continued genuine need persisted.

63 According to FAO, for most donors at least 50% of food aid is provided in cash: FAO, “World Trade Organization (WTO) Agreement on Agriculture: Export Competition after the Nairobi Ministerial Conference”, Trade Policy Technical Notes – WTO Negotiations, No. 16, May 2017, p. 6

64 *Ibid.*, footnote 21.

65 WT/GC/138 of 18 November 2011.

66 JOB/AG/148 of 14 November 2018.

67 <http://www.g20.utoronto.ca/2011/2011-agriculture-plan-en.pdf>.

disciplines under certain conditions, as envisaged in the Nairobi 2015 Ministerial Decision on Public Stockholding for Food Security Purposes.

146. **Public stockholding programmes** may be implemented by countries (including those vulnerable to disasters), in order to ensure food security in emergency situations. For WTO Members, these programmes should be consistent with accepted obligations, primarily the commitments on the reduction of trade-distorting domestic support measures under Article 6 of the AoA, as expressed by the Aggregate Measurement of Support (AMS) calculated for each Member, as well as Article 7.2 of the AoA. Public stockholding programmes are specifically addressed in Annex 2 to the AoA on the so-called Green Box measures, and related expenditures are excluded from the calculation of each Member's AMS if the relevant criteria are met.
147. In particular, according to paragraph 3 of the Annex 2, expenditures (or revenues foregone) in relation to the accumulation and holding of stocks of agricultural products are exempted from the determination of domestic support's reduction commitments. This provision specifies the conditions applying to the accumulation and holding of stocks by governments for food security, including government assistance to private storage, as part of a food security programme identified in national legislation. The criteria involved relate to food security targets and financial transparency. The exemption applies for market-based food stockholding programmes, whereby purchases by the public authorities are made at market prices and the sales from the stock are at no less than domestic market prices.
148. Purchases and sales at administered prices are not prohibited per se. However, in this case, the difference between the market price and the administered price should be accounted in order to determine compliance with the commitments on domestic support, unless the *de minimis* exception under Article 6.4 of the AoA applies. Under this provision, domestic support is not included in the calculation of the current AMS if it is lower than 5% of the value of total agricultural production (10% in the case of developing countries).<sup>68</sup> Purchases and sales administered under public stockholding programmes exceeding this threshold have to be taken into account in assessing compliance with reduction commitments on domestic support.
149. With the purpose to support nutrition programmes in developing countries, in 2013 the Ministerial Conference adopted a decision on public stockholding for food security purposes,<sup>69</sup> as later confirmed by the General Council in 2014.<sup>70</sup>
150. An additional exemption from reduction commitments is set out in paragraph 4 of Annex 2 to the AoA, on **consumers' support measures**. In particular, Members are allowed to accord domestic food assistance, whether expenditure or revenue foregone, through the direct provision of food or means to buy food at market or subsidized prices, subject to specific criteria. These include that the food purchases by the government are made at market prices, the financing and administration of aid is transparent, and eligibility to food aid is set in accordance with clearly-defined criteria related to nutritional objectives. A footnote to paragraph 4 expressly recognizes that the regular provision by developing countries of foodstuffs at subsidized (but reasonable) prices conforms to the above-mentioned requirements. Within these limitations, programmes for the direct (or at subsidized prices) provision of food in emergency situations determined by a natural disaster may be excluded from the domestic support's reduction commitments.
151. Reference can also be made to Article XIII:1(d) of the Revised GPA, allowing for the use of **"limited tendering"**, i.e. a procurement method of covered goods (see section 4.4 below) whereby the procuring entity contacts a supplier or suppliers of its choice, and most procedural requirements under the Revised GPA are not applied "insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering". The use of limited tendering is furthermore placed under the condition that it is not used for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers.

68 T Nakuja, W A Kerr, "Do WTO Commitments Restrict the Policy Space of Countries Wishing to Provide Food Security Through Stockholding Programs?" (2018), Vol. 52, No. 6, *Journal of World Trade*, pp. 967-994.

69 WT/L/913 of 11 December 2013, para. 2.

70 WT/L/939 of 28 November 2014, para. 1.

152. Finally, enhanced access to domestic foodstuff could also be pursued through the adoption of **restrictions on the exportation of agricultural products**. These measures could be adopted when coping with a food emergency in the aftermath of a natural hazard, in order to ensure at least the availability of the domestic production to the affected population. Such restrictions are permitted under Article XI:2(a) of the GATT 1994, whereby Members are allowed to introduce export prohibitions or restrictions to prevent or relieve “critical shortages of foodstuffs” essential for the country concerned, provided they are temporary and applied in a non-discriminatory manner pursuant to Article XIII of the GATT 1994. According to Article 12 of the AoA, these restrictions have to be notified to the Committee on Agriculture before they become effective, to be then discussed with any other Member having a substantial interest as an importer. However, these conditions do not apply to developing countries, unless they are net exporters of the specific foodstuff concerned.

153. According to the case law, Article XI:2(a) can be invoked to justify *temporary* measures, i.e. measures “taken to bridge a ‘passing need’”,<sup>71</sup> as food shortages in the aftermath of a disaster could be understood. The question arises as to whether it could also cover food crises due to slow on-set disasters, as famine or drought, since they could result in a steady reduction of foodstuffs progressively impairing food availability, and not in a sudden lack of crops and livestock. However, in these circumstances (as well as in case of sudden extreme events) it is undisputable that foodstuffs may become “absolutely indispensable or necessary”<sup>72</sup> to meet the nutrition needs of the affected population and that deficiencies in quantity may exist “that are crucial, that amount to a situation of decisive importance, or that reach

a vitally important or decisive stage, or a turning point”.<sup>73</sup>

### 3.3 Issues affecting the supply of services and the entry of service suppliers

154. In the disaster response phase, a broad range of services are needed. These services will be provided by a diverse cross-section of commercial, non-governmental and governmental service suppliers, both domestic and foreign. Some of these services will be provided on a non-commercial basis by relief providers, private firms or governmental agencies. Others will be provided on a commercial basis by domestic and foreign suppliers.

155. Many of the services needed in disaster response are critical backbone services, fundamental to cope with the emergency in the affected State. Examples of these critical backbone services include:

- Health-related services necessary to provide medical assistance to the affected population;
- The repair of damaged energy generation and distribution networks;
- Environmental services (in particular sewage, sanitation or refuse disposal) to clear and restore affected areas; and
- Information technology or emergency telecommunication services to reach devastated regions and disaster victims.

156. Box 8 below gives an overview of the main services sectors according to the Services Sectoral Classification developed for the purpose of undertaking commitments under the GATS.<sup>74</sup> Many of the services outlined in the box may be offered by foreign entities during the disaster response.

#### Box 8: Services Sectoral Classification List

- |  |  |
|--|--|
| 1. BUSINESS SERVICES                             | 7. FINANCIAL SERVICES                            |
| 2. COMMUNICATION SERVICES                        | 8. HEALTH RELATED AND SOCIAL SERVICES            |
| 3. CONSTRUCTION AND RELATED ENGINEERING SERVICES | 9. TOURISM AND TRAVEL RELATED SERVICES           |
| 4. DISTRIBUTION SERVICES                         | 10. RECREATIONAL, CULTURAL AND SPORTING SERVICES |
| 5. EDUCATIONAL SERVICES                          | 11. TRANSPORT SERVICES                           |
| 6. ENVIRONMENTAL SERVICES                        | 12. OTHER SERVICES NOT INCLUDED ELSEWHERE        |

<sup>71</sup> Appellate Body Report, *China – Raw Materials*, 30 January 2012, para. 323.

<sup>72</sup> *Ibid.*, para. 326.

<sup>73</sup> *Ibid.*, para. 324.

<sup>74</sup> MTN.GNS/W/120 of 10 July 1991.

157. The GATS recognizes the right of Members to regulate the supply of services by taking measures to meet national policy objectives. The GATS covers any service in any sector, but excludes those supplied within the exercise of governmental authority (Article I:3(b)). General exceptions (Article XIV) and security exceptions (Article XIV bis) apply which give Members scope to take measures, *inter alia*, to protect human, health or plant life or health and in time of war or other emergency in international relations, to the extent that these measures are within the scope of application of the GATS. The chapeau of Article XIV requires such measures not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade. Under Article XIII of the GATS, government procurement is also exempted from certain GATS obligations, namely those of MFN treatment, market access and national treatment. However, for the 48 Members having accepted it, the Revised GPA and its disciplines on transparency, impartiality and non-discrimination apply also to government procurement of covered services (see section 4.4 below). Exceptions set out therein (e.g. the previously mentioned provision on limited tendering and the security and general exceptions) allow exemptions for the purposes of procuring services necessary immediate disaster response (and/or for the purposes of disaster recovery and disaster resilience).

158. The GATS defines trade in services according to four different modes of supply:

- Mode 1: from the territory of one Member into the territory of another Member (cross-border supply);
- Mode 2: in the territory of one Member to the service consumers of any other Member (consumption abroad);
- Mode 3: by a service supplier of one Member, through the establishment of a commercial presence in the territory of another Member (commercial presence); and
- Mode 4: by a service supplier of one Member through the presence of natural person of that Member in the territory of any other Member (movement of natural persons).

159. The schedule of commitments annexed to the GATS by each Member defines the scope of market access and national treatment offered to foreign services and service suppliers within different services categories subject to any limitations inscribed in each schedule. Articulated along the 12 different service sectors, comprising nearly 160 subsectors, these schedules constitute a multilateral legal framework shaping trade in services, notably in

terms of guaranteed market opening. The depth of commitments differs by Member, by service sector, by mode of supply and in terms of the limitations applied.

160. Against this background, outlining how the GATS may condition the supply of services within the disaster response phase entails certain challenges. Issues such as coverage, applicability and relevant definitions quickly arise – issues which also arise more broadly in the conduct of international services trade. GATS disciplines would only apply to measures taken in the aftermath of a natural disaster provided such measures indeed fall within the scope of the Agreement. This section focuses on three specific issues, namely: access of foreign relief service providers; the allocation of frequencies for emergency telecom providers; and the ability to offer financial services (e.g. moving to chase based forms of humanitarian relief). These three areas emerged during the country-focused research.

### 3.3.1 Access of foreign relief service providers

161. ***“Philippine diplomatic missions have standing instructions to facilitate the arrival of humanitarian aircraft and to process visa application for relief personnel in a single day”***.<sup>75</sup> Ambassador Esteban Conejos of the Philippines made these remarks in relation to the entry of foreign relief suppliers in the wake of the Typhoon Haiyan on 6 November 2013. The approach he outlines underscores how prior action can facilitate the entry of relief providers.

162. In the absence of such preparedness in relation to entry requirements, a disaster-affected government may find that foreign relief suppliers face regulatory challenges to enter the country. A disaster-affected government may find itself seeking to establish exceptions to, or to temporarily waive, applicable procedures and requirements so as to hasten the entry of foreign suppliers. A relevant example arose in the country research for Nepal after the 2015 earthquakes.

163. In the aftermath of the 2015 earthquakes, the normal process for international health personnel to obtain a temporary license from the Nepal Medical Council was waived, and instead the Ministry of Health and Population required emergency medical teams (EMTs) to simply submit a copy of the passport of the team members with a copy of their professional medical license, a covering letter to the Ministry expressing their interest in providing services, and the registration form prepared by WHO headquarters. They were then “licensed” to work as health professionals for a period of 30 days (renewable upon application) so

<sup>75</sup> Source: Remarks by Ambassador Conejos, Philippines, Side event 1, Lessons from Natural Disasters and Other Humanitarian Emergencies on the Role of Trade in Relief and Reconstruction “Summary report of the Fifth Global Review of Aid for Trade” [https://www.wto.org/english/tratop\\_e/develop\\_e/a4t\\_e/global\\_review15prog\\_e/5gr\\_review\\_e.pdf](https://www.wto.org/english/tratop_e/develop_e/a4t_e/global_review15prog_e/5gr_review_e.pdf).

long as they practised medicine within their EMT and in line with their training.<sup>76</sup>

panel report in the *EU – Energy Package* case could be considered to lend weight to such an approach.<sup>78</sup>

164. Disaster response predicted on case-by-case exceptions to applicable domestic regulation is suboptimal in terms of economic efficiency and may endanger delays. It could potentially also lead to arbitrary decisions that do not sit well with the commitments and obligations scheduled by Members under the GATS. The analysis that follows in this section examines the scope that governments enjoy to speed-up and facilitate entry procedures in accordance with their GATS obligations. The analysis then examines where government may wish to strike an appropriate balance between the need to hasten entry and the verification of professional qualifications – as per the example of Nepal above.
165. One challenge here is that the GATS is likely to cover some entry requirements, but not others. Measures necessary to protect the integrity of, and to ensure the orderly movement of natural person (for example an entry visa or stay permit) would fall outside the ambit of the GATS (unless they nullify commitments made).<sup>77</sup> Other procedures (e.g. the recognition of professional qualifications for specialized personnel) may fall within the ambit of the GATS (Articles VI and VII) and there would be good reasons to continue apply such requirements – as explained later in this section.
166. Analysis of the GATS highlight that governments enjoys a margin of discretion. For example, the GATS purposely excludes from its scope the **services “supplied in the exercise of governmental authority”** (Article I:3(b)), that is services supplied “neither on a commercial basis nor in competition with one or more service suppliers” (Article I:3(c)). Likewise, other provisions could also provide leeway for Members should concerns related to discrimination under Article II:1 of the GATS (MFN obligation) arise in relation to the facilitation of entry procedures for some, and not for other relief providers and to the extent that they are supplying like services. Article XIV on **general exceptions** allows the adoption or enforcement of measures “necessary to protect public morals or to maintain public order” (Article XIV(a)). The analysis of the
167. Provisions dealing with actions “necessary for the protection of ... essential security interests” ... “taken in time of war or other emergency in international relations” (Article XIV *bis* (b)(iii)) or “in pursuance of the ... obligations under the Union Nations Charter for the maintenance of international peace and security” may also give relief to disaster-affected Members. The twin provisions in the GATT 1994 have been previously commented. The legal considerations developed with respect to the GATT 1994 disciplines on security exceptions may apply *mutatis mutandis* to Article XIV *bis* GATS, supporting the possibility to invoke it in order to justify privileges granted to the entry of UN personnel or to personnel of foreign public agencies or of NGOs participating post-disaster humanitarian operations led by the UN.
168. An area where governments may wish to strike an appropriate balance between facilitation and control is in relation to professional qualification requirements and procedures, addressed in Article VI:4-6 of the GATS. This provision covers measures relating to **qualifications** which are mandatory **for the exercise of professional activities** across service sectors. Typically, Members set these requirements for the safeguard of consumers’ interests, i.e. in order to guarantee that service suppliers within the domestic market have the competence and knowledge deemed indispensable to provide their professional activity. At the same time, these regulations may also fulfil economic purposes, given that they may affect the level of competitiveness in service markets.
169. In the aftermath of a disaster, overly bureaucratic and time-consuming measures may slow the timeliness of humanitarian operations. If the possession by foreign relief personnel of requisite professional qualifications required in the disaster-affected county needs to be verified, such a procedure may delay their deployment.
170. In all countries, **health-related services** are among the most regulated sectors, with licensing and accreditation requirements set for the different

76 IFRC, WHO (2017) above, 31

77 The GATS Annex on Movement of Natural Persons Supplying Services under the Agreement is of interest here. The GATS does not prevent Members from applying measures regulating the entry and the temporary stay of natural persons into their territories, “including measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons” across borders. This provision confers Members latitude in policing their borders and administering the entry of foreigners. In a footnote, it is further stipulated that nullification or impairment of specific commitments does not occur because of “[t]he sole fact of requiring a visa for natural persons of certain Members and not for those of others”.

78 In the *EU – Energy Package* case, the European Union (EU) claimed that the measures challenged by Russia could be justified on the basis of the public order clause. Indeed, according to the EU the security of energy supplies is a “fundamental interest of society” within the meaning of footnote 5 to Article XIV(a) of the GATS: it involves, inter alia, “the ability to respond promptly to sudden changes within the supplydemand balance” caused by, e.g. “infrastructure breakdown, natural disasters, social unrest, political action or terrorism” (Panel report, 10 August 2018, para. 7.1151). The Panel did not contest the validity of this proposition, and the findings in this regard have not been subject to appeal. Accordingly, the application of MFN-inconsistent conditions on the entry of foreign relief personnel could be deemed as addressing public order concerns under Article XIV(a) of the GATS. Hence, a degree of discrimination could find a legal justification, provided it also meets the “necessity” test pursuant to Article XIV(a) and the further requirement under the chapeau that the measure is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade in services”. In the case law, it has been acknowledged that the chapeau of Article XIV of the GATS is drafted in terms very similar to the chapeau of Article XX of the GATT 1994 (Panel Report, *Argentina – Financial Services*, 14 April 2016, para. 7.745) and that the Appellate Body’s findings as to its interpretation are relevant also for the purposes of applying Article XIV of the GATS (Panel Report, *EU – Energy Package*, 10 August 2018, para. 7.1244).

medical specialities, and sometimes even for the employment of specific types of medical procedures. Only a few countries have taken formal legal steps to either provide a temporary license.<sup>79</sup>

171. Members regulatory policies are addressed in Article VI of the GATS. On its basis, in case Members have undertaken commitments on health services under mode 1 (with respect to tele-medicine or e-health) or mode 4, the obligations arise to “ensure that all measures of general application” affecting trade in services are administered in a reasonable, objective and impartial manner” (Article VI:1). The Agreement also contains a mandate to develop disciplines that aim to ensure that licensing requirements, qualification and technical standards, are based on objective and transparent criteria and are not more burdensome than required to guarantee the quality of the service (Article VI:4-5). The disciplines shall also aim to ensure that licensing procedures are not in themselves a restriction on the supply of the service.

172. A practical solution being trialled by the World Health Organization<sup>80</sup> and the IFRC is the establishment of a certification system for Emergency Medical Teams (see box 9 below). This scheme seeks to establish mechanisms for pre-registration of medical personnel subject to compliance with specific pre-determined requirements, dealing also with professional qualifications and insurance coverage. The overall purpose is to facilitate a prompt intervention, in particular in those situations where sudden natural disasters cause a huge number of casualties and persons in need of medical assistance. However, the effective involvement of pre-registered personnel is conditional upon the acceptance by the affected State.

### Box 9: WHO certification of Emergency Medical Teams

The WHO Emergency Medical Teams (EMT) Initiative assists organizations and States to build capacity and strengthen health systems by coordinating the deployment of qualified medical teams in emergencies. WHO has developed a global verification system where EMTs can be classified and ready to be deployed in health emergencies. A global list of all EMTs that meet the WHO EMT minimum standards provides time-limited surge clinical capacity to the affected populations. It serves as a deployment and coordination mechanism for all partners who aim to provide clinical care in emergencies such as tsunami, earthquake, flood, and more recently, in large outbreaks, such as the West Africa Ebola outbreak. It allows a country affected by a disaster or other emergency to call on teams that have been classified and quality assured. WHO’s viewpoint is that international teams need be deployed only in the case of an emergency of overwhelming proportions.

Source: World Health Organization website<sup>81</sup>

173. While a practical solution may emerge from the IFRC and WHO EMT Initiative, many other professional service categories also still face entry difficulties. Solutions such as the EMT Initiative offer a pathway that balances compliance with facilitation. Similar solutions based upon mutual recognition of qualifications are compatible with the GATS, provided they meet the conditions laid out in Article VII). Such approach would appear a preferable alternative to domestic authorities waiving altogether their domestic regulations for the purposes of facilitating the entry of foreign professional teams.

### 3.3.2 Issues affecting the use of ICTs: the allocation of frequencies

174. **Information and communication technologies** (ICTs) are pivotal in disaster response for the collection of timely information needed by humanitarian agencies involved in rescue and assistance operations. For instance, they are

indispensable tools for the coordination among relief organizations and in order to reach devastated regions and to assess their actual needs. However, the use of ICTs largely depends upon **access to frequencies**, commonly considered a scarce resource.

175. Within the humanitarian community, these considerations have led to the conclusion of the **1998 Tampere Convention** (see Annex 5). In view of its stated aim of ensuring “the reliable, rapid availability of telecommunication resources for disaster ... relief”, the Convention compels its contracting parties to reduce or remove, “when possible, and in conformity with their national law”, “regulatory barriers to the use of telecommunication resources for disaster ... relief, including to the provision of telecommunication assistance” (Article 9.1).
176. Among the regulatory barriers identified in the Tampere Convention are “regulations on the use of

<sup>79</sup> IFRC, WHO (2017) above, 31.

<sup>80</sup> See WHO, “Classification and Minimum Standards for Foreign Medical Teams in Sudden Onset Disasters” (Geneva, 2013).

<sup>81</sup> See [https://www.who.int/hac/techguidance/preparedness/emergency\\_medical\\_teams](https://www.who.int/hac/techguidance/preparedness/emergency_medical_teams).



... radio-frequency spectrum” [Article 9.2(b)]. The matter has been further tackled by the International Telecommunications Union, where a resolution on “Public protection and disaster response” was approved in 2015,<sup>82</sup> followed by a recommendation on “Frequency arrangements for public protection and disaster relief radiocommunication system” covering radio-frequency arrangements and, more recently, by the recommendation on “Fixed wireless systems for disaster mitigation and relief operation”.<sup>83</sup>

177. Within the WTO, the relevant instrument is the **1996 Reference Paper on telecommunication services**.

With the aim of enhancing competitiveness, the Paper sets some basic principles concerning national regulatory policies for the basic telecommunications (not for valued-added services). On the allocation of frequencies, WTO Members adhering to the Paper and having incorporated its obligations in their schedules are bound to carry out any relevant procedure “in an objective, timely, transparent and non-discriminatory manner” to the benefit of all Members (para. 6). It is worth underlining that this provision does not impose following a specific procedure for the allocation of frequencies. Rather, its purpose is to guarantee that, irrespective of the chosen modality for allocation, it does not discourage competition in the relevant markets.

178. Notwithstanding its main economic rationale, the Reference Paper acknowledges the importance of frequencies for public purposes. In this regard, it recognizes that the obligation to make the state of allocated frequency bands publicly available does not apply to “frequencies allocated for specific government uses” (para. 6). The term “government use” is not defined, leaving Members the discretion of applying it also to the use for civil protection operations.

179. In disaster response, the transparency of available frequencies is highly recommended, as it would greatly ease the interoperability between different systems of communication. Indeed, the 2015 ITU resolution encourages domestic administrations “to use harmonized frequency ranges” for disaster response.

### 3.3.3 Ability to offer financial services (remittances and cash aid)

180. Income remitted from abroad by the nationals of a disaster-affected country is an important tool for alleviating suffering, facilitating access to

goods and services and helping markets to start functioning again. Country research in Nepal and Tonga highlighted that **remittances** increased in the aftermath of a natural disaster. It also underscored the importance of these income streams for households and small businesses. These findings echo the results of research on the pace and value of remittances in the aftermath of disasters.<sup>84</sup> Income remitted is also crucial during the reconstruction phase, in particular in countries lacking an effective banking sector able to provide local credit or as a fiscal buffer at both the households and business level.<sup>85</sup>

181. The international humanitarian community is expanding the support that it provides in the form of **cash aid**. In part this move is motivated by the regulatory difficulties and costs in securing entry for relief goods. A desire to help markets recover and to reduce the costs of assistance is also acting as a push factor. To this end, increasing attention is devoted to cash aid as a complement for emergency assistance, and as a substitute for relief goods (although mostly after the initial response phase).<sup>86</sup> Cash aid is by definition untied (i.e. not linked to a particular good or supplier) and permits choice in decisions as to meet urgent needs.

182. Money transfers take place through different channels, which have increased in number and importance thanks to technological innovations. Reference can here be made to money transfer agents, traditional banking, online banking and mobile banking. The role of mobile banking, in particular under a non-bank-based model, has been the object of some attention for the purposes of social inclusion. Indeed, it may enhance access to financial services of low-income consumers, as they do not need to enter into a contractual relationship with a financial institution and can make or receive payments through mobile networks.<sup>87</sup> Operationally, the functioning of these channels requires the continuity of the financial and telecommunications systems in the disaster-affected country, or that at least they are quickly re-established. On a regulatory level, the effectiveness of international money transfer also depends upon the degree of integration of the domestic markets with international markets.

183. The GATS applies to all modes of supply of services, including to the cross-border supply of services, i.e. to services that are supplied from one Member to another Member without requiring a personal contact, face to face, between the supplier and the consumer of services. In so far as Members have enabled the supply through mode 1 of “payments

82 Resolution 646 (REV.WRC-15) (November 2015).

83 Recommendation ITU-R M.2015-2 (January 2018) and ITU-R F.1105-4 (January 2019).

84 L Le De, J C Gaillar, W Friesen, “Remittances and disaster: Policy implications for disaster risk management” (2015) Migration, Environment and Climate Change: Policy Brief Series, 1:2.

85 G Bettin, A Zazzaro, “The Impact of Natural Disasters on Remittances to Low- and Middle-Income Countries”, (2018) The Journal of Development Studies, 54:3, 481-500.

86 World Bank, “Cash Transfers in Humanitarian Context” (Washington DC, 2016).

87 S/FIN/W/88 of 14 November 2014, paras. 5.24-5.25.

and monetary transmission services”,<sup>88</sup> the access by their population to remittances or cash aid from relief organizations would be facilitated.

184. Regulatory measures adopted by other Members in view of fighting against illicit or fraudulent practices widely distorting the functioning of financial markets (e.g., international corruption, money laundering, or tax avoidance) may complicate remittances and cash transfers.
185. Even though adopted in view of more general and collective purposes, these limitations may impinge on the ability of “non-compliant” or “non-cooperative” disaster-prone or disaster-affected countries to guarantee the access of their population to the resources that could be available through money transfers under mode 1. However, since the regulatory measures at hand are adopted by the “exporting country” of the service, and not by the country which may have possibly undertaken specific commitments under mode 1, it is not clear what might be the legal basis for their challenge under WTO law.

### 3.4 Do's and don'ts – a checklist of disaster response and trade measures

186. The preceding analysis seeks to map the scope that exists under WTO Agreements for Members to take trade measures in support of disaster response. From this analysis, a possible “checklist” of actions available to both disaster-affected Members and their trading partner(s) can be elicited. This list is neither definitive nor exhaustive and is proposed for discussion. These actions are outlined in the following two sub-sections below.

#### 3.4.1 Trade measures that could be taken by a disaster-affected Member in the disaster response phase

- Use implementation of TFA commitments to address bottlenecks which can arise in disaster response. Particular attention here could be given to disciplines, *inter alia*, on publication of rules (including emergency rules), the separation of release from the final determination of customs duties and charges payable, the inclusion of relief providers within the ambit of authorized operator schemes, the use of *de minimis* provisions to facilitate aid from residents abroad and consideration of how provisions for expedited shipments and perishable goods could also be applied in disaster response situations.
- Give consideration as to how other legal instruments may facilitate the entry and clearance of relief items. Relevant procedures agreed by the WCO, guidelines adopted by the

International Federation of the Red Cross and Red Crescent (IFRC) and work by the United Nations Conference on Trade and Development (UNCTAD) on the ASYREC system could be of utility in this regard;

- *Ex ante* approaches to establishing derogations from customs duties and other fees and charges for specific goods or organizations could help contribute to transparency and lessen delays. Consideration should also be given to temporary admission, in accordance with WCO instruments. Attention needs to be paid to ensure that such measures are not applied as a disguised restriction on trade or in a discriminatory manner according to the origin of relief items.
- Ensure that import licensing procedures do not result in inadvertent delays for essential relief equipment. The provisions of the Tampere Convention for the entry of telecommunications equipment is relevant in this regard. The ITA is also germane for participating Members.
- Public stockholding for food security purposes undertaken in accordance with the AoA and any rules that may be further agreed pursuant to the 2013 Bali WTO Ministerial Decision could facilitate the procurement of foodstuffs by disaster-affected Members. The Revised GPA could also play a role for the procurement of foodstuffs, and other goods and services needed in the aftermath of a disaster.
- Conformity assessment and control, inspection and approval procedures provided for in TBT Agreement and SPS Agreement should conform to legitimate objectives pursued by and meet the appropriate level of sanitary and phytosanitary protection of, the disaster-affected Member. Such procedures should be undertaken expeditiously in the disaster response phase. International standards can help disaster-affected Members to strike an appropriate balance between control and facilitation.
- A broad range of services will be required in the disaster response phase. *Ex ante* measures to facilitate the entry of foreign service suppliers should be considered and, if appropriate, incorporated into the domestic regulation of service suppliers. Domestic regulatory measures to support remittances from nationals overseas and to facilitate cash approaches to disaster relief merit consideration. The critical role of telecommunications in disaster response may also require specific consideration of allocation of frequencies.

<sup>88</sup> MTN.GNS/W/120, under the “Financial services” heading.

### 3.4.2 Trade measures that can be taken by trading partner(s) of a disaster-affected Member during the disaster response phase

- *Ex ante* consideration of how to comply with transit obligations under Article V of the GATT 1994 and in Article 11 of the TFA will help disaster response. For Members sharing a common frontier, such consideration could be given in the broader framework of Border Agency cooperation. Consideration should also be given to transit provisions adopted by other relevant organizations.
- Supplying food aid in accordance with the 2015 Decision on Export Competition and in respect of commitments under the AoA will support the access of disaster-affected countries to food products from foreign sources, notably for those who are net food importing developing countries. The Food Assistance Convention is also relevant in this regard. Work on export restrictions for food aid is recalled. The Revised GPA provide also scope of action for procuring with a view to provide international assistance.
- Both the SPS and TBT Agreements recognize the right of Members to take measures in pursuit of legitimate objectives and to meet its appropriate level of sanitary and phytosanitary protection. Both agreements also recognize that measures taken should not be applied in a manner which would constitute an arbitrary or disguised restriction on trade, particularly where similar or identical conditions prevail, including those in a disaster-affected trading partner.
- Give consideration to ensuring that measures taken to promote compliance with prudential financial regulation (e.g. to control illicit financial flows) do not unduly restrict the flow of remittances or the use of cash aid in disaster response situations.

# Disaster recovery



## 4.1 Introduction and overview

187. The letter of Director-General Supachai Panitchpakdi, sent to the Members in the wake of the 2004 tsunami in the Indian Ocean and South East Asia (reproduced below), highlighted the role the WTO Members may play in supporting their trade partners in recovering from natural disasters.

188. In broad terms, disaster recovery refers to the activities aiming at restoring the full functioning of an economy or community affected by a disaster. It requires efforts to reestablish livelihoods, restore the domestic economic, social, and environmental system and rebuild critical infrastructures, housing and services. Economic output can be brought back up to pre-disaster levels, and at the same time the necessary conditions may be established to strengthen the resilience to future disasters.

### Box 10: Supachai urges members to mull trade policies to help tsunami sufferers

*Swiftly concluding the current Doha Agenda negotiations and perhaps other actions, such as better market access, and restraint in using trade remedies, are needed to help countries trying to recover from the Asian tsunami, WTO Director-General Supachai Panitchpakdi told members on 13 January 2005. In a letter to all members, he urged them to consider whether they can introduce any trade policies now to help the worst affected economies to recover. This is what he wrote:*

Dear Permanent Representative,

I know how deeply we all feel about the terrible toll taken by the recent tsunami in the Indian Ocean and South East Asia. As someone from the affected region, I naturally feel a particular sense of tragedy. I also want to express my, and the Organization's, deep appreciation for the generosity of the response from so many governments and from millions of ordinary people both within the region and around the world.

As an important actor in international economic cooperation, the WTO shares part of the responsibility to assist recovery from this disaster. The question we must address is how best the Organization can contribute given its mandate and sphere of competence.

Although we are not involved in humanitarian assistance or disaster relief, clearly we can make a major contribution to the economies of the affected countries (and others) by pressing on with and concluding the Doha Development Agenda as soon as possible. This would seem to be particularly relevant in the field of market access, including trade in some services sectors and certain modes of supply. Additionally, a successful Round will help to generate resources that can be used to reduce poverty, which will in turn improve the capacities of countries to prevent disasters (whether tsunamis or other natural phenomena), to cope with their effects, and to recover as quickly as possible.

With the best will in the world, the benefits of successful completion of the DDA will only be felt in the medium term. That does not undermine the case for concluding it as soon as humanly possible. Quite the opposite. But it also leads me to ask whether there is any action which can be taken more immediately. I accordingly wish to urge all Members individually to reflect deeply and expeditiously on whether there is anything they can do at this moment in time in terms of their trade policy to help the worst affected economies to recover. Since this is a matter for individual governments, I do not wish to make specific suggestions. Obvious possible areas which occur to me and no doubt others will be market access and some restraint in use of trade remedies. However, I do not wish to imply that these are the only ways in which help could be offered. If you feel that some form of enabling action at the multilateral level could be useful, please raise this possibility as appropriate with colleagues, the Chairman of the General Council, other relevant chairpersons and/or myself.

I hope and trust that you will relay these sentiments to your authorities.

Yours sincerely,  
Supachai Panitchpakdi

Source: WTO website<sup>89</sup>

89 [https://www.wto.org/english/news\\_e/news05\\_e/dg\\_letter\\_13jan05\\_e.htm](https://www.wto.org/english/news_e/news05_e/dg_letter_13jan05_e.htm).

189. For countries whose macroeconomic fundamentals are highly dependent on a narrow range of sectors, restoring the activity within these sectors is essential and creates positive spillover effects. Country research shows that in disaster-prone countries the agricultural sector may account for an important share of the economic activity and employment. Since agriculture is also highly vulnerable to natural hazards, its prompt recovery becomes of crucial importance to restore production at the levels necessary to meet the basic food needs of the population, to maintain or re-establish export flows and to repair the links within domestic or international value chains in the agri-food sector. Similar considerations may also apply for service sectors, such as the tourism sector.
190. Trade and trade-related measures can help to stimulate recovery after a disaster strikes. A first area of concern for policymakers is the **provision of financial support to sectors damaged by a natural hazard**. The lack of sufficient financial resources on the domestic credit markets can be overcome through a variety of instruments, including state aid and the financial assistance from multilateral or regional intergovernmental institutions. In designing these policies, Members should give due consideration to the relevant WTO disciplines, namely the SCM Agreement, the AoA, and the Marrakesh Ministerial NFIDCs Decision. These texts merit careful consideration since they include a number of provisions that could support financial aid policies for recovery purposes.
191. The revitalization of the economic and productive base can also be pursued through **import policies**. In this regard, contrasting priorities may arise. On the one hand, some firms or sectors may argue that a disaster necessitates more breathing space in the form of policy space (e.g. through an increase in tariff protection). Such a request could help address a deficit in the balance payments, in particular when the disaster is an extreme event. On the other hand, country research suggests that the rapid entry of imports is crucial to restart economic activity (e.g. building materials, machinery and spare parts).
192. The **re-establishment of exports** is indispensable for relieving pressure on the current account following a natural hazard. Tariff preferences offered by the partners of disaster-affected developing countries can help. The main instrument in this regard is the tariff preferences under the General Systems of Preferences covered by the 1979 Enabling Clause and the decisions adopted by the Ministerial Conference in 2008 and 2013 for LDCs. At the same time, the WTO practice shows that similar initiatives have been undertaken also according to the waiver clause under Article IX:3 and IX:4 of the Marrakesh Agreement.
193. Exports from disaster-affected countries may suffer specific obstacles in the country of destination. Damage to productive facilities and the deterioration of environmental conditions due to natural hazards may compromise the quality and safety of exported products, whose entry in foreign markets could be hampered by the application of (existing) **technical regulations, conformity assessment procedures, standards or sanitary or phytosanitary measures**. Provisions included in two WTO Agreements (the TBT and SPS Agreements) on technical assistance and special and differential treatment in favour of developing and least-developed Members suggest measures could be adopted by trading partners.<sup>90</sup>
194. Similarly, developments in **trade in services** may also be affected by varied demands in the diverse sectors and subsectors. Where national economies are highly dependent on the services sector (e.g. tourism), in the absence of GATS subsidy disciplines there is a wide margin of discretion that Members enjoy.
195. A disaster-affected country may need the knowledge and competences of foreign suppliers in sectors where a relevant domestic market is lacking (for instance, for engineering services), pushing for the (temporary) suspension or **removal of restrictions or quantitative limitations**, if any, on their entry set by national laws and regulations.
196. Lastly, **public procurement** of both goods and services represents an additional area for consideration. In the event that sufficient public financial resources are available (also thanks to support from international organizations), key goods and services could be purchased by national agencies to be then distributed to the population or used in recovery activities (e.g. re-building of critical infrastructures or restoring the environmental conditions of affected regions). The plurilateral Revised GPA would apply to those WTO Members that have accepted it. The definition of the scope of this agreement and the exceptions included in its text grant WTO Members room for manoeuvre in designing procurement policies consistent with the recovery needs.
197. The mapping surveys the following WTO Agreements: Marrakesh Agreement, GATT 1994, AoA, SPS Agreement, TBT Agreement, SCM Agreement, Agreement on Safeguards, TFA, GATS, Revised GPA.
198. **The analysis is organized as follows.** Issues affecting **trade in goods** are tackled first. Under this heading, the leeway WTO Members enjoy for the provision of **subsidies** is discussed first, with a particular focus on programmes for the agricultural sector. Next, the focus shifts to the measures that may be adopted by the **disaster-affected Members** for the regulation of their **imports**. The analysis

<sup>90</sup> A WTO Secretariat compilation of Special and Differential Treatment Provisions in WTO Agreements and Decisions can be found in document: WT/COMTD/W/239

on trade in goods concludes with consideration of the measures available to trade partners that may promote (or negatively restrict) the **exportation** of products originating in disaster-affected Member. A discussion of **subsidies** opens the section on **trade in services**, aiming first at addressing the permissible space available under the GATS for the design and implementation of **state aid policies** in favour of services suppliers. Thereafter, the GATS provisions affecting the **imports and exports of services** are tackled, from the perspective of both the disaster-affected country and of its trade partners. A closing section looks at the Revised GPA and the scope granted therein in view of **designing government procurement policies** consistent with recovery needs.

## 4.2 Issues affecting trade in goods

### 4.2.1 Subsidies and financial aid mechanisms in support of domestic producers

199. In the recovery phase after a disaster, restoration of economic activity may require the provision of financial support to enterprises that have suffered material damage. In this regard, WTO Agreements provides for some flexibility within the framework of the SCM Agreement, the AoA and the Marrakesh Ministerial NFIDCs Decision.

200. The space afforded to Members under the **SCM Agreement** may be inferred from the distinction between export subsidies and actionable subsidies. According to Article 3 of the SCM Agreement, subsidies contingent upon export performance or upon the use of domestic over imported products are prohibited in view of their harmful impact on the trade interests of other Members. Other financial support programmes (so-called “actionable subsidies”) are permitted, unless other Members can show an adverse effect on their interests, as defined under Articles 5 and 6. In case of both prohibited and actionable subsidies, affected members can bring a claim before the Dispute Settlement Body. In alternative, they may carry out investigations at the national level, and eventually levy a “countervailing duty” on the subsidized imports hurting domestic producers. During the consultations carried under Article 4 of the DSU or when presenting evidence considered relevant for the domestic investigation (Article 12.1 of the SCM Agreement), the subsidizing Member is given the opportunity to represent the particular circumstances that led to the introduction of the subsidy in question and its importance for the purposes of recovering from a natural hazard.

201. State aid policies addressing the recovering needs of businesses hurt by a natural disaster

come under the scope of the SCM Agreement only on the condition they satisfy the definition of “subsidy” set therein. Indeed, the SCM Agreement applies to subsidy programmes that meet three requirements: (i) a financial contribution is granted by a government or a public body (Article 1.1(a)(1)); (ii) it confers a benefit upon the recipient (Article 1.1(b)); and (iii) the subsidy is “specific” (Article 1.2). The **financial contribution** may take the form of a direct or indirect transfer of funds, a foregone or not collected government revenue, government provision of goods or services (other than general infrastructures) or the purchase of goods by the government, or government payment into a funding mechanism (Article 1.1(a)(1)).

202. A subsidy within the meaning of the SCM Agreement is only subject to WTO law if it is **specific**, i.e. provided on a selective basis, to a particular enterprise or industry or to a group of enterprises or industries (Article 2.1), or to certain enterprises located within a designated geographical region (Article 2.2). Prohibited subsidies under Article 3 are deemed to be specific (Article 2.3).

203. Specificity cannot be found where eligibility for the subsidy is based on **objective criteria or conditions**, which are set forth explicitly in law, regulation or other official documents, so as to be capable of verification, and provided that those criteria are strictly adhered to and are applied in an automatic manner (Article 2.1(b)). Objective criteria are defined as criteria “which are neutral, which do not favour certain enterprises over others, and which are **economic in nature and horizontal in application**, such as the number of employees or size of the enterprise”. This provision leaves leeway for designing subsidy programmes in order to support domestic producers to recover from damages suffered after a natural hazard, provided they are designed according to “objective” criteria. For instance, the footnote to Article 2.1(b) suggests that subsidy programmes would escape the discipline of the SCM Agreement where their beneficiaries are **micro, small or medium enterprises**.<sup>91</sup>

204. Some difficulties could arise with respect to specificity as defined in Article 2.2. Indeed, “a finding of **regional specificity** depends on whether a subsidy programme limits availability to ‘enterprises’ that are located in a designated geographical region within the jurisdiction of the subsidizing Member”,<sup>92</sup> even in case the potential beneficiaries are all enterprises located in the designated region.<sup>93</sup> The “designation” of a geographic region has been understood as implying that the limitations on access to the subsidy are set excluding portions of the territory of a Member from the subsidy’s scope.<sup>94</sup> Accordingly, depending

91 See Panel Report, *Brazil – Taxation*, 30 August 2018, para. 7.506.

92 Appellate Body Report, *US – Washing Machines*, 7 September 2016, para. 5.220.

93 Panel Report, *EC and certain member States – Large Civil Aircraft*, 30 June 2010, para. 7.1223.

94 Appellate Body Report, *US – Washing Machines*, 7 September 2016, para. 5.231.

upon their exact features, subsidies to companies located in the area hit by a disaster may fall under the definition of “regional specificity”. In any case, they could be remedied against by the adoption of countervailing measures or be challenged pursuant to the Dispute Settlement Understanding only provided the other conditions set in Article 3 (on prohibited subsidies) or Article 5 (on actionable subsidies) are satisfied.<sup>95</sup>

205. As mentioned above, a financial contribution by a government does not involve subsidy under the SCM Agreement unless it confers a **benefit** upon the recipient. This term has been interpreted as implying that the financial contribution is “provided on terms which are more advantageous than those that would have been available to the recipient on the market”.<sup>96</sup> Assessing whether a benefit has arisen requires a comparison, and in particular “determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available ... in the market”.<sup>97</sup>
206. This articulated definition of subsidy opens the question of whether the **suspension of custom duties and/or other fees or charges on the importation of foreign products** may be covered by the SCM Agreement. Indeed, as made clear in the country research, this support could be relevant for the restoration of local production of goods, in particular where the use foreign inputs is required (e.g. imported spare parts) or local producers have to resort to foreign products for the purposes of reconstructing productive facilities and infrastructures which suffered material damages.
207. The suspension of tariffs would not be prohibited under Article II:1(b) of the GATT 1994, since it merely prohibits fixing higher import duties than their bound level, provided the suspension is applied on an MFN basis according to Article I:1 of the GATT 1994. Discrimination on the basis of the origin of the imported products could be however justified under exception clauses included in the GATT 1994, in particular under Article XX.
208. However, this kind of support could be at odds with the SCM Agreement. Indeed, it is indisputable that when a “financial contribution” under the terms of Article 1 is accorded, in the form of government revenue foregone or not collected,<sup>98</sup> and that a benefit is conferred, as “the recipient is ‘better-off’ than it would otherwise have been, absent that contribution”.<sup>99</sup> Then, the question arises as to whether the suspension of import tariffs results in a “specific” subsidy pursuant to Article 2. In particular, the specificity would depend on the list of products whose importation is exempted from the customs payment. A presumption of specificity would be legitimate in case the use of these products is specific for a given enterprise or industries or group of enterprises or industries, even more in case where the benefit is conferred exclusively to companies located in a given geographical area, i.e. the area affected by the natural hazard. Again, for remedies to be applied or for a dispute to be brought before the DSB, substantive evidence must be given that the other requirements established under Article 3 or in Article 5 are met.
209. Given that disaster also strike LDCs, it is worth considering the flexibilities defined in the SCM Agreement in their regard. Pursuant to Article 27.1, WTO Members recognize that “subsidies may play an important role in economic development programmes of developing countries Members” and establish a unique sub-categorization of developing Members for purposes of transition rules and other special and differential treatment provisions pertaining to prohibited subsidies that could prove to be useful for the re-establishment of production and export trade in a post-disaster scenario.
210. According to paragraph (a) of the Annex VII to the SCM Agreement, LDC Members are not subject to the prohibition of export subsidies for as long as they remain designated as least-developed countries by the United Nations. In addition, pursuant to the following paragraph (b), certain listed developing Members are not subject to the prohibition of export subsidies until their GDP per capita reaches a pre-determined threshold. Finally, all other developing Members had a period of eight years from the entry into force of the Marrakesh Agreement to phase out their export subsidies (Article 27.2(b)).
211. The flexibility afforded to **LDCs** to finance their exporters was reaffirmed in 2001 by the WTO Ministerial Conference.<sup>100</sup> However, in more recent times, the critical role of export subsidies has been highlighted before the General Council. Indeed, in a document submitted in April 2018,<sup>101</sup> a group of LDCs drew attention to the challenges they face once “graduated” (namely, once they are excluded by the UN from the official list of least-developed countries – see section 4.2.3 below). Included among these difficulties is their exclusion from the exemption under Article 27.2(a) of the SCM Agreement. Therefore, the proposal was made for a General Council decision whereby LDC

95 In this regard, the SCM Agreement departs from other legal regimes which include exemptions from the subsidy discipline in case of disasters. For instance, under the Treaty on the Functioning of the European Union, State aid “to make good the damage caused by natural disasters” is deemed to be consistent with EU law. See Article 107(2)(b) TFEU.

96 Panel Report, Canada – Aircraft, 14 April 1999, para. 9.112.

97 Appellate Body Report, Canada – Renewable Energy, 6 May 2013, para. 157.

98 Appellate Body Report, Canada – Autos, 31 May 2000, para. 91.

99 Appellate Body Report, Canada – Aircraft, 2 August 1999, para. 157.

100 WT/MIN(01)/17, 14 November 2001, para. 10.4.

101 WT/GC/W/742 and G/C/W/752, both of 19 April 2018.



- Members, once graduated, could continue to enjoy the flexibility to support their exporters under the same conditions as those set in Annex VII(b) for the listed developing countries.
212. Considering that most LDC Members are disaster-prone countries and continue to be so even after having left the LDC status, the possibility to grant financial support to their exporters could be an instrument to boost disaster recovery and to support the rehabilitation of their economic activity. However, the proposal did not meet an agreed support within the General Council.<sup>102</sup> While LDCs and most developing Members voiced their endorsement, developed Members questioned the necessity of the proposed decision or, while declaring being ready to discuss it, required more extensive information to the proponents.
213. The 8-year transition period for **developing countries** under Article 27.2(b) has been the object of further assessment within the WTO. Indeed, the 2001 Ministerial Conference decided on a package of “fast-track” extension procedure under Article 27.4 for certain developing Members whose share of world merchandise export trade was lower than 0.10 percent and whose gross national income in 2000 was lower than USD 20 billion.<sup>103</sup> Under these procedures, the beneficiary Members obtained extension on a streamlined basis, subject to standstill and transparency requirements. The extension package was renewed in 2007 with important modifications.<sup>104</sup> Pursuant to the renewal package, certain subsidies programmes of 19 developing countries could be continued until the end of 2013, with the final phased-out period referred to in Article 27.4 beginning on 1 January 2014 and the definitive elimination of the eligible programme by December 2015.

### Box 11: Jordan’s export subsidies

Notwithstanding the new deadline set in 2007 for the removal of export subsidies by developing Members, some Members requested a further extension. As for Jordan, its legal basis was found no longer in Article 27.4 of the SCM Agreement, but in Article IX:3 and IX:4 of the Marrakesh Agreement.<sup>105</sup>

This change of approach suggests also a change in determination of the factual justification of the request: the possibility to continue to finance Jordanian exporters was not tied to the “development needs” of the country, but to the existence of “exceptional circumstances”, as required by the opening words of Article IX:3. In the case at hand, those circumstances were found, *inter alia*, in the global economic crisis and in the political instability of Arab countries, which constituted more than half Jordan’s export trade.

An initial request for a waiver from Article 3 of the SCM Agreement for a 7-year period was progressively reduced to a 3-year period, deemed as suitable to define a new support programme for domestic SMEs in accordance with the SCM Agreement. The issue remained under the surveillance of the WTO Council on Trade in Goods, where other Members, in particular developed Members, have regularly expressed the hope Jordan complied with the schedule for the termination of the programme communicated in 2015.<sup>106</sup> A final communication for the complete removal of the export subsidy programme originally extended in 2001 was submitted in July 2018.<sup>107</sup>

214. According to Article 8 of the SCM Agreement, certain types of subsidies (assistance for research activities, to disadvantaged regions or for the proper implementation of environmental laws and regulations) were “**non-actionable**”. Article 8 lapsed on 31 December 1999 by virtue of Article 31 of the SCM Agreement.
215. However, the category of non-actionable subsidies has been considered by the Ministerial Conference in 2001, with respect to “measures implemented by developing countries with a view to achieving legitimate development goals”.<sup>108</sup> Therefore, the proposal to treat them as “non-actionable subsidies” has been taken note of and, consequently, the decision was taken to start negotiations on that issue. Pending the conclusion of these negotiations, other Members were urged to exercise due restraint with respect to challenging these measures before the DSB.
216. Paragraph 10.2 of the 2001 Ministerial Declaration includes a list of envisaged “development goals”, i.e. “regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production”. Except for the diversification of production, this list takes up the categories of non-actionable subsidies provided for in Article 8. In any case, the list was merely illustrative, and other purposes could have been brought under the scope of both

102 WT/GC/M/173 of 5 October 2018, p. 25 ff. See also G/C/M/132 of 13 March 2019, p. 9 ff.

103 WT/MIN(01)/17 of 14 November 2001, para. 10.6 and G/SCM/39 of 20 November 2001, para. 2.

104 WT/L/691 of 31 July 2007.

105 G/C/W/705/Rev.2 of 6 November 2015.

106 Lastly, see G/C/M/131 of 5 October 2018 and G/C/M/132 of 13 March 2019.

107 G/SCM/N/315/JOR/Suppl.1 and G/SCM/N/299/JOR/Rev.2, both of 24 July 2018.

108 WT/MIN(01)/17 of 14 November 2001, para. 10.2.

the negotiation mandate and the peace clause, including the restoration of the economic activities within a disaster affected area. This specific issue was not raised within the preliminary debate of the Negotiating Group on Rules,<sup>109</sup> where it was simply affirmed the crucial importance of the notion of non-actionable subsidies in achieving development goals of developing countries and LDCs.<sup>110</sup>

217. As the peace clause set out in Article 13 of the AoA lapsed at the end of 2003, the SCM Agreement disciplines include also financial support programmes to the **agricultural sector**. Due to the extreme vulnerability of agriculture to disasters, Members may ponder to design **financial aid mechanisms** suitable to support it and to limit the duration and severity of the impact of natural disasters. The AoA does not disregard this particular interest within the provisions setting the scope of the reform programme on domestic support. Furthermore, para. 3(iii) of the NFIDCs Decision clearly address Members to give full consideration, in the context of their aid programmes, to the requests of financial assistance from LDCs and net food-importing developing countries, with a view to improve their agricultural productivity and infrastructures and, thereby, to lower their reliance on food imports to meet the domestic nutrition needs.
218. According to paragraph 8 of Annex 2 to the AoA, the commitment to reduce domestic support does not apply to **payments to agricultural producers aiming at upholding relief from natural disasters**, done directly or by way of government financial participation in crop insurance schemes if certain conditions are met. Eligibility to these payments arises following a formal recognition by the government authorities that a natural disaster or a like disaster has occurred or is occurring. Paragraph 8 sets out detailed criteria on the substantial circumstances that may justify relief payments (beneficiaries must have suffered a production loss higher than 30% of the average production in the previous three years or a three-year average based in the preceding five-year period, excluding the highest and the lowest entry), the losses that can be compensated (losses to income, livestock, land and other production factors, not to the production itself), the existence of a link between the losses and the disaster (losses must be “due” to a natural disaster), the amount of compensation (at maximum equal to the total cost supported for replacing the losses). Finally, the support may not be made conditional upon the type or quantity of future production.
219. From the text of paragraph 8, it may be inferred that these Green Box measures relate to the recovery of the agricultural sector, predominantly at the re-establishment of producers’ production facilities.
- Financial programmes remedying structural weaknesses, addressing the improvement of resilience and the reduction of vulnerability of the agricultural sector to disasters, may come under the scope of Annex 2 norms on **investment aids, payments under environmental programmes or to producers in disadvantaged regions**, provided the requirements established respectively under paragraphs 11, 12 and 13 are fulfilled (see section 5.2.3 below).
220. Annex 2, paragraph 8 does not provide a definition of the term “natural disaster”. This issue could be considered in case the legitimacy of a payment programme is raised under the DSU to determine whether the material requirements set in paragraph 8 are met by the measure in question. In this regard, some indications may be given from the illustrative list of “like disasters” included in paragraph 8. This list refers to “disease outbreaks, pest infestations, nuclear accidents, and war on the territory of the Member concerned”. All these events seem to share the common characteristics of being sudden or clearly evident events.
221. The question then arises as to whether paragraph 8 covers also slow-onset disasters, i.e. disasters that emerge over time, in some cases over years (e.g., drought or desertification), with the consequence that payments addressing relief from them would also be exempted from the reduction commitments of domestic support. Absent any express definition of natural disasters and given the illustrative character of the list of “like disasters”, slow-onset hazards may not be excluded *in abstracto*. However, the exemption would apply provided that the other conditions set in paragraph 8 are satisfied, i.e. that government authorities have recognized that a disaster has occurred or is occurring, that evidence is given that the losses admitted to compensation are “due” to a slow-onset disaster and that the compensation is granted to losses calculated with respect to a specific timeframe.
222. Paragraph 8 does not give any indication as to the territorial dimension of the covered natural disasters. As evidenced by practice, this opens up the possibility of invoking it with reference to hazards affecting the whole territory and a specific region of Members.<sup>111</sup>
223. A further provision of the SCM Agreement could also be of interest. Article 6.7 of the SCM Agreement takes into consideration the situation that a Member grants financial support in favour of domestic producers with a view to face “**force majeure**” circumstances (including natural disasters) affecting production in another Member.
224. Indeed, according to Article 6.7(c) of the SCM Agreement, a WTO Member may not claim it

109 For a brief summary, see TN/RL/W/143 of 22 August 2003, p. 100.

110 TN/RL/W/41/Rev.1 of 10 March 2003 and TN/RL/W/131 of 11 July 2003.

111 G/AG/N/EEC/16 of 22 March 1999, 4, and G/AG/R/19 of 25 August 1999, p. 24.

is suffering a “serious prejudice” because of a displacement or impediment affecting its exports into the territory of another Member granting subsidies to local producers when “natural disasters, strikes, transport disruption or other force majeure” have substantially affected the production, qualities, quantities or prices of the exported product at issue.

225. According to the Panel report in the *EC and certain member States – Large Civil Aircraft* case, “a finding of displacement or impediment under Article 6.3 cannot be made where the market share effects alleged to constitute such displacement or impediment are the result of *extraordinary* (“*force majeure*”) events which affect the supplies of the product available for export from the [exporting] Member”.<sup>112</sup> Further, it is specified that “in order to qualify as *force majeure* under Article 6.7(c), such events would ... have to concern limitations on exports of the [exporting] Member that do not also affect the product of the [importing] Member in the same or similar way”.<sup>113</sup> “[W]hen a force majeure event, unrelated to subsidization, substantially affects production, qualities, quantities or prices of the product available for export from the [exporting] Member, a decrease in that Member’s market share in an export market shall not constitute serious prejudice”.<sup>114</sup>

#### 4.2.2 Measures affecting imports by the disaster-affected country

226. The challenges arising in the aftermath of a natural hazard may push countries to revise their import policies and to use them as a tool to address a balance of payments deficit or to support national production. As a premise, it is worth underlining that nothing under WTO law prevents Members from increasing unbound tariffs or applied MFN custom duties to the level of bound rates. Therefore, to the extent that **increased tariff protection** is deemed as desirable for the purposes of disaster

recovery, WTO Members may enjoy scope for such action depending upon the content of their respective schedules of concessions annexed to the GATT 1994. Besides that, a scope for action is offered to increase tariff protection above the bound level under various exceptions provided for in WTO Agreements.

227. The fulfilment of balance of payments purposes is the object of Articles XII and XVIII:B of the GATT 1994 (complemented by the 1994 Understanding agreed upon at the end of the Uruguay Round), that authorize the application of **import restrictions to recover from a deficit in the trade balance**. In particular, under Article XII WTO Members may safeguard their external financial position and balance of payments by instituting, maintaining or intensifying import restrictions “to forestall the imminent threat of, or to stop, a serious decline” in their monetary reserves (para. 2(a)(ii)) or “to achieve a reasonable rate of increase” of “very low” monetary reserves (para. 2(a)(iii)). An ad hoc regime is added by Article XVIII:B in favour of developing countries whose “economy can only support low standards of living and ... in the early stage of development” (Article XVIII:4(a)). Imports restrictions for balance of payments purposes are allowed if temporary in nature and applied to the extent necessary to address the balance of payments situations. When applied Members are required to notify time-schedules for their removal.
228. Since natural disasters have significant impacts on trade flows, the material conditions justifying import restrictions according to Articles XII and XVIII:B of the GATT 1994 may occur in their aftermath. Therefore, depending on the circumstances of each case, the adoption of balance-of-payments safeguards or the maintenance of existing import restrictions could be used to restore or preserve adequate foreign exchange reserves. Article XVIII:B has been invoked twice, by Bangladesh in 1999 and by Ecuador in 2016 (see box 12 below).

#### Box 12: Bangladesh and Ecuador Balance of Payments measures in the aftermath of natural disasters

Bangladesh has long been under the consultation procedures before the BoP Committee because of the restrictive import measures it applied under Article XVIII:B. As an LDC, these consultations were brought under the “simplified procedure” envisaged by paragraph 9 of the 1994 Understanding. In 1997 it was agreed to switch to the “full procedures” under paragraph 5. However, the 1998 floods caused huge damages to Bangladesh’s national economy, in particular to agricultural infrastructure and crops. As a result, exports went down and the trade deficit widened, also due to the increase of imports, mostly of food grains and equipment for reconstruction.<sup>115</sup> In view of the serious economic situation, the Balance of Payments Committee accepted the request from Bangladesh to continue to hold consultations under the simplified procedures.<sup>116</sup> During these consultations, Bangladesh represented the serious difficulties it had to cope with after the floods, which had dimmer its growth prospects and aggravated an already delicate balance-of-payments position in the short-term.<sup>117</sup>

112 Panel report, *EC and certain member States – Large Civil Aircraft*, 30 June 2010, para. 7.1699 (emphasis added). These findings by the Panel have not been appealed by the disputing parties.

113 Ibid., para. 7.1700.

114 Ibid., para. 7.1699.

115 WT/BOP/S/9 (28 April 1999), para. 7.

116 WT/BOP/18 of 18 September 1998 and WT/BOP/R/42 of 16 October 1998, para. 2.

117 WT/BOP/G/8 of 28 April 1999, para. 9.

A similar justification was raised by Ecuador in 2016 to justify the postponement of the removal of existing restrictions. Indeed, in March 2015, the Government of Ecuador adopted a balance of payment safeguard to protect the liquidity of its economy and prevent a sharp decline in its growth and employment. The measure was introduced to contain the significant external imbalance that developed in the middle of 2014 due to the fall in international market oil prices and appreciation of the US dollar.<sup>118</sup> Both factors had a negative impact on the fundamentals of the country's economy.

The BoP measure was imposed on approximately 30% of imports. Surcharges included a 5% ad valorem import tax on non-essential capital and primary goods, 15% on imports of "medium need", 25% on ceramics, tyres, motorbikes and TVs and 45% on final consumer goods. Ecuador informed WTO members that the measure would be removed after 15 months and began the process to progressively phase out the surcharge, lowering the highest rate from 45 %to 40% in January 2016.<sup>119</sup>

In April 2016, Ecuador was hit by a 7.8 magnitude earthquake. Six provinces were badly hit, including the coastal province of Minabi, where many of the main economic activities are located: tourism and production of the country's main export products (tuna, shrimp, coffee oil and refined products), was severely affected. The earthquake left a toll of at least 659 dead and 27,732 injured.

In view of the "unfavourable economic climate" which worsened following the earthquake, the government extended the period for phasing out its import surcharge by one year (from June 2016 to June 2017).<sup>120</sup> This extension was justified by the earthquake's negative impact on tourism and on Ecuador's export products (including tuna, coffee and shrimp); the appreciation of the US dollar (Ecuador's currency) which was making its export less competitive; the decrease in Ecuador's monetary reserve; and, the fall in the prices of oil and other commodities – another important source of revenue for Ecuador.

WTO members remained divided on whether Ecuador's measures complied with WTO rules and several called for consultations. While all expressed solidarity with the people of Ecuador who had experienced "their worst natural disaster in 70 years", some Members urged the country to dismantle the balance of payments safeguard measure as soon as possible and to adopt less trade restrictive measures. They reiterated concerns about whether the measure could be economically justified. Other Members said that Ecuador's measures were fully compliant with WTO provisions, a position supported by the government of Ecuador. On 21 July 2017, Ecuador informed the Balance of Payment committee that it had phased out its measure.<sup>121</sup>

229. Article XVIII:A and C on "infant industry" provide for a further flexibility. Pursuant to their text, in order "to promote the establishment of a particular industry" developing countries satisfying the requirements set in para. 4(a) (and other developing countries, subject to approval by WTO Members – Article XVIII:4(b) and Article XVIII:22) may modify or withdraw tariff concessions subject to negotiations with other WTO Members (para. 7(a)) or, as a last resort, adopt "measures affecting imports" (paras. 13 and 14) provided that other GATT-consistent measures are not "practicable". According to *Ad Article XVIII* (paragraphs 2, 3 7, 14 and 22), the reference to the establishment of a particular industry covers also "the reconstruction of an industry destroyed or substantially damaged as a result of hostilities or natural disasters".

230. Therefore, the reconstruction of businesses which have suffered significant injuries from a natural disaster could be supported by the modification or withdrawal of bound tariff concessions pursuant to less restrictive procedures than under Article XXVIII (clearly, Article XVIII:A does not apply to unbound tariffs, that can be modified unilaterally). In addition, the possibility is open of adopting otherwise unspecified "measures affecting imports" under Section C. The limited practice under both the

GATT 1947 and the GATT 1994 shows that in most cases paras. 13 and 14 have been relied on with the purpose of justifying import licenses or other import restrictions inconsistent with other GATT provisions. The question remains as to whether the notion of "measures affecting imports" may also cover the provision of financial support to a particular industry.

231. A further flexibility envisaged by WTO law for the introduction of import restrictions is established in **Article XIX of the GATT 1994** and in the **Agreement on Safeguards**. Article XIX of the GATT 1994 provides that a WTO Member may suspend a GATT obligation or deviate from the scheduled tariffs' upper limits to the extent and for such time as may be necessary to prevent or remedy an injury to a domestic industry. That is, under certain conditions, a WTO Member may, for example, set aside its bound rates and charge higher import duties or otherwise restrict trade for specific products, provided that there is an import surge that causes or threatens to cause a serious injury to domestic producers. Furthermore, such an import surge must be the result of unforeseen developments and the effect of the obligations incurred by the Member concerned. Only where the existence of these conditions is determined under a domestic investigation, may

118 WT/BOP/G/22 of 28 May 2015.

119 WT/BOP/N/79 of 7 April 2015.

120 WT/BOP/N/82 of 10 May 2016.

121 WT/BOP/R/113 of 10 August 2017.

safeguard measures be introduced, in the form of additional custom duties or quantitative import restrictions.

232. If a WTO Member in a disaster recovery stage wishes to resort to safeguard measures, some of the issues it would need to consider are the following. First, whether it has the capacity to conduct an investigation. Second, whether the increased imports have in fact caused or are threatening to cause serious injury to domestic producers as defined in Article 4 of the Agreement on Safeguards. Third, whether that Member has a bound rate on the specific imported product at hand and, should this be the case, whether the remedial action could be rather limited to an increase of the MFN applied duty. In addition, the question of whether the specific natural disaster at issue can be considered “unforeseen development” as provided for in the Agreement on Safeguards is a tricky issue to be kept in mind from a legal viewpoint.
233. As an exception to the prohibition of non-tariff measures on **agricultural products** contained in Article 4.2 of the AoA, Article 5 allows some Members to apply additional duties under the **Special Agricultural Safeguard** (SSG) in case of import surges or price declines. This tool is only available to those Members that applied the tariffication modality to convert their NTMs into ordinary customs duties during the Uruguay

Round, and was hardly available during subsequent accessions.

234. Furthermore, the scope of the SSG is limited to those tariff lines in respect of which the symbol “SSG” is clearly specified in the respective tariff schedules. In accordance with defined criteria and calculation methodologies, additional duties may be imposed on top of the applied duties provided that the volume of imports of the product concerned increases beyond a certain trigger level; or that the price of individual import shipments falls below a pre-defined trigger price. Since 1995, a limited number of Members taken have recourse to the SSG. Even if not yet invoked after a natural disaster, nothing would appear to preclude an affected Member with SSG rights from following this path to support the recovery of some sectors of their agricultural market, if the afore-mentioned conditions are met.
235. A final clause that may give scope for the application of trade restrictive measures is found in Article IX:3 and IX:4 of the Marrakesh Agreement, providing for a sort of “remedy of last resort” that could be invoked in case the particular needs of a disaster-affected Member cannot be properly addressed under the other exceptions. The **request for a waiver** from an obligation arising under any WTO Agreements could in principle be justified on the basis of the “exceptional circumstances” to be tackled for disaster recovery purposes.

### Box 13: Philippines’ tariff quotas on the import of rice

Article IX:3 and IX:4 of the Marrakesh Agreement was invoked in 2012 by the Philippines with the purpose of continuing to apply quantitative restrictions on the imports of rice, instead of converting them into ordinary customs duties within the deadline set out in Annex 5 to the AoA. A waiver was requested from the obligations arising under Article 4.2 and Section B of Annex 5.

Among the reasons stated to justify its submission, the Philippines made reference also to weaknesses of the domestic rice sector, which had been affected “by extreme natural calamities” in the previous years.<sup>122</sup> WTO Members raised some doubts over the necessity of the waiver and requested consultations to arrive at a mutually-agreed solution.

The waiver was adopted in 2014 for a three-year period,<sup>123</sup> subject to the condition that the Philippines provided expanded minimum market access guarantees by means of specific tariff quota on imports of rice.

The definite conversion of the tariff quotas into import duties has been made effective in February 2019, after the enactment by the Philippines’ Parliament of the Republic Act No. 11203 amending the Agricultural Tariffication Act of 1996.<sup>124</sup>

236. As noted earlier though, in the disaster recovery phase many disaster-affected countries will be looking at **import policies** that **facilitate** rather than **impair the entry of foreign products**. Here practice shows that in a number of cases, governmental authorities have deemed it necessary to remove or to lower import obstacles with the ultimate purpose

of increasing the availability of goods and materials necessary for reconstruction and that they lack domestic production capacity. In particular, these measures concerned the importation of building materials.

<sup>122</sup> WT/GC/M/137 of 13 September 2012, para. 170.

<sup>123</sup> WT/L/932 of 25 July 2014.

<sup>124</sup> [http://www.congress.gov.ph/legisdocs/ra\\_17/RA11203.pdf](http://www.congress.gov.ph/legisdocs/ra_17/RA11203.pdf).

237. For instance, in 2011, following the Christchurch earthquake, the government of New Zealand decided to suspend already existing anti-dumping

duties applied on the importation of building materials (see box 14 below).<sup>125</sup>

#### Box 14: The New Zealand Trade (Anti-dumping and Countervailing Duties) Act 1988 as amended in 2017

The New Zealand legislation on anti-dumping and countervailing duties passed through some relevant modification following the 2011 Christchurch earthquake,<sup>126</sup> with the purpose to find a new balance between the safeguard of fair competition within the domestic market and the fulfilment of general public interests that could be put at risk by the adoption of trade remedies.

In particular, the 2017 amendment extended until 30 June 2019 the suspension of anti-dumping duties on residential building materials introduced following the 2011 earthquake (Section 14AA).<sup>127</sup> Furthermore, since the entry into force of the amendments, domestic authorities responsible for the investigation for trade remedies are also required to assess

whether the imposition of an anti-dumping or a countervailing duty “is in the public interest”, that is whether the implied costs for downstream industries and consumers does not materially outweigh the benefits to the domestic industry (Section 10F). Finally, the new Section 13B grants the government the power to defer imposing, to elect not to impose (Section 13B(1)), and to terminate or suspend the imposition of, a duty (Section 13B(3)) if it considers that “the users of the goods have been significantly impacted by a natural disaster or emergency”.

238. A further example is given by the mutually agreed solution found in the dispute between Mexico and the United States brought before the Dispute Settlement Body in 2003, regarding the US anti-dumping duties introduced in 1990 affecting the importation from Mexico of Portland cement and clinker cement.<sup>128</sup> In August 2005 hurricanes Katrina and Rita hit the south-east coasts of the United States, causing serious material damages and loss of life. One critical issue the US authorities had to cope with was the reconstruction of the buildings which had been destroyed, which resulted in an increase in the domestic demand for construction materials.

239. In 2006, the “Trade Cement Agreement” was concluded between the US and Mexico, whereby the parties agreed to terminate in March 2009 the 1990 anti-dumping duty and to increase the volume of cement originating in Mexico that could enter the US.<sup>129</sup> At the same time, it was also established that additional imports could occur in order to respond to an upsurge in US demand of cement in connection with a declaration of a state of emergency as a result of a disaster. The conclusion of this agreement was communicated to the DSB as a “mutually agreed conclusion” pursuant to Article 3.6 of the Dispute Settlement Understanding.<sup>130</sup>

#### 4.2.3 Measures affecting export products of the disaster-affected country: tariff preferences

240. The resumption of exports to foreign markets can play a supportive role in disaster recovery, as it enables business opportunities for local firms, with all the ensuing positive effects on local communities and households. Against this background, the use of tariff preferences by trade partners could prove to be an indispensable tool.

241. The WTO legal regime includes some specific provisions on concessions for **trade preferences** to developing and least-developing Members. In particular, derogations from the MFN obligation under the GATT 1994 are permitted according to the **1979 Enabling Clause**.<sup>131</sup> This provides a legal basis for the Generalized System of Preferences (GSP) that may be accorded by developed Members in favour of developing countries. Under GSP schemes, Members may grant “generalized, non-reciprocal and non-discriminatory” preferences, so as to respond positively to the development, financial and trade needs of developing countries and LDCs. In 1999, the General Council adopted the Decision on Waiver regarding Preferential Tariff Treatment for Least Developed Countries which allows developing country members to

<sup>125</sup> According to Article VI of the GATT 1994 and the Agreement on Anti-Dumping, Members are allowed to apply anti-dumping duties on the entry of products exported by a foreign company on a price lower than its “normal value”, provided that a material injury or a threat of material injury to a competing domestic industry occurs, or that the establishment of such industry is retarded. The purpose of anti-dumping duties is to bring the price of the product at issue closer to its “normal value” or to remove the injury to the domestic industry.

<sup>126</sup> Public Act 1988 No 158, amended, on 29 November 2017, by the Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017 (2017 No 21).

<sup>127</sup> See the *Regulatory Impact Assessment* prepared by the New Zealand’s Minister of Business, Innovation and Employment of March 2017 (<https://www.mbie.govt.nz/assets/526c6ca588/ris-soadd.pdf>).

<sup>128</sup> WT/DS281/1 of 11 February 2003.

<sup>129</sup> The text of the agreement is available on the website <https://enforcement.trade.gov>.

<sup>130</sup> WT/DS281/8 of 21 May 2007. See also [https://ustr.gov/archive/Document\\_Library/Press\\_Releases/2006/March/United\\_States\\_Mexico\\_Reach\\_Agreement\\_on\\_Cement.html](https://ustr.gov/archive/Document_Library/Press_Releases/2006/March/United_States_Mexico_Reach_Agreement_on_Cement.html).

<sup>131</sup> GATT doc. L/4903 of 28 November 1979.

provide preferential treatment to products of least developed countries.<sup>132</sup>

242. At the 2005 Hong Kong Ministerial Conference, Members adopted a decision which stated that Members would provide **duty free and quota free (DFQF)** market access for at least 97% of products originating from **LDCs** by 2008 or no later than the start of the implementation period.<sup>133</sup> At the Bali Ministerial Conference in 2013, Members agreed to take further steps to provide DFQF market access to LDC products.<sup>134</sup> This Decision, inter alia, stated that developed Members that did not yet provide DFQF market access for at least 97% of products originating from LDCs, defined at the tariff line level, should have sought to improving the existing DFQF coverage prior to the following Ministerial Conference. The Bali Ministerial Decision also established the first set of multilateral guidelines for rules of origin that WTO preference-granting Members should apply to their non-reciprocal preference schemes for LDCs. The guidelines are intended to make it easier for LDC exports to qualify for preferences and therefore better utilize market access opportunities that are available to them.<sup>135</sup>
243. The notion of **developing countries** is not defined under WTO law, with that status basically applied on the basis of a criterion of self-election. However, the design and structure of GSP schemes is decided autonomously by each preference-granting Member. There is no restriction prescribed under the Enabling Clause as to the designation of beneficiaries, except for the prohibition to discriminate between beneficiaries that share the same development, financial and trade needs, as affirmed by the Appellate Body.<sup>136</sup> Hence, the developing Members enjoying tariff preferences can vary significantly by scheme – as well the value of the preferences offered.
244. On the contrary, **LDCs** are a clearly-defined, separate category of Members. Even though the relevant criteria for designation are not set by the WTO itself but by the UN,<sup>137</sup> various WTO Agreements include specific arrangements for LDCs. Officially established in 1970 by the UN as a separate category of States,<sup>138</sup> LDCs are identified by a decision of the UN General Assembly, adopted according to a recommendation by the Committee for Development Policy, as endorsed by the Economic and Social Council (ECOSOC).<sup>139</sup> Inclusion in the list is subject to a three-year cycle review based on three criteria: gross national income (GNI) per capita and scores calculated on two indices, one dealing with human assets and another on economic vulnerability. Countries with a three-year average GNI per capita, as measured by the World Bank, below USD 1,025 are eligible for inclusion in the list. Those LDCs with a three-year average GNI per capita income in excess of USD 2,460 are eligible for graduation on basis of their income only. LDCs may also be eligible for graduation if their three-year average GNI per capita is 20 per cent above the inclusion threshold (i.e. USD 1,230) and they meet one or both of the human assets and economic vulnerability scores.
245. The Committee for Development Policy recommends the “graduation” (i.e. the exclusion from the list) for the countries.<sup>140</sup> For instance, at the 2018 triennial review, ECOSOC endorsed graduation for Bhutan, Sao Tomé and Príncipe and the Solomon Island, while the consideration of recommendation for the graduation of Kiribati and Tuvalu was deferred to 2021. In its current practice, ECOSOC usually provides for a “transition period” to ensure a smoother graduation. Bhutan will graduate starting 2023, Sao Tomé and Príncipe in 2024 and Solomon Island in 2021.<sup>141</sup>
246. Within the WTO legal system, LDCs have lesser commitments and enjoy non-reciprocal market access through trade preferences provided for by the 2005 and 2013 Ministerial Conference’s decisions. As in the case of the tariff preferences established under the domestic GSP schemes, these support measures could be helpful within the framework of recovery strategies in the aftermath of a disaster.
247. Graduation decisions by the UN General Assembly trigger the progressive end of dedicated, specific trade preferences for LDCs, sometimes after a phasing out period. Nevertheless, some graduating

132 WT/L/304 of 17 July 1999.

133 See para. 36 and Annex of the 2005 Ministerial Declaration (WT/MIN(05)/DEC of 22 December 2005).

134 WT/L/919 of 11 December 2013.

135 WT/L/917 of 11 December 2013 and WT/L/917/Add.1 of 21 December 2015.

136 Appellate Body Report, *EC – Tariff Preferences*, 7 April 2004, para. 165.

137 Article IX:2 of the Marrakesh Agreement.

138 UN doc. A/RES/2626(XXV) of 24 October 1970 (paras. 56-58) and A/RES/2768(XXVI) of 18 November 1971.

139 United Nations, *Handbook on the Least Developed Country Category. Inclusion, Graduation and Special Support Measures*, 3<sup>rd</sup> ed. (2018).

140 Graduation is recommended where a country meets two out of three thresholds for graduation, or in case the gross national income per capita is twice the graduation threshold, at two consecutive triennial review. The decision on graduation is also based on the “vulnerability profile” elaborated by UNCTAD and takes into account the impact assessment carried out by the UN Department of economic and social affairs.

141 The inclusion in the LDCs list by the UN has a further impact on the eligibility of countries to economic support. Indeed, any three years the Development Assistance Committee (DAC) of the Organization for Economic Cooperation and Development (OECD) adopts a list of so-called Official Development Assistance (ODA) Recipients, that is of countries deemed to be eligible for receiving Official Development Assistance by OECD Members. The list includes automatically LDCs countries as determined by the UN General Assembly, together with some other low income, lower middle-income and upper middle-income countries as defined by the World Bank. In 2018, the DAC decided that the income thresholds determining the inclusion among ODA beneficiaries could be adjusted to take into account the specific conditions of each beneficiary, opening the door for a possible consideration of the exposure and vulnerability to disasters and of the material losses already suffered because of past natural hazards (see <https://www.devex.com/news/donors-agree-to-new-rules-on-untied-aid-and-eligibility-93737>).

LDCs may also continue to enjoy comparable preferences under existing GSP schemes. An example here is transitioning from the EU “Everything But Arms” initiative<sup>142</sup> to the GSP+ schemes. In addition, some LDC specific schemes provide for an additional “transition period”, during which the preferences continue to be accorded notwithstanding graduation has become effective under the UN regime.

248. Exposure and vulnerability to disaster plays a role in the UN graduation process. First, the “economic vulnerability index” is measured also taking into

account the exposure to natural shocks, assessed in terms of number of victims of past disasters and instability of agricultural production. In this last regard, the high vulnerability to disasters of the agriculture sector is specifically acknowledged. Second, the decision to defer the consideration for graduation or the length of the transition period following a graduation decision may be tied to the vulnerability of graduating LDCs to natural disasters. Finally, the same reasons could persuade preference-giving Members to include in their own preferential schemes the additional transition period mentioned in the previous paragraph.

### Box 15: LDC graduation and natural disasters

Natural disasters have affected a number of LDC graduations. Maldives was scheduled to graduate from LDC category in 2004. However, following the Indian Ocean tsunami in 2004, the UN General Assembly granted additional time to allow breathing space for post-disaster recovery. Maldives’ graduation was postponed until 2011. Similarly, Samoa was scheduled to graduate in 2010, but the UN General Assembly deferred Samoa’s graduation for an additional three years until 2014 due to the disruption wrought by a Pacific Ocean earthquake and tsunami in 2009 and Tropical Cyclone Evan in 2012.

The 2015 earthquake in Nepal raised concerns about economic vulnerability among the UNCTAD and a decision on whether to recommend graduation has been delayed until the next triennial review period in 2021. Another LDC whose graduation was delayed by a natural disaster is Vanuatu. Graduation was scheduled for 2017, but due to the damage and losses wrought by Cyclone Pam, the UN General Assembly extended the transition period by three years and Vanuatu’s graduation is now scheduled for 2020.

With environmental vulnerability raising concerns within the UNCTAD about graduation processes, the Committee decided to defer the graduation of Kiribati and Tuvalu from LDC status while it floated the idea of the creation of a new category of “countries facing extreme vulnerability to climate change and other environmental shocks” into which both countries would have graduated. This proposal was not, however, endorsed by the UN Economic and Social Council. The CDP recommended Kiribati and Tuvalu for graduation, but the Council deferred the decision to consider the recommendation to no later than 2021.

249. In WTO practice, there have also been cases where Members have invoked the procedure on **temporary waivers under Article IX:3 and IX:4** of the Marrakesh Agreement with the purpose of granting to a disaster-affected country more favourable market access conditions than under their domestic preferences schemes. These requests for a waiver were submitted to the General Council and their acceptance has been the object of lengthy consultations between the interested Members.

250. Reference can be made to the General Council decision of 2012 authorizing the European Union to waive from MFN obligations under Articles I and XIII of the GATT 1994 and apply a two-year period duty-free and other preferential tariff treatments on imports of textiles and apparel originating in Pakistan.<sup>143</sup> Similarly, a 2016 decision granted the US a 10-year waiver to provide duty-free treatment on some imports from Nepal.<sup>144</sup> In both cases, the dramatic social and economic situation of the two beneficiary countries in the aftermath of natural

disasters (the 2010 floods in Pakistan and the dramatic earthquake that occurred in Nepal in 2015) was considered as a legitimate “exceptional circumstance” according to Article IX:3 of the Marrakesh Agreement, justifying the adoption of the waiver.

251. In 2014 the humanitarian situation of Haiti after the massive earthquake of 2010 was also referenced by the US at the General Council to support its request to extend and expand the scope of the Caribbean Basic Recovery Act (CBERA) waiver – a measure approved by the Council in 1995. In its decision of 2015, the General Council authorized the US to waive through the end of 2019 from its obligations under Articles I and XIII of the GATT 1994 to provide preferential treatment to imports of all products (with certain exceptions) from a group of Caribbean countries and territories.<sup>145</sup> The authorized preferences include also the establishment of a specific duty-free programme and special rules of origin for imports of apparel from Haiti: already introduced by US legislation in 2008 and 2009, these

142 See Chapter IV of the Regulation (EU) No 978/2012 (OJ L 303, 31 October 2012, p. 1 ff.).

143 WT/L/851 of 22 February 2012.

144 WT/L/1001 of 12 December 2016.

145 WT/L/950 of 5 May 2015.



preferences had been extended until September 2020 in the aftermath of the 2010 earthquake.

252. In the above-mentioned cases, the countries eligible for the preferential treatment were already beneficiaries of tariff preferences according either to the 1979 Enabling Clause (as in the case of Pakistan and Nepal) or to an already existing waiver approved under Article IX:3 of the Marrakesh Agreement (Haiti). The request for a further decision by the WTO in favour of Pakistan and Nepal is explained by the (positive) discrimination features of the EU and US programmes, aiming at according additional further preferences to the beneficiaries in view of the impact of massive natural disasters on their economies.
253. They are inspired by the interpretation given by the Appellate Body of the obligation of non-discrimination established under the 1979 Enabling Clause: “[W]e read paragraph 3(c) [of the Enabling Clause] as authorizing preference-granting countries to ‘respond positively’ to needs’ that are *not* necessarily common or shared by all developing countries. Responding to the ‘needs of developing countries’ may thus entail treating different developing country beneficiaries differently”.<sup>146</sup> The peculiarity of the trade needs of a country hit by a natural disaster may justify the introduction of additional preferences deemed to be necessary for quicker economic recovery. In the absence of existing GSP schemes specifically supporting disaster-prone countries,<sup>147</sup> the decision by the EU and the US to further grant support Pakistan and Nepal required an “authorization” by the WTO according to Article IX of the Marrakesh Agreement.
254. In both instances, the duration of the waiver was determined on the basis of the peculiar circumstances of each case (two years for Pakistan and ten years for Nepal), including upon the material devastation due to the disasters and the impact on the national economies. However, as mentioned above, the waivers were only agreed many months after these calamitous events. As such a more general question arises, concerning the appropriateness of the waiver procedure in case of a natural disaster due to the time it takes for decision to be adopted or how long the recovery phase should be.
- 4.2.4 Measures affecting export products of the disaster-affected country: quality and safety of products**
255. In Section 3 on disaster response, the issue of the quality and safety of products has been tackled from the perspective of the disaster-affected country. The enforcement of technical regulations, conformity assessment procedures or standards (TBT measures) and SPS measures may impact on
- the entry of relief goods and equipment needed for disaster relief operations.
256. Damage to quality infrastructure, in terms of both physical infrastructure and institutional capacity, may raise concerns on the part of trading partners about the **quality or safety of the export products of the affected country**. One case cited in the research was of a recently export-certified packhouse that suffered significant damage during a tropical cyclone. In this case, the issue needs to be considered from the perspective of the WTO Member(s) importing goods originating in disaster-affected countries. A natural disaster may undermine confidence and affect the exports from the disaster-affected country.
257. This underlines the importance of **technical assistance** under both the TBT Agreement and the SPS Agreement to support the rebuilding of the quality infrastructure of disaster-affected countries. For instance, under **Article 11 of the TBT Agreement** technical assistance, when requested, may cover the methods by which the requesting developing/LDC Member may best meet the technical regulations in force in the importing Member (para. 3.2) or the steps that should be taken by its producers to have access to the conformity assessment procedures of the importing Members (para. 5).
258. Initiatives can also be taken for the purposes of strengthening the capacity of developing Members in preparing technical regulations (para. 1) or in establishing regulatory bodies and bodies for the assessment of conformity with domestic technical regulations (para. 3.1) and standards (para. 4). A similar provision is included also in **Article 9 of the SPS Agreement**, addressing technical assistance supporting developing Members in adjusting to, and complying with, SPS measures necessary to cope with the appropriate level of SPS protection in the export markets (para. 1) or in view of permitting them to maintain and expand access opportunities in foreign markets (para. 2).
259. In WTO case law, issues pertaining to the quality of exported products have been explored with respect to Article 5.1.1 of the TBT **Agreement**. Under the text of this provision, where a positive conformity assessment with technical regulations or standards is required for a given product, Members must ensure that the **conformity assessment procedures** (CAPs) that they prepare, adopt and apply grant access to foreign suppliers under conditions that are no less favourable than those granted to suppliers of like products of national origin or originating in any other country “in a comparable situation”.
260. In *Russia – Railway Equipment*, the Panel considered that an analysis under Article 5.1.1 of the TBT

<sup>146</sup> Appellate Body Report, *EC – Tariff Preferences*, 7 April 2004, para. 162.

<sup>147</sup> See below, Section 5.2.4.

Agreement entails “a comparison of differential conditions of access with a view to determining whether the less favourable conditions of access are being granted despite the situation being comparable.”<sup>148</sup> The Panel explained that in order to perform such a comparison, “it is necessary to identify relevant factors that render a situation comparable or not”.<sup>149</sup> The Panel noted that those “aspects of a situation that have a bearing on, for instance, the ability of the importing Member to undertake [conformity assessment] activities under the rules of the procedure with adequate confidence would, in principle, seem to be relevant”.<sup>150</sup> The Panel further observed that “the relevant aspects of a situation would include aspects specific to the suppliers who are claimed to have been granted access under less favourable conditions or to the location of the suppliers’ facilities.”<sup>151</sup> Moreover, the Panel stressed that “whether a situation is comparable must be assessed on a case-by-case basis and in the light of the relevant rules of the conformity assessment procedure and other evidence on record.”<sup>152</sup>

261. The Panel considered that in the dispute before it, given certain “risks to life and health of inspectors [from the Russian Federation]” that existed during the specific period of time covered by the dispute, the situation in Ukraine at that time was “not comparable” to that of other countries.<sup>153</sup> It therefore found that, although Ukrainian suppliers of railway products were given less favourable access to the relevant CAP than suppliers from other countries, the less favourable access conditions concerned a situation that was not comparable to the situation in which Russia granted access to suppliers of Russian railway products and suppliers of railway products from other countries.<sup>154</sup> Importantly, however, the Panel cautioned that it was making such a finding only with respect “to the specific time-period at issue”, noting that “developments subsequent to a panel’s finding that a situation is not comparable could render a situation comparable, with the consequence that the importing Member would have to make a change in the access conditions granted for it to continue to act consistently with Article 5.1.1.”<sup>155</sup>

262. It would appear that this conclusion [currently under appeal] could in principle be extended also to disaster situations. It might therefore be permissible, in principle, to restrict access to an importing country’s CAP for goods imported from disaster-affected countries, if their quality infrastructure has significantly deteriorated as a consequence of the natural disaster. An

importing country’s more restrictive conformity assessment approach would, however, have to be limited to the duration of the deterioration of the quality infrastructure and to imports originating in disaster-affected areas of such countries. Against this framework, the provision of technical assistance could support the recovery efforts, as it could help to avoid the exclusion of disaster-affected countries’ exports from foreign markets.

263. Trade measures taken by import Member(s) may also include **sanitary or phytosanitary measures**. The country research accompanying this legal mapping exercise reports that this issue arises with respect to the exportation of trees and timber felled by a hurricane or cyclone. The presence of quarantine pests means that this sometimes very large number of commercially-valuable fallen trees cannot be easily exported. An additional concern that may overlay that of quarantine pests is that of environmental measures taken to prevent illegal logging. The combination of both measures can be that fallen trees either remain in situ, are used for local rebuilding activities or are treated as green waste.

264. Pursuant to the SPS Agreement, WTO Members may adopt trade-restrictive measures provided they are necessary to protect human, animal or plant life or health from a specific SPS risk, are based on scientific principles, and are maintained with sufficient scientific evidence (Article 2.1 and 2.2). Further requirements are set out in Article 2.3, whereby SPS measures have not to arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, nor should they be applied in a manner that would constitute a disguised restriction on international trade. An additional requirement is established in Article 5.6, according to which a SPS measure has not to be more trade-restrictive than required to achieve the “appropriate level of protection” from a specific risk, as determined by the importing Member. As clarified in a footnote to this provision, this criterion is satisfied unless a less trade-restrictive alternative measure is reasonably available that achieves the same level of protection set by the importing Member.

265. According to Article 3.1 of the SPS Agreement, Members’ sanitary and phytosanitary measures have to be “based” on international standards. This provision has been interpreted as requiring that SPS measures are founded, built on or supported by the relevant standards “such that they serve as a principal constituent or fundamental principle

148 Panel Report, *Russia – Railway Equipment*, 30 July 2018, para. 7.282 (currently under appeal).

149 *Ibid.*, para. 7.283.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid.*, para. 7.387.

154 *Ibid.* On the basis of the foregoing, the Panel ultimately concluded that Ukraine had failed to establish that Russia had acted inconsistently with its obligations under Article 5.1.1 of the TBT Agreement.

155 Panel Report, *Russia – Railway Equipment*, 30 July 2018, para. 7.388.

- of the ... measures".<sup>156</sup> In addition, a presumption of consistency with WTO law is established for SPS measures "consistent", i.e. complying with<sup>157</sup> international standards (Article 3.2).<sup>158</sup> It is not excluded that Members may pursue a higher level of protection than that enshrined in the international standards, provided that there is a scientific justification or that it is appropriate on the basis of risk assessment carried out according to Article 5 (Article 3.3).
266. The interpretation of these provisions has been the object of a number of disputes before the WTO. In *Korea – Radionuclides (Japan)*, the claim brought by the complainant specifically concerned SPS measures adopted in the aftermath of a disaster. Even though the case referred to a man-made disaster (a nuclear accident), the approach followed by the panel and the Appellate Body may provide useful guidance as to the design of measures consistent with the SPS Agreement aiming at reducing the exposure to a risk due to a natural disaster without, at the same time being an unnecessary obstacles to the exports from a disaster-affected country.
267. In *Korea – Radionuclides (Japan)*, Japan challenged the import bans and the additional testing requirements imposed by Korea between 2011 and 2013 on food products imported from Japan. The measures were introduced after the Fukushima Dai-ichi Nuclear Power Plant accident occurred in March 2011 in Japan. Their purpose was to reduce the risk for Korean consumers to be exposed to radioactive materials through the consumption of food imported from Japan. In its complaint, Japan claimed the inconsistency of the challenged measures with Articles 2.3 and 5.6 of the SPS Agreement, and with some procedural requirements set out in Articles 7 and 8 and in the Annexes B and C to the Agreement.<sup>159</sup>
268. The Appellate Body ruled extensively on Article 5.6. It was interpreted as allowing WTO Members to set their own "appropriate level of protection" (ALOP) to cope with sanitary or phytosanitary risks, consistent with the interests they wish to pursue. That level must be determined with sufficient precision and may comprise various elements, both quantitative and qualitative, relating to the risk concerned.<sup>160</sup> On this basis, any SPS measure may be introduced and maintained to the extent it is required to achieve the ALOP as determined by the importing Member, provided that there is no less trade restrictive measure alternative pursuing that same level of protection.<sup>161</sup>
269. The prohibition to discriminate under Article 2.3 has been interpreted as requiring a comparison between the conditions prevailing in different Members, in order to assess whether those conditions are identical or similar and eventually acknowledge the discriminatory nature of an SPS measure. A crucial point in this assessment concerns the identification of the relevant "conditions" to be compared: according to the Appellate Body, they are informed by the particular objective pursued and the risk addressed by the SPS measure in question.<sup>162</sup> Therefore, it may not be *a priori* excluded that relevant conditions may relate both to the products at issue and the SPS risk they may pose, and to the prevailing conditions in the Members concerned, including the environmental and ecological conditions.<sup>163</sup> Therefore, the worsening of environmental conditions in a disaster-affected country could justify the adoption of a discriminatory SPS measure in view of the actual and potential adverse effects on the safety of the exported products.
270. The impact on science-based SPS measures taken against disaster-affected Members could be reduced through the application of "zoning" measures in accordance with Article 6 of the SPS Agreement. Article 6.1 requires Members to "adapt" their SPS measures to the "regional conditions" of the exporting Member, so as to ensure that the measures apply only to the imports of products originating from areas where a pest or disease concern has actually arisen. The criteria take into account when assessing the sanitary and phytosanitary conditions of a region include the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and any appropriate criteria or guidelines developed by relevant international organizations. SPS measures taken in the aftermath of a natural hazard in another Member could avoid hitting all imports of the product(s) at issue originating from that Member, but instead be adapted to the risks arising in the specific region struck by the disaster.

156 Panel Report, *US – Animals*, 24 July 2015, para. 7.233.

157 Appellate Body Report, *EC – Hormones*, 16 January 1998, para. 163.

158 According to Annex A to the SPS Agreement, relevant international standards are those adopted by the Codex Alimentarius Commission (<http://www.fao.org/fao-who-codexalimentarius/codex-texts/list-standards/en/>), under the auspices of the World Organisation for Animal Health (formerly called International Office of Epizootics) (<http://www.oie.int/standard-setting/overview/>), or under the auspices of the Secretariat of the International Plant Protection Convention (<http://www.ippc.int/en/core-activities/standards-setting/ispm/#596>). For matters not covered by these three standard-setting bodies, other standard-setting international organizations may be identified by the SPS Committee, provided their membership is open to all WTO Members.

159 Appellate Body Report, *Korea – Radionuclides (Japan)*, 11 April 2019, para. 1.3.

160 *Ibid.*, para. 5.23. In the case at hand, Korea referred to consumers' exposure to radionuclides through the consumption of food below 1 millisievert per year, but also to the levels of radioactive contamination in food that exist in the ordinary environment and "as low as reasonably achievable" (*ibid.*, para. 5.25).

161 *Ibid.*, para. 5.33.

162 *Ibid.*, para. 5.59.

163 *Ibid.*, paras. 5.63-5.64.

### 4.3 Issues affecting trade in services

#### 4.3.1 Subsidies to local service suppliers

271. For disaster-prone economies with large service sectors (for example tourism) reviving this sector can be critical in the immediate aftermath of a natural disaster. One encouraging finding from the research is that some service sectors appear to be

resilient to natural hazards. For example, tourists appear to return quickly after a disaster event. To help ensure that facilities and infrastructure are up and running again quickly, the national authorities of a disaster-affected country may make financing available to help restore normal conditions of business activity. Box 16 gives an example of the tourism sector in Dominica in the aftermath of Hurricane Maria in 2017.

#### Box 16: The impact of the 2017 Hurricane Maria on the tourism sector in Dominica

On 18 September 2017 category 5 Hurricane Maria hit the island of Dominica, in the Caribbean. The country suffered extensive damages (USD 931 million) and losses (USD 382 million), amounting to 226 per cent of the 2016 GDP. Tourism was the second affected sector, for a total of USD 80 million. Given the dimensions of the Dominica's economy, the strategic importance of the tourism sector is evidenced by its contribution to the composition of GDP, equal to 23.9 per cent in 2016. The loss of the season in 2017 implied direct economic damages and losses for the businesses operating in the sector, but also for other satellite activities and support services.

The main recovery effort involved a main challenge, rebuilding the hotel room stock and the piers allowing cruise ships to dock. In view of strengthening resilience to future natural hazards, the adoption of a "building back better approach" required attention for the quality of the new construction and building materials and for the location of tourism firms and infrastructures.

The country report for the Caribbean accompanying this legal mapping exercise suggests that the government made efforts to put in place financing in the wake of the Hurricane through the Dominica Agricultural and Industrial Development (AID) Bank. However, a concern raised by the private sector was that this funding could not be used to refinance existing debts – a factor which thus limited the ability of firms to assume new obligations and recommence trading. Hurricane Maria struck at a time when many businesses had taken on debt in preparation of a new tourist season.

Source: "Post-Disaster Needs Assessment Hurricane Maria September 18, 2017. A Report by the Government of the Commonwealth of Dominica", 15 November 2017.

272. Unlike the legal regime for trade in goods, the GATS does not provide for a comprehensive or specific regulation of subsidies. Article XV:1 merely recognizes that subsidies may have distorting effects on trade in services, and therefore negotiations are envisaged in order to establish multilateral disciplines in this area. These negotiations are carried out within the Working Party on GATS Rules established in 1995, but scant progress may be reported on the matter.<sup>164</sup> Article XV:2 further requires that WTO Members accord sympathetic consideration to any request for consultation from another Member claiming to be adversely affected by their subsidy programmes in the service sector.

273. The absence of specific discipline on subsidies does not imply that WTO Members enjoy a completely autonomous policy space. Indeed, the scope of the GATS extends to any measure "affecting trade in services" (Article I:1). In the case law, this notion has been interpreted as encompassing any measure that "affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services".<sup>165</sup> Furthermore, the national treatment obligations under Article XVII of the GATS applies "in respect of all measures affecting the supply of services" (para. 1). It is on these bases that the 2001 "Guidelines on the scheduling of specific commitments" under the

GATS specify that subsidies are not excluded from the scope of Article II on the MFN treatment and Article XVII on national treatment as regards the sectors inscribed in a Member's schedule (para. 16).

274. Article II constitutes a general obligation, applying to all Members in respect of all services sectors, irrespective of the existence of specific commitments. Deviations from the MFN requirement are allowed for the measures that Members have listed in accordance with the Annex on Article II exemptions. Therefore, absent an Article II exemption, access to government financial support programmes (for the purposes of this report, in case they address the needs of service suppliers which have suffered material damages due to a natural disaster) have to be opened on an MFN basis to like service suppliers of any other Member exercising their activity in the territory of the disaster-affected Member, to the extent that the activity is trade in services within the meaning of Article I:2 of the GATS.

275. The national treatment obligation in Article XVII of the GATS applies only in respect of the sectors in which a Member has undertaken specific commitments, subject to the limitations specified in its services schedule. Therefore, with respect to government financial support, a Member having undertaken specific commitments in a particular

164 P Sauv , M Soprana, "Learning by Not Doing: Subsidy Disciplines in Services Trade", E15 initiative, Geneva (ICTSD and WEF) 2015.

165 Panel Report, *EC – Bananas III*, 22 May 1997, para. 7.285. See also the para. 7.971 of the Panel Report in *China – Publications and Audiovisual Products* (12 August 2009): "the term 'affecting' is wider in scope than 'regulating' or 'governing'".

service sector has the obligation to provide foreign services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that accorded to like domestic services and service suppliers.

276. Where the national treatment obligation does not apply (for instance, in noncommitted sectors, or where a subsidy-related limitation has been included for a specific sector/subsector or in the horizontal section of the schedule, applying to all committed sectors), foreign service suppliers may be granted less favourable treatment than that granted to like domestic service suppliers as regards access to subsidy programmes. The fact remains that Members are not precluded from applying a less restrictive regime than under their schedules, opening also to foreign suppliers under similar circumstances the possibility to be granted financial support.

#### 4.3.2 Modifying access for foreign services and service suppliers

277. In the recovery phase, disaster-affected governments may have to contend with competing demands for market opening and protection, sometimes emanating from within the same service sub-sector. An example here is construction services. The damage generated by a large natural disaster may surpass the capacity of domestic service suppliers to respond to the additional demand. Where construction markets are closed to foreign suppliers, households and firms may push for sector liberalization to ensure supply, increase choice and reduce costs. Domestic construction firms on the other hand may push for continued, or even additional, restrictions to ensure that profits from reconstruction stay within the country. The rest of this section examines the options available to Members whilst abiding by their obligations and commitments on trade in services.
278. WTO Members' bindings set in the schedules of commitments represent a minimum threshold of liberalization, which does not prevent the application of **more favourable market opportunities** in crucial sectors, under the condition that they are consistent with the most-favoured nation obligation set out in Article II of the GATS. Therefore, limitations on market access (i.e., limitations on the number of service suppliers, on the value of service transactions, on the number of service operations, on the number of people that may be employed in a particular service sector, on the participation of foreign capital in domestic companies, or the requirement of specific types

of legal entity through which a service supplier may carry out its business activity), as well as limitations on national treatment could be softened or removed.

279. In the opposite case, i.e. when a government comes under pressure **to protect domestic service suppliers**, Members are at liberty to take measures when these services have not been the subject of commitments in their services schedules and/or modes of supply. In sectors where they have taken commitments, their scope to add protection will be constrained. Deviations from such commitments would need to be negotiated according to Article XXI, and it would only become effective after the procedure for the modification of schedules is concluded.
280. However, certain flexibilities exist, that could be invoked in order to justify the application of restrictions to trade in services in order to favour national suppliers. For example, a temporary waiver can be requested according to **Article IX:3 and IX:4 of the Marrakesh Agreement**. An example here is the 2004 Albania request for a temporary waiver from the market access commitments it had included in its schedule for international telecommunication services. The request was justified, according to the submission, by external factors such as the war in Kosovo and the terrorist attacks of 2001.<sup>166</sup> The waiver was approved by the General Council,<sup>167</sup> and the "exceptional circumstances" requirement under Article IX:3 of the Marrakesh Agreement was deemed to be fulfilled because of the "substantial direct damage to the Albanian economy" caused by the war in Kosovo. Similar flexibility could potentially also be demonstrated to disaster-affected Members.

#### 4.4 Public procurement

281. One core responsibility of national authorities in the aftermath of a disaster is to **procure goods and services needed for recovery**. In that regard, putting in place a public procurement system that complies with international best practice and standards is essential in ensuring value for money in reconstruction. For the 48 WTO Members which have accepted it, the plurilateral **Revised GPA** establishes disciplines on governmental purchases. Other WTO Members may have adopted similar disciplines through government procurement chapters in recent bilateral and regional trade agreement.<sup>168</sup> As a general principle, Members having accepted such disciplines abide by rules on transparency, impartiality and non-discrimination (national treatment and MFN) with regard to covered goods, services and suppliers of any other Party to

166 S/L/148/Rev.1 of 1 March 2004 and S/C/M/69 of 15 December 2003, para. 24.

167 WT/L/567 of 7 June 2004.

168 See Robert D. Anderson, Anna Caroline Müller and Philippe Pelletier, "Regional Trade Agreements and Procurement Rules: Facilitators or Hindrances?" in A. Georgopoulos, B. Hoekman and P. Mavroidis (eds.), *The Internationalization of Government Procurement Regulation* (Oxford: Oxford University Press, 2016), pp. 56-86. Preliminary version available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2707219###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2707219###).

the Revised GPA.<sup>169</sup> Procedural provisions address the notification of procurement, conditions for participation, qualification of suppliers tendering procedures, awarding of contracts, and domestic review procedures. In the Revised GPA, transitional measures are also available to developing economy parties to the accord.<sup>170</sup>

282. Specific concerns arise in the event of post-disaster recovery procurements: the need of a speedy procedure, that does not delay the availability of goods and services for the population and for the business community involved in the reconstruction of economic activities and critical infrastructures; the potential lack of domestic suppliers, and the ensuing need to engage foreign suppliers efficiently; avoiding cost increases of such purchases as compared to regular procurement, which could overwhelm public finances already under acute pressure; and in particular, the need to ensure adequate level of competition to avoid any price speculation by interested suppliers.
283. These issues should ideally be addressed *ex ante*, first by ensuring that the general framework for public procurement can be used as efficiently as possible. In that regard, “**framework agreements**” setting out the goods and services that are expected to be needed in disaster response situations, the terms of the contracts to be awarded, including the price and the estimated quantities envisaged, can be used as flexible tools in order to enhance resilience. Furthermore, special rules and procedures for emergencies that balance the need for speedy procurement with the need to ensure value for money through the highest possible level of transparency and competition can be spelled out in the legislation.
284. In order to provide flexibility for Parties in responding to disasters, the Revised GPA contains several provisions to exempt procurements from the application of general disciplines and/or to simplify procurement procedures with the purpose to encourage recovery and to speed up assignments and conclusion of contracts with suppliers. Previous sections have already taken into consideration the provisions on limited tendering, which could be critical in a disaster response scenario in order to procure goods and services needed for immediate relief (see section 3.2.4 above).
285. Under the **general exception clause** set in Article III, the Revised GPA’s parties are given a certain margin

of discretion for the imposition or enforcement of measures necessary to the protection of human, animal or plant life or health (para. 2(b)) or relating to goods or services of philanthropic institutions (para. 2(d)), to the extent these measures are “applied in a manner that would not constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade” (Article III:2, chapeau).

286. Finally, **an interlinkage between the Revised GPA and the TFA** deserves some consideration. Indeed, a correspondence between, on one side, the list of domestic bodies whose procurement are subject to the Revised GPA and, on the other side, the beneficiaries of the “authorized operators” regime under Article 7.7 TFA could be of critical relevance for the purposes of smoothing post-disaster recovery.<sup>171</sup> In this case, the importation of foreign goods by procuring entities according to the Revised GPA would also imply the application of expedited custom procedures under the TFA, facilitating the entry for foreign products purchased through government procurement procedures and, thereby, the effective implementation of recovery activities.

#### 4.5 Do’s and don’ts – a suggested checklist of disaster recovery and trade measures

287. From the preceding analysis, a possible “checklist” of actions available to both disaster-affected Members and their trading partner(s) can be elicited. This list is neither definitive, nor exhaustive and is proposed as a basis for further discussion.

##### 4.5.1 Trade measures that could be taken by disaster-affected Member(s) in the disaster recovery phase

- Subsidies can help support business recovery after a natural disaster. Such measures should use eligibility criteria that are objective, economic in nature and horizontal in application. On this basis, such measures should, *prima facie*, pass eventual scrutiny under the SCM Agreement.
- To help support recovery in the agriculture sector, a range of government services and direct support measures can be taken that are in accordance with Annex 2 of the AoA if the relevant compliance criteria are met. The

169 The GPA applies exclusively to the procurement of goods and/or services that come under its scope. In particular, the purchase for governmental purposes has to be higher than a *de minimis* value set by each party (Article II.2(c)), must be carried out by so-called “procuring entities”, i.e. the central and sub-central bodies listed by each participating Member in annexes to the Agreement (Article II:2(d)), and must relate to the goods and services listed in the same annexes (Article II:2(a)). Accordingly, the GPA does not apply to all public procurement by its parties: governmental purchases below the *de minimis* value, of non-listed goods and services or by non-“procuring entities” are beyond its scope.

170 See Anna Caroline Müller (2011). “Special and differential treatment and other special measures for developing countries under the Agreement on Government Procurement: the current text and new provisions,” in Arrowsmith, Sue and Robert D. Anderson (2011). *The WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press: 2011), pp. 339-376.

171 For an overview of the interplay between the GPA and other WTO Agreements, in particular GATT and GATS, see also Robert D. Anderson and Anna Caroline Müller (2018), “The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development,” 49 *Georgetown Journal of International Law* 1. Previous version published as WTO Working Paper ERSD-2017-04, available at: [https://www.wto.org/english/res\\_e/reser\\_e/ersd201704\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201704_e.pdf).

provision of disaster insurance may also help address the insurance protection gap.

- Reconstruction and recovery may be hastened by the temporary lowering or lifting of tariffs and other duties and charges. Such an approach can support "build back better" principles. Measures should be applied on an MFN and non-discriminatory basis.
- Where necessary, any room between applied and bound tariff rates may give a disaster-affected Member scope to adjust a specific tariff rate upwards. For agriculture products, due consideration should be given to the fact that variable import duties and minimum import prices are prohibited in the case of agricultural products. Ordinary customs duties could be raised towards or up to the bound rate level indicated in the Member's schedule of concessions annexed to the GATT 1994, if such a figure is indicated. Applied duties that exceed bound duties could, potentially, find justification under exception clauses, for example, the Special Agricultural Safeguard, in conformity with the specified application criteria.
- Reconstruction and recovery may be helped by market opening to foreign service providers. Where such action is taken, (e.g. to remove limitations on market access and/or on national treatment), measures should be applied on an MFN and non-discriminatory basis.
- WTO Members facing balance-of-payments difficulties in the aftermath of a natural disaster may apply import temporary restrictions under provisions in the GATT 1994 and under the GATS.
- Public procurement of goods and services plays an essential role in recovery and reconstruction. Where a disaster-affected Member is a party to the Revised GPA, general exceptions provide scope for discretion in the aftermath of a disaster event. Establishing and publishing ex ante the procurement processes and procedures to be followed in the event of a disaster will support preparedness, transparency and efficiency.

#### 4.5.2 Trade measures that could be taken by trading partner(s) of a disaster-affected Member during the disaster recovery phase

- Importing Members should give due consideration to the recovery and reconstruction needs of a disaster-affected Member before engaging in consultations on measures pursuant to the SCM Agreement for the phasing-out of such measures or their possible challenge.
- Importing Members should adapt their SPS measures to take account of the "regional conditions" pertaining in a disaster-affected

Member in accordance with Article 6 of the SPS Agreement.

- Preference schemes benefitting eligible disaster-affected Members can support recovery in exports. *Ex ante* provisions which can be triggered under the ambit of existing schemes in legal force could be considered by preference-granting trading partners. The merits of a WTO decision under which Members could notify additional, time-limited specific benefits in favour of a disaster-affected Member or Members could also warrant possible discussion.
- In the context of aid programmes for LDCs and net food-importing developing Members, full consideration could be given to the request of financial assistance from potential beneficiaries under existing bilateral and multilateral development assistance frameworks, with a view to restore and improve the productivity and the infrastructures of the agricultural sector, and to lower their reliance on food imports to meet basic domestic nutrition needs.
- Where the compliance of a disaster-affected Member's exports with an importing Member's regulatory requirements is impaired, the importing Member should promptly and clearly communicate the necessary steps to be taken to regain regulatory compliance. The rapid provision of technical assistance to regain market access is highly recommended.

# Disaster resilience





## 5.1 Introduction and overview

288. The 2015 Sendai Framework on Disaster Risk Reduction envisions the substantial reduction of disaster risk and losses “through the implementation of ... measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and *thus strengthen resilience*” (para. 17, emphasis added). The clear focus of the document is on “resilience” to disasters, understood as the ability “to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and effective manner, including through the preservation and restoration of its essential basic structures and functions through risk management” (see box 17 below).
289. Resilience does not strictly refer to a time phase in disaster risk management. Rather, it embraces all the actions that need to be taken within a given State or territory in order to reduce its exposure and vulnerability to disasters. Resilience can also encompass the reduction of losses and damages, the establishment of a prompt response capacity and the start of recovery operations for restoring rapidly and effectively normal conditions of life and regular business activities. To some extent, resilience can be addressed through a sum of preventive actions, within the framework of coherent and mutually supporting disaster risk management strategies and policies.
290. In pursuance of its expected outcome, the Sendai Framework identifies 13 general principles and suggests actions to be taken in four priority areas. Even though not developed in expressed terms, a trade component may be inferred for some of these actions. Against this background, the purpose of this section is to discuss how WTO Agreements can support the design and implementation of resilience measures.

### Box 17: The role of trade and trade-related measures in the priority areas of the Sendai Framework

**Priority 1 – Understanding disaster risk:** “Policies and practices for disaster risk management should be based on an understanding of disaster risk in all its dimensions of vulnerability, capacity, exposure of persons and assets, hazard characteristics and the environment. Such knowledge can be leveraged for the purpose of disaster-risk assessment, for prevention and mitigation and for the development and implementation of appropriate preparedness and effective response to disasters” (Sendai Framework, para. 23).

The focus of priority 1 is on the collection, analysis and use of relevant data and information, necessary to design appropriate disaster risk reduction strategies and policies. A further element concerns the dissemination of these information to the communities to support national measures for successful disaster risk management. The implementation of these actions requires the availability and the access to some services, including telecommunication services, data base and data processing services, weather-related services and environmental services, such as nature and landscape protection services. The Sendai Framework also underlines the critical role of technology transfer so as to enhance the access of developing and LDCs to communication, geospatial and space-based technologies and related services.

**Priority 2 – Strengthening disaster risk governance to manage disaster risk:** “Strengthening disaster risk governance for prevention, mitigation, preparedness, response, recovery and rehabilitation is ... necessary and fosters collaboration and partnership across mechanisms and institutions for the implementation of instruments relevant to disaster risk reduction and sustainable development” (Sendai Framework, para. 26).

Within this area States are recommended to promote the coherence and to further the strengthening of national and local laws, regulations and public policies. The law-making and regulatory power of domestic authorities is given particular emphasis, also in view of the establishment of “coordination and organizational structures”. At a normative level, these structures could also include a coherent and all-encompassing discipline addressing the trade issues that may emerge in the disaster response phase, in particular with regard to customs procedures and operations and the entry of foreign relief personnel. Countries are also encouraged to establish the necessary mechanisms and incentives to ensure compliance with safety-enhancing legal disciplines, presuming the existence of sectoral laws including, among the others, building codes and health and safety standards.

**Priority 3 – Investing in disaster risk reduction for resilience:** “Public and private investment in disaster risk prevention and reduction through structural and non-structural measures are essential to enhance the economic, social, health and cultural resilience of persons, communities, countries and their assets, as well as the environment. These can be drivers of innovation, growth and job creation. Such measures are cost-effective and instrumental to save lives, prevent and reduce losses and ensure effective recovery and rehabilitation” (Sendai Framework, para. 29).

Under the third area of priority, the Sendai Framework identifies some concrete instruments suitable to strengthen resilience. Reference is made to the promotion of mechanisms for disaster risk insurance, requiring the availability of insurance services in the domestic market which may be supported through government financial programmes facilitating the participation of individuals, entities and companies in insurance schemes. The importance of the implementation of the “build back better approach” in the design, construction and reconstruction of critical facilities through the use of appropriate materials and the development of new building codes is highlighted, given that the resistance to natural hazards of hospitals and physical infrastructures could facilitate disaster response and recovery.

**Priority 4 – Enhancing disaster preparedness for effective response and to “Build Back Better” in recovery, rehabilitation and reconstruction:** “The steady growth of disaster risk ... indicates the need to further strengthen disaster preparedness for response, take action in anticipation of events, integrate disaster risk reduction in response preparedness and ensure that capacities are in place for effective response and recovery at all levels. ... [T]he recovery, rehabilitation and reconstruction phase, which needs to be prepared ahead of a disaster, is a critical opportunity to “Build Back Better”, including through integrating disaster risk reduction into development measures, making nations and communities resilient to disasters” (Sendai Framework, para. 32).

Actions under priority 4 take up some of the previous suggestions. On the one hand the focus is on disaster preparedness through contingency policies and appropriate information and telecommunication systems for forecasting, early warning and emergency communications. These measures require the availability of service systems, placed under governmental authority or supplied by the private sector. On the other hand, the critical role of a “Build Back Better” approach is once more emphasised in view of promoting resilience of critical infrastructures to ensure that they remain safe and operational “during and after disasters in order to provide live-saving and essential services”. Among the suggested activities, mention is also made to the stockpiling of necessary materials to implement rescue and relief activities, implying for instance the setting up of food and other items reserves or their purchase through government procurement.

Source: Sendai Framework for Disaster Risk Reduction

291. Some of the issues mentioned in the Sendai Framework have been explored in other international *fora*. For example, with regard to customs operations in the relief phase, in 2013, the IFRC adopted the text of the Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (see Annex 2). Clearly, its content has to be adapted to the legal system of each State. Nevertheless, the Model Act still preserves its highest value, since it designs a fully comprehensive legislative instrument covering all issues related to the entry of relief items and personnel. Besides, some international conventions address customs issues with respect to the entry in the disaster affected State of specific typologies of goods or equipment.
292. Furthermore, during the country research domestic authorities and other stakeholders raised some concerns which fit into actions envisaged in the Sendai Framework. In particular, the crucial role of insurance and reinsurance markets was highlighted as a possible source of funding to recover the agricultural sector or to rebuild and repair buildings and infrastructures. Always in the service sector, countries are fully aware of the importance of weather systems and related services as a tool for forecasting and taking emergency measures even before the natural hazard hits a given area. The Building Back Better approach is also acknowledged a decisive importance in resilience strategies.
293. Against this background, this section gives an overview of the scope to pursue such concerns within the framework of existing WTO law. A first section is devoted to resilience issues that may affect **trade in goods**. The scope to give legal effect to the IFRC 2013 Model Act through implementation of the WTO TFA is explored, albeit at the expense of repeating some of the analysis offered already under the heading of disaster response.
294. The analysis will then continue taking into consideration the crucial role for resilience purposes of the adoption of building codes and relevant discipline in other sectors inspired by the **“Building Back Better”** approach. This issue will be explored through the lens of the **TBT Agreement**.
295. In light of the importance of insurance as a tool to increase preparedness to disaster and the particular vulnerability of the agricultural sector to natural hazards, the analysis will focus on the relevant discipline of the Green Box under Annex 2 of the AoA. Indeed, expenses for government participation in **insurance schemes for farmers** are excluded from the calculation of reduction commitments under the AoA.
296. The second part of this section surveys **service-related trade policies** and their implications for strengthening resilience to natural disasters. In the analysis on the recovery phase, one of the issues that has been explored concerned the obstacles to humanitarian relief arising from the application of substantive and procedural regulations on the **recognition of professional qualifications** of foreign personnel. Some international organizations are doing a growing effort in view of addressing them, in particular the WHO on foreign medical teams.
297. As evidenced by the Sendai Framework, some services are crucial for strengthening the resilience of a country to natural disaster. This section will focus in particular on some specific service sectors, i.e. **insurance services, telecommunication services and weather services**.
298. The mapping surveys the following WTO Agreements: AoA, TBT Agreement, TFA, ITA and ITA Expansion, and GATS. It also refers to these other international instruments: Istanbul Convention (see Annex 3), UN OCHA Model Customs Facilitation Agreement, Tampere Convention (see Annex 5), WCO Revised Kyoto Convention,

International Organization for Standardization standard on business continuity management (and related national measures), Sendai Framework on Disaster Risk Reduction, Automated System for Relief Consignments (ASYREC), IFRC Model Act (see Annex 2).

## 5.2 Issues affecting trade in goods

### 5.2.1 National legislation on custom duties and procedures

299. The Sendai Framework on Disaster Risk Reduction places a strong emphasis on mainstreaming and integrating disaster risk reduction also through national laws, regulations and public policies addressing disaster risk in public services and infrastructures (para. 27(a)). The improvement in the domestic laws and regulations would facilitate immediate response and recovery activities, smoothing assistance and the restoration of ordinary conditions of life.
300. As for trade matters, disaster preparedness promotes the **ex-ante incorporation of specific measures in customs procedures and processes**. The existence of a clear and pre-defined legal framework setting out the provisions that could be accorded to foreign relief agencies and personnel and the criteria for eligibility for these measures would help establish conditions of legal certainty and hasten international assistance. These legal provisions could include the exemption from customs duties and other charges, a waiver from import restrictions or prohibitions of economic character, the simplification of the documentary requirements for imports, the establishment of simplified procedures for customs inspections and for the clearance and release of goods.
301. As mentioned in the section on recovery, a number of international legal instruments have already been adopted in this regard. They usually set out confined legal regimes, referring to the entry of specific goods and items, or to assistance provided by specific humanitarian actors. Among the former, mention can be made to the 1998 Tampere Convention (see Annex 5), Annex B.9 to the 1990 Istanbul Convention establishing a legal discipline for the importation and re-exportation of goods and equipment used for humanitarian purposes (see Annex 3). A general discipline of both goods and equipment is established under Chapter 5 of the Specific Annex J to the WCO Revised Kyoto Convention (see Annex 4). Legal tools on categories of humanitarian actors mostly concern the United Nations and its specialized agencies, as envisioned in the general conventions on their privileges and immunities and suggested in the Model Customs Facilitation Agreement devised by UN OCHA.
302. According to the IFRC, a general national legislation covering all aspects of disaster relief would be coherent with an “actors-based model”. This approach informed the **Model Act** adopted by the IFRC in 2013 (see Annex 2). Its Chapter VI suggests the legal facilities that may be accorded to entities providing international assistance, including the exemption from import duties and other taxes, a waiver of the entry prohibitions or restrictions based on economic motivations, the implementation of a clearance regime without regard to the country of origin or the country from which the goods have arrived (Article 32), the imposition of simplified documentation requirements (Article 33). The Model Act provides also the adoption of regulations for extended hours of customs in order to facilitate the entry of relief items (Article 34) and for simplified customs inspections, that should be carried out on the basis of risk analysis and as they are deemed essential (Article 35).
303. Among the international legal instruments that address critical customs matters for disaster response, the **WTO TFA** is of particular relevance. The participation by WTO Members and the enactment of proper implementing domestic legislation could indeed support disaster preparedness. The domestic discipline giving effect to some of its provisions could strengthen resilience to disasters and, as suggested in the Sendai Framework, increase preparedness for response.
304. With regard to the **exemption from customs duties**, it is tackled in some TFA provisions whose proper implementation at the domestic level could facilitate customs operations in a post-disaster scenario. For instance, under Article 7.8.2(d), parties to the TFA are required to provide, to the extent possible, for a *de minimis* shipment value or dutiable amount for which customs duties and taxes will not be collected”. Matched with the introduction of simplified customs procedures, this measure would alleviate the administrative burdens at customs, reducing congestion of customs facilities due to the arrival of unsolicited donations.
305. An additional facilitation measure is established under Article 10.9.1 TFA on **temporary admission of goods** entering “for a specific purpose”. Since this last notion can be applied also to assistance to disasters, the total or partial exemption from the payment of import duties and taxes envisaged in Article 10.9.1 could be made applicable also to the temporary entry of equipment necessary to the relief agencies and that will be presumably re-exported at the end of their humanitarian operations. The preventive establishment of these facilities would have a positive impact on the efficiency of the assistance.
306. Parties to the TFA are required to adopt **customs procedures** for the pre-arrival submission of the documentation requested under customs regulations (Article 7.1) and for the release of goods prior to the final determination of the duties and other charges to be paid (Article 7.2). The application of these “regular” procedures also to

relief items could be fundamental: for instance, under Article 7.2, the verification of eligibility to any exemption from trade barriers would not hamper their entry and the deployment of foreign humanitarian assistance.

307. According to the TFA, preferential facilitation measures may be applied to specific categories of operators, who would enjoy a “more favourable treatment” for customs matter. For instance, it is provided for in Article 7.7 on “authorized operators”. Its implementation under a “disaster preparedness” perspective could open its scope not only to private sector actors in logistics and international transportation, but also to humanitarian relief actors who would enjoy several legal facilities. Indeed, under Article 7.7.3 domestic legal discipline has granted to them 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.
308. Similarly, TFA parties are also called to establish the criteria for eligibility to procedures for the expedited release of goods (Article 7.8). In the implementation of this provisions, Members could include relief organizations under the scope of these procedures, so that they could enjoy lower documentary requirements and the speedy release of goods.
309. A special regime is introduced by the TFA for **some typologies of goods**. The implementation of Article 7.9 could establish in advance the procedures to be followed for the clearance and release of “perishable goods”, i.e. goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions. This would be of paramount importance for the entry those items subject to deterioration, which can no longer be distributed or used in relief operations. Some foodstuff (e.g., water reserves), blood reserves or components could come under this category.
310. Finally, it is worth recalling that all exceptions and exemptions under the GATT 1994 apply to the provisions of the TFA (Article 27.4 TFA). Accordingly, where improving customs processes and procedures with a view to strengthening disaster resilience, Members may be allowed to depart

from the TFA disciplines to the extent they satisfy, for instance, the requirements set out in Article XX of the GATT 1994 on the protection of public morals or of human, animal or plant life or health.

311. It is also worth mentioning the development within the International Organization for Standardization standard on **business continuity management** (ISO 22301), adopted in 2012.<sup>172</sup> The stated purpose is to help both private and public organizations to prepare for, respond to and recover from “incidents”. Under ISO 22301, organizations are called to carry out risk assessment seeking to understand in a structured way the risks they are exposed to and to develop on this basis a business continuity strategy. Contingency planning would then require envisaging the steps to be taken when an incident occurs. Significant work has also been undertaken by other international organizations, such as the UN Economic Commission for Europe<sup>173</sup> and the International Electrotechnical Commission<sup>174</sup>, and in national bodies, such as the American Society for Testing Materials (ASTM),<sup>175</sup> whose standards may also be used internationally.
312. The accepted notion of “incidents” under the standard includes large scale natural disasters or small disasters that may nevertheless have an impact on business management. It could be further explored how to adapt the standard to governmental agencies or other entities exercising governmental activities, including customs authorities. Under a resilience perspective, the establishment of contingency strategies foreseeing the activities to be implemented in the aftermath of a disaster could facilitate the customs operations, most probably speeding up procedures and the entry of foreign relief materials. Indeed, ISO 22301 emphasized how the establishment of a “well-defined incident response structure” may ensure that when a disaster occur, “responses are escalated in a timely manner and people are empowered to take the necessary actions to be effective”. A further point made by the standards is the need to communicate with external partners: for our purpose, these would include other governmental authorities and agencies involved in relief plans and operations, as well as the organizations providing assistance to the affected population.
313. A further positive development from a preparedness perspective would be the adaptation of customs regulations and infrastructures to the Automated System for Custom Data (ASYCUDA) and the **Automated System for Relief Consignments (ASYREC) developed by UNCTAD**. The computerization of customs procedures and, within that framework, the establishment of a special

172 <https://www.iso.org/news/2012/06/Ref1602.html>. See L. Jachia, “Standards and normative mechanisms for disaster risk reduction”, Background Paper prepared for the 2015 Global Assessment Report on Disaster Risk Reduction, UNECE, August 2014, p. 20 ff.

173 UNECE, “Resilience to disasters for sustainable development. UNECE taking action to protect lives and livelihoods” (Geneva, October 2019).

174 M. Fachot, “Dealing with natural and industrial disaster. IEC Standards are key to help prevent and/or mitigate the impact of many disasters”, IEC e-tech, issue 06/17 (<https://iecetech.org/issue/2017-06/Dealing-with-natural-and-industrial-disasters>).

175 See, for instance, <https://www.astm.org/standardization-news/?q=features/standards-and-fight-against-wildfires-.html>.

module on relief consignments could prove to be fundamental to speed up customs procedures. The identification within ASYREC of a pre-defined list of relief items and the pre-registration of relief organizations could accelerate the implementation of simplified customs procedures.

## 5.2.2 Building codes: TBT measures supporting resilience

314. The 2015 Sendai Framework acknowledges that “[d]isasters have demonstrated that the recovery, rehabilitation and reconstruction phase, which needs to be prepared ahead of a disaster, is a critical opportunity to **‘Build Back Better’**” (para. 32). On this basis, legislation consistent with a Build Back Better approach would be of utmost importance.<sup>176</sup>

315. The Building Back Better approach promotes the use of all post-disaster activities “to increase the resilience of nations and communities through integrating disaster risk reduction measures into the restoration of physical infrastructures and societal systems, and into the revitalization of livelihoods, economies and the environment”.<sup>177</sup> Within this framework, critical importance is assigned to “building codes”, understood as the “set of ordinances and associated standards intended to control aspects of the design, construction, materials, alteration and occupancy of structures that are necessary to ensure human safety and welfare, including resistance to collapse and damage”.<sup>178</sup>

316. In domestic legal regimes, **construction regulations** may be set in order to require that buildings and other civil engineering works (e.g., bridges, harbours) resist to natural disasters. The legal discipline can be designed following a “prescriptive” approach or a “performance-based” approach. Prescriptive regulations lay down how buildings must be built and prescribe the characteristics of the materials allowed to be used; performance-based regulations focus on the fulfilment of a specific goal (e.g., the building must be able to withstand a natural disaster of a certain magnitude) and on the technical specifications for construction materials coherent with that goal. These technical specifications may also be set as non-binding standards, compliance with which proves compliance with the construction regulation.

317. The adoption of a performance-based approach entails some advantages, including that it does not hamper innovation: new construction materials departing from the adopted standard, but coherent

with the desired policy goal, may be introduced on the markets since their use would not imply a violation of the building code. Furthermore, performance-based regulations are less trade-restrictive than prescriptive regulations.

318. For WTO Members, codes setting the characteristics of building materials could amount to technical regulations, in case compliance with them is mandatory. However, as evidenced above, also non-binding standards may play a role. These standards are covered by the TBT Agreement whenever they are adopted by a “standardizing body” as defined in paragraph B of the Code on Good Practice on the Preparation, Adoption and Application of Standards included in Annex 3 to the TBT Agreement. It is worth underlining that the notion of standardizing body covers both national bodies (i.e. a central or a local government body or a non-governmental body located in the territory of a Member) and regional bodies (i.e. governmental regional standardizing bodies one or more members of which are WTO Members, and non-governmental regional standardizing bodies one or more members of which are situated in the territory of a WTO Member). Accordingly, under the TBT Agreement, standards can not only be national, both also regional. This may be particularly relevant in view of the harmonization of domestic building codes adopted by WTO Members situated within the same region (e.g. within a region prone to disasters) thereby facilitating the trade of building materials among them.

319. As to the dichotomy between the prescriptive approach and the **performance-based approach**, Article 2.8 of the TBT Agreement establishes that “wherever appropriate, Members shall specify technical regulations based on product requirements *in terms of performance rather than design or descriptive characteristics*” (emphasis added). As stated by the Panel in the *US – Clove Cigarettes case*, “[t]he object and purpose of Article 2.8 is to avoid the creation of unnecessary obstacles to trade by requiring that product requirements be laid down in *functional terms*”.<sup>179</sup> The formulation of the relevant regulations in terms of materials’ descriptive characteristics, rather than in terms of their performance, is not excluded, provided that it is demonstrated that in the situation at hand it would be more proper, fitting and suitable.<sup>180</sup> This line of reasoning can also be extended to standards, as paragraph I of the Code on Good Practice replicates the text of Article 2.8.

320. Accordingly, the TBT Agreement does not constraint Members in choosing between a prescriptive or a performance-based approach for the definition of building codes aiming at ensuring the resilience

176 UNISDR, “Building Back Better in recovery, rehabilitation and reconstruction” (Geneva, 2017), p. 35 ff.

177 UN doc. A/71/644 of 1 December 2016 (“Report of the open-ended intergovernmental expert working group on indicators and terminology relating to disaster risk reduction”), p. 11.

178 Ibid.

179 Panel Report, *US – Clove Cigarettes*, 2 September 2011, para. 7.481 (emphasis added).

180 Ibid., para. 7.491.

of physical infrastructures and constructions to hazardous natural events. A preference is expressed for performance-based codes, deemed to be less trade restrictive than codes mandatorily detailing terms the technical characteristics of the building materials.

321. Under the TBT Agreement **international standards** (i.e. standards adopted by an international standardizing body, "that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members")<sup>181</sup> are deemed as crucial tools in order to properly regulate public concerns without unnecessarily hindering international trade flows. Indeed, Members are required, as a general rule, to use international standards when preparing their technical regulations. Under Article 2.4, first sentence of the TBT Agreement Members are strongly encouraged to use international standards as a basis for their regulations (including construction regulations and building codes), "as the principal constituent or the fundamental principle for the purpose of enacting [a] technical regulation".<sup>182</sup> A similar obligation applies with respect to conformity assessment procedures. (Article 5.4) and national or regional standards (Annex 3, para. F).
322. This emphasis on international standards aims at attaining "better" outcomes by relevant regulatory and standardizing bodies. At the same time, reliance upon them helps ensure that any trade restrictive effects deriving from the application of technical regulations or standards based upon international standards will likely be acceptable and uncontroversial under the TBT Agreement. Members are provided with some flexibilities. First, Members are not required to use an international standard that is "ineffective or inappropriate" for the fulfilment of legitimate objective pursued by its measure (Article 2.4, second sentence; see also Article 5.4 and Annex 3, para. F). Second, developing countries have an additional flexibility: the TBT Agreement recognizes that developing country Members "should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs" (Article 12.4).
323. The second sentence of Article 2.5 of the TBT Agreement sets that when technical regulations are "in accordance with relevant international standards", they shall be "rebuttably presumed not to create an unnecessary obstacle to international trade" pursuant to Article 2.2. So, under the TBT Agreement, the combined effect of both *requiring* and *rewarding* basing regulations on international standards means a greater level of regulatory harmonization is incentivised.

324. Therefore, in the design of national building codes, specific attention should be devoted to verifying whether relevant standards have been adopted by international standardizing bodies. In case they are deemed suitable to address the concerns on the stability and resistance of construction works, the decision to rely completely on them is incentivised.

### 5.2.3 Government support programmes strengthening resilience of the agricultural sector: The Green Box of the Agreement on Agriculture

325. For Members whose agricultural sector may suffer consistent damages from natural disasters, instruments for strengthening resilience may be designed according to the discipline on the Green Box measures under Annex 2 of the AoA.
326. Annex 2 defines a list of public support programmes which are excluded from the reduction commitments on domestic support under Article 6 of the AoA, provided that some general requirements are satisfied and that the specific conditions laid down for each typology of programme are met. In general, the exemption operates with respect to domestic support granted through public funds and according to programmes with no, or at least minimal, trade-distorting effects or effects on production, not involving transfers from consumers and price support to beneficiaries.
327. A first reference can be made to the governmental programmes for the provision of **general services** to the agricultural sector (Annex 2, para. 2), including research (in general, for environmental protection or relating to a particular product) and infrastructural services (such as water supply facilities, dams and drainage schemes and infrastructural work associated with environmental programmes). A decision adopted at the end of the 2013 Bali Ministerial Conference has expanded the list of general services, in view of allowing developing countries a wider latitude in designing public support programmes for rural development.<sup>183</sup> Some of these services are particularly significant for Members prone to natural disasters, as in the case of programmes for land rehabilitation, soil conservation and resources management, drought management and flood control. The use of public funds for the provision of these services is not covered by the commitments on the reduction of domestic support. Therefore, they may be resorted to without any financing limit in order to strengthen the capacity of the agricultural sector to cope with natural disasters.
328. Resilience to disasters may also be fostered under the Green Box programmes on structural adjustment assistance through **investment aid**, aiming at

181 Appellate Body Report, US – Tuna II (Mexico), 16 May 2012, para. 359

182 Appellate Body Report, EC – Sardines, 26 September 2002, para. 243-244.

183 WT/MIN(13)/37 of 11 December 2013.

- supporting “the financial or physical restructuring of a producer’s operations in response to objectively demonstrated structural disadvantages” (para. 11), such as the disadvantages deriving from the location of the agricultural production in a region vulnerable to natural hazards. Scope for action may also be explored under paragraphs 12 and 13 of Annex 2, concerning respectively **payments under environmental programmes** (limited to the extra costs or income losses incurred by the farmers in view of complying with the environmental programmes themselves) and **payments to producers in disadvantaged regions under regional investment programmes**. For all these Green Box measures, as in the case of programmes for the provision of general services, Annex 2 lays down specific requirement to be satisfied, so as to ensure that Members’ measures have no or minimal trade-distorting effects, impact on production and do not involve price support for producers.
329. Furthermore, according to Annex 2, para. 7, **financial government participation in income insurance and income safety-net programmes** has also not to be counted among the domestic support schemes subject to the reduction commitment pursuant to Article 6.
330. In particular, payments under these schemes are exempted from reduction commitments subject to the condition that they compensate for less than 70% of the income losses suffered by the beneficiaries. Access to the schemes is determined according to the losses suffered by the individual farmer. Indeed, agricultural producers become eligible where their income losses exceed 30 per cent of their average gross income in the preceding three-year period (or a three-year average based on the preceding five years).
331. Contrary to the payments envisaged under Annex 2, para. 8, which are exempted from domestic support reduction commitments only when addressing relief from natural disasters (see section 4.2.1 above), the programmes under paragraph 7 are wider in scope, since this provision does not give any indication as to the causes of the income losses that may be covered under the insurance and safety-net programmes. However, it may not be excluded that agricultural producers who have suffered damages from a natural disaster be granted access to both typologies of programmes. In this case, a threshold is set on the payment they can receive under paragraphs 7 and 8 combined, as it cannot be higher than the total suffered losses.
332. The actual significance of these provisions has to be confronted with the difficulties agricultural producers suffer in the event of a natural hazard and with the evolutions occurring in the insurance markets with the purpose to address them. As reported in some studies,<sup>184</sup> in developed countries the agricultural sector is integrated with financial markets, and at least price risks can be easily managed through the use of financial instruments. The involvement of the public sector is deemed necessary for the management of other typologies of risks, including production or income risks, due to high costs of their related insurance programmes. In developing countries and LDCs, structural weaknesses may inhibit all these developments, including the lack of effectively functioning financial and insurance markets or the unavailability of sufficient resources that could be used by farmers to cover from disaster-related risks (primarily in the case of small-scale farmers whose production is intended to cover households’ food security needs). Therefore, the direct involvement of the public sector becomes crucial.
333. A first typology of support schemes includes indemnity-based programmes, covering losses against specific disasters. They may be difficult to manage, in particular when they imply the conclusion of a high number of contracts with dispersed farmers. In this situation, also the calculation of suffered losses may be challenging, as it needs to be made with respect to any potential beneficiary. Weather index-based insurance schemes may be an alternative, at least for some natural disasters. Under these schemes, payments to farmers respond to a weather-related parameter (e.g. temperature, level of rainfalls) set to correlate to the losses suffered by the policyholder: payments are made when the established limit for the parameter is exceeded.<sup>185</sup>
334. These policy instruments hardly fit within the Green Box under the AoA. Indeed, the exemption for reduction commitments under paragraph 7 of Annex 2 is foreseen exclusively for public support programmes meant to cover “income losses”. They may not be related to losses in production, to the factors employed in production or to price developments in crops domestic or international markets, but exclusively to income, whose reduction needs to be calculated for each beneficiary on the basis of the criteria laid down in Annex 2. Members do not benefit from this flexibility with respect to their participation in insurances programmes based upon a presumption of losses and of their amount, as under the index-based programmes. Therefore, when notified to the WTO, these programmes are included in the calculation of the total AMS under the Amber Box and subject to the reduction commitments.
335. As evidence in the section on response, assistance to regions hit by a natural disaster entails the provision of essential services, such as health services, engineering services, telecommunication services or environmental services. At the same

184 FAO, “The state of agricultural commodity markets. Agricultural trade, climate change and food security” (Rome, 2018), p. 49.

185 WFP, IFAD, “Weather Index-based Insurance in Agricultural Development. A Technical Guide” (Rome, 2011).

time, the pace of recovery also depends upon the availability of financial resources necessary for the reconstruction of damaged buildings or infrastructures or for the resumption of productive activities. In many instances, the availability of these finances depends upon the existence of a functioning domestic financial market.

336. Under a resilience perspective, actions could be taken in advance, so as to ensure that these services are provided on the domestic market, or that in case foreign supply is necessary to meet demand needs, they are readily available. From a trade perspective, these actions could also be built upon the enhanced opening to foreign services and service suppliers, as for instance in those sectors where the domestic market is not yet developed enough. Liberalization of trade in services could indeed have a positive impact on inward investments in these sectors, encouraging the growth of the private sector and, overall, enhancing the domestic capacity to supply services crucial for reducing vulnerability in advance of calamitous events Members are exposed to.
337. Against this background, the following paragraphs address some relevant topics. The first concerns preventive actions on the recognition of foreign qualifications owed by foreign service suppliers who could be engaged during the response phase, for the provision of services on the ground or on a cross-border basis, as for instance in the case of telemedicine or e-health. The other paragraphs focus on some services that are crucial for a prompt response and during the recovery phase. These services are insurance services, telecommunication services and weather-related services. The overall purpose of the analysis is to assess the potential positive impact of higher levels of trade liberalization in these sectors on the overall service supply capacity of Members prone to natural disasters.

### 5.3.1 Recognition of foreign professional qualifications

338. As noted above, in the immediate aftermath of a natural hazard or during the disaster recovery phase disaster-affected countries may need foreign assistance in specific service sectors. However, the entry of the foreign relief personnel supplying these services may be hindered by the domestic regulations setting mandatory qualifications for the exercise of professional activities. Differences between the regulatory approaches followed by different States may require that the professional qualifications possessed by foreign relief personnel be verified and recognized by domestic competent authorities. Since the application of these procedures usually takes time, in situations of emergency temporary licences could be adopted in view of speeding up the provision of professional services in the context of natural disasters.

339. These issues are not ignored by the **IFRC Model Act**, whose Article 26 suggests the adoption of specific legislation for managing disaster assistance. In particular, States may designate a relevant authority with the mandate of establishing a list of countries and/or of educational institutions whose professionals are given automatic recognition of their qualifications. For other countries and/or institutions, expedited procedures can be laid down for the assessment and recognition of their regulatory requirements. In any case, when granted, the recognition should exempt the beneficiaries from any obligation regarding the membership to professional associations or from any other registration processes.
340. The **GATS** could facilitate the adoption and implementation of the legislation as recommended under the Model Act. Indeed, its **Article VII** expressly covers the recognition by Members of the “education or experience obtained, requirements met, or licences or certifications granted” to service suppliers in a foreign country. This provision does not set out an obligation to recognize foreign professional qualifications, rather it establishes some obligations to be complied with in case recognition is granted (including the notification to the WTO of recognition agreements/arrangements). For countries prone to disasters, a suggestion could be to strengthen their disaster preparedness with respect to facilitating the provision of relief services in their territory by foreign professionals. A comprehensive regime for recognition of foreign qualifications between neighbouring countries placed in disaster-prone regions or sub-regions could facilitate the promptness of humanitarian assistance. Such measures would be consistent with GATS obligations if implemented in accordance with the requirements of Article VII.
341. According to Article VII of the GATS, the recognition of professional qualifications is informed by a prohibition to accord it in a manner which would constitute discrimination in the application of standards or criteria for authorization, licensing or certification of the service suppliers, or a disguised restriction on trade in services (para. 3). The recognition could be achieved through the harmonization of national laws and regulations, unilaterally (i.e., on the basis of an autonomous determination by the granting Member) or on the basis of agreements or arrangements with the beneficiary country (para. 1). In any case, Members are due to afford adequate opportunities to other interested Members either to negotiate their accession to the above-mentioned agreements/arrangements or to demonstrate that qualifications under their domestic law satisfy the requirements underpinning unilateral recognition (para. 2).
342. In order to facilitate the activity of foreign relief personnel, some international organizations have been developing in the last years **international standards** with respect to specific professions. For instance, in box 9 above an illustration is made of



the standards developed within the WHO on the certification of international medical teams. Similar and other initiatives could play a crucial role in the context of recognition under Article VII of the GATS. Paragraph 5 provides that whenever appropriate, recognition should be based on “multilaterally agreed criteria”. Under a broader perspective, the definition of professional qualifications at the national level on the basis international standards, whenever appropriate, may facilitate the harmonization of domestic regulations across Members, and therefore the recognition of foreign qualifications.

343. Due to time pressure and the need to allow the prompt deployment of humanitarian operations, Members could temporarily waive their domestic regulations and **grant licences** in order to accelerate the activity of foreign qualified personnel into their territory. The ensuing temporary liberalization of market access may be approved ad hoc, e.g. to cope with a disaster once it has occurred, or it may be already provided for under the domestic regulation, which should also design the authority with enforcement powers in the aftermath of a disaster. In this way, the degree of preparedness would be improved, and the capability to support immediately the affected communities enhanced.
344. Temporary licences would have to be granted on an MFN-basis, that is without discriminating between services and service suppliers from other Members (unless a discriminatory treatment can be justified on the basis of exception clauses included in the GATS). Where a market access commitment exists, the temporary lifting of domestic requirements would find no obstacles (apart from compliance with the MFN obligation), as the ultimate outcome would be the widening of the market access opportunities. Members maintain discretion to waive or suspend limitations or conditions on market access specified in their schedule as these commitments only allow, but do not require Members, to impose the respective restrictive measures.

### 5.3.2 Financial services: insurance and reinsurance services

345. In the field of financial services, it is recognized that the development of the insurance systems could greatly support preparedness to disaster. Indeed, a widespread participation by individuals, households and firms in insurance schemes for the transfer of disaster-related risk specifically addressing their potential losses and damages in case of natural hazards could enhance rehabilitation.

346. There is real potential to **improve resilience by promoting access to insurance programmes**. Estimates of the value of uninsured losses from natural disasters total USD 280 billion for the years 2017 and 2018.<sup>186</sup> Empirical studies reveal that uninsured disaster-related losses drive high macroeconomic costs and that countries whose households and businesses are financially prepared to cope with a disaster recover faster.<sup>187</sup> Non-life insurance programmes could provide protection in case of natural disasters, allocating funds directly to injured people to cover losses; they can also protect companies against business-specific consequences of disasters, such as business interruption or supply-chain failure. In the last case, insurance programmes could be envisaged also in countries not directly affected by a disaster, but which participate in supply-chains involving foreign companies located in countries particularly vulnerable to disasters. Finally, governments may also have an interest in purchasing insurance products with the purpose of having access to additional resources in the event of a disaster.

347. **On the demand side**, the main obstacles to insurance coverage may be given by low income levels of potential buyers, high expectations of external assistance in case of future disasters (disincentivizing the conclusion of insurance contracts and the payment of the premiums), and the limited awareness and understanding on disaster risk exposure by households, businesses and governments.<sup>188</sup> Previous practice attesting delays and uncertainty in the pay-outs may also discourage the purchase of insurance policies. For instance, the country research on the Caribbean region reports that several months after Hurricane Maria in Dominica still outstanding pay-outs amounted to 15 per cent GDP, largely due by the sole domestic insurance company. **On the supply side**, some weaknesses may be due to a still unfavourable financial environment at the domestic level and to the lack of insurance products specifically designed to cover losses from disasters, based upon accurate data and tailored risk models and risk profiles.<sup>189</sup>

348. Public authorities may be called to play a crucial role, in view of stimulating both the access to disaster-related insurance products for transfer risk (also through financial support programmes) and the supply of proper insurance services on the domestic market (through the approval and implementation of the necessary regulation for the stability and efficiency of the insurance market or the adoption of policies favouring the supply of insurance services by both domestic and foreign suppliers).

186 Swiss Re Institute, “Secondary natural catastrophe risks on the front line”, Sigma No. 2/2019 (10 April 2019) [available at <https://www.swissre.com/institute/research/sigma-research/sigma-2019-02.html>].

187 G von Peter, S von Dahlen, S Saxena, “Unmitigated disasters? New evidence on the macroeconomic cost of natural catastrophes”, BIS Working Paper No 394, December 2012.

188 C Benson, E J Clay, “Understanding the Economic and Financial Impacts of Natural Disasters”, World Bank Disaster Risk Management Series No. 4, 2004, in particular 53 ff.; J D Cummis, O Mahul, “Catastrophe Risk Financing in Developing Countries. Principles for Public Intervention”, World Bank, Washington D.C. (2009) 28 ff.

189 Ibid.

349. As the practice shows,<sup>190</sup> disaster preparedness through insurance could be improved by a variety of measures, ranging from the introduction on the market of **tailored insurance products** specifically addressing the disaster-related risk run by the potential buyers, to a proper **communication on available insurance products** covering disaster risk, to the introduction of **public incentives** to the purchase of disaster insurance (such as the tax breaks on premiums approved by the Italian government in the aftermath of the 2010s earthquakes in Central Italy). The mandatory requirement could be introduced under domestic legislation to possess insurance coverage affording protection against losses due to a disaster. Moreover, insurance policies may **support risk reduction policies** by linking the participation in insurance schemes or the determination of the premium to be paid by the policyholder to compliance with building codes.<sup>191</sup>
350. Insurance schemes may also be designed so that the **governments purchase policies** and funds are quickly disbursed to them in the event of a disaster in order to cope with the immediate response and/or to finance recovery. As part of a comprehensive disaster risk management approach, participation in these schemes would lessen pressures on public finances, making available additional resources for the purposes of response and recovery.
351. In the last decade “**sovereign catastrophe risk pools**” have been established. Financed by development banks and international donors, they can provide governments access to large financial resources in case of disasters.<sup>192</sup> Reference can here be made to the Caribbean Catastrophe Risk Insurance Facility launched in 2007 and extended in 2016 to cover also Central American countries (counting 28 countries eligible for insurance coverage),<sup>193</sup> the African Risk Capacity established in 2012 (whose establishing agreement has been signed by 33 out of 55 members of the African Union) and the Pacific Catastrophe Risk Assessment and Financing Initiative founded in 2016 (with 14 Pacific countries eligible to purchase its insurance products). Within the pools, country-specific insurance policies are bought by governments which, according to an index-based model, ensure quick pay-outs after a disaster event. It is estimated that to date these pools have made over USD 180 million in payments to their members and have collected USD 42 million in premiums.<sup>194</sup> Apart from coverage from disaster risk, these pools may have additional advantages in terms of sharing
- knowledge among governments and developing a shared understanding of their disaster exposure and vulnerability.<sup>195</sup>
352. The involvement of the private sector in these programmes could also be planned by the establishment of so-called private-public partnership. The association under a common umbrella of national governments, international organizations, civil society organizations and insurance and reinsurance companies could facilitate the development of those synergies necessary for the design and implementation of programmes addressing the concrete needs of the affected individuals, households, and firms. For instance, a similar initiative was launched at the 2017 UN Climate Conference of the Parties (COP 23) in Bonn, where the Insuresilience Global Partnership was established.<sup>196</sup>
353. From a trade perspective, for countries with no yet mature financial markets, some **advantages in terms of resilience to disasters could be achieved through the opening of the domestic market to foreign suppliers**, in particular for the supply of insurance and reinsurance services on a cross-border basis or through commercial presence. Similar policies could allow the Members to overcome some of the above-referred shortcomings of the insurance markets and to strengthen their disaster preparedness. On the one hand, trade liberalization could **increase the overall supply of insurance services** in the domestic market where both domestic and foreign suppliers could exercise their activity. It could be conducive to the creation of **partnerships** between foreign and domestic companies, thereby to the transfer of knowledge and to the improvement of management and risk-assessment practices specific to the disaster-related risks affecting each Member. **Product diversification** could be promoted by the placing on the markets indemnity-based insurance products, ensuring the policyholders the pay-out of the covered losses they suffered, and index-based products, where claim payments are triggered by the indexed event and which entail lower management and monitoring costs while at the same time accelerating payments. Finally, opening to foreign suppliers of insurance services should be accompanied by **the proper regulation** of the domestic market, in view of guaranteeing the reliability of insurance companies and increasing the confidence by consumers. Non-discriminatory incentives to encourage and reward buying insurance and mitigating risks by individuals and

190 Swiss Re Institute, “Confronting the cost of catastrophe” [25 March 2009] [available at <https://www.swissre.com/risk-knowledge/mitigating-climate-risk/natural-catastrophes-affecting-more-people-what-can-do-to-help.html>].

191 C Benson, E J Clay, “Understanding the Economic and Financial Impacts”, above, 59

192 See OECD, “Disaster Risk Financing. A Global Survey of Practices and Challenges” (Paris, 2015); World Bank Group, “Sovereign Climate and Disaster Risk Pooling. World Bank Technical Contribution to the G20” (Washington, 2017); UN ESCAP, “Disaster Risk Financing: Opportunities for Regional Cooperation in Asia and the Pacific” (Bangkok, 2018).

193 See the country report on the Caribbean region accompanying this legal mapping exercise, 24 ff.

194 L Martinez-Diaz, L Sidner, J Mcclamrock, “The future of disaster risk pooling for developing countries: Where do we go from here?”, World Resources Institute Working Paper (August 2019) 8.

195 Ibid., 39.

196 See <http://www.insuresilience.org>.

corporates, like the Italian incentives highlighted earlier, could also complement liberalization efforts and help expand coverage.

354. From the perspective of the GATS, this evolution would be consistent with the purpose stated in the GATS preamble on the achievement of “progressively higher levels of liberalization of trade in services”. Liberalization policies could **tackle the barriers imposed upon the supply foreign insurance services**, which can be categorized in three typologies:<sup>197</sup> measures related to the establishment of foreign suppliers; measures on the access of foreign services on a cross border basis; measures imposing requirements on the supply of insurance services.
355. Existing research suggests that cross-border supply of insurance and reinsurance services is more restricted by WTO Members than trade through commercial presence. As for **mode 3**, relevant restrictions derive from existing monopolies, limitations on foreign capital participation, prohibitions on the establishment of foreign branches or the reservation exclusively to nationals of the retail sale of insurance services. The sale of retail insurance products on a **cross-border basis** is usually restricted, if not prohibited. Less restrictions may be found on the cross-border supply of reinsurance services or on the supply of services auxiliary to insurance (e.g., claim settlement or actuarial services) or of insurance intermediation (e.g., brokerage and agency services). For instance, a horizontal limitation may apply whereby the employment of foreign natural persons is subject to work permit regulations, the issue of permits is confined to persons with specialized managerial and technical skills and the administration of the regime is guided by a labour market test. These are just some examples of the restrictions that may affect the **movement of natural persons** carrying out specific activities in the insurance industry, as for instance risk assessors and experts sent by foreign companies to evaluate the damages caused by a natural disaster.
356. Independently from the market access and national treatment commitments and their respective limitations inscribed in a Member’s schedule annexed to the GATS, nothing prevents Members from implementing trade policies pursuing a higher opening of the domestic insurance market, under the sole condition of acting consistently with the MFN obligation under Article II of the GATS.

### 5.3.3 Telecommunication services

357. As evidenced in a recent study by the International Telecommunication Union, availability of telecommunication resources is an essential component of disaster risk management policies.<sup>198</sup> Not only traditional telecommunication services but also new services technologies (i.e., artificial intelligence, Big Data, cloud capabilities, Internet of Things) may play a critical role in disaster management.
358. For instance, mobile phones have witnessed an exponential growth to become a universal communication device. Apart from voice calls and text messaging, other applications on location services, Internet access or access to social networks have made them an essential device for disaster response purposes. They allow to communicate with the disaster-hit areas and to collect information on the actual damages and the needs of the affected population. Accordingly, access to **mobile telecommunication services, Internet telecommunication services and data transmission services** may prove essential in the immediate aftermath of a natural disaster. For instance, it is reported that after the floods in Chennai (India) in 2015, several groups used Twitter to share information that helped to organize relief operations in planning assistance, and to provide updated information to those living in the area hit by the floods.<sup>199</sup> At the same time some telecommunication services may support the remote, cross-border supply of other services, as in the case of telemedicine, e-health or engineering services.
359. In many cases, high beneficial effects derive from the **combination of telecommunication services with other services, as for instance data storage and data management services**: their combined use allows to collect reliable information for predicting the approaching of a disaster, or for the organization of relief operations fulfilling the actual needs of the affected communities. In this last regard, it is worth recalling the efforts made in the aftermath of Hurricane Odile which struck Baja California in Mexico in 2014, when the use of Big Data techniques allowed to map out and systematize the financial transactions before, during and after the hurricane, helping to identify the most affected groups and to target on them post-disaster assistance.<sup>200</sup>
360. As in the case of insurance services, trade liberalization in the telecommunication services may be instrumental for the purposes of strengthening preparedness of disaster-prone countries. Trade policies aiming at favouring

197 This and the following paragraphs are drawn from J Marchetti “Financial services liberalization in the WTO and PTAs”, in J Marchetti, M Roy (eds), *Opening Markets for Trade in Services. Countries and Sectors in WTO and Bilateral Negotiations* (CUP 2008) 300 ff.

198 ITU, “Disruptive technologies and their use in disaster risk reduction and management”, ITUGET 2019 Background document. Emergency telecommunications (ITU 2019).

199 Ibid., 21 ff.

200 Ibid., 24 ff.

market access by foreign telecommunication suppliers enhance service penetration and affordability on the domestic market,<sup>201</sup> but they could also have a positive impact on resilience to disasters. Indeed, they could open access to new digital technologies and reinforce and modernize the existing telecommunication networks and infrastructures. Access to telecommunication would then be encouraged to the advantage of both the final users who could be potentially affected by a natural hazard, and of relief organizations and agencies, improving their capacity to provide effective assistance.

### 5.3.4 Weather-related services

361. Reliable weather, climate and water information enables individuals, households, businesses and governments to take decisions which reduce the impacts of natural hazards. The provision of early warning services enables communities to prepare for, and minimize the impacts of, extreme hydrometeorological phenomena such as tornadoes, storms, hurricanes, heatwaves, wildfires, floods and droughts.<sup>202</sup>
362. Historically, the responsibility to provide hydrological and meteorological (hydromet) services has resided with the public sector, in particular with government-funded national hydrological and meteorological services (NMHS). However, the private sector is now becoming involved in nearly all the elements of the pipeline that goes from observations to tailored weather services, and the respective roles of the public and private sectors are evolving.<sup>203</sup> From being mostly engaged in manufacturing equipment and providing media services, private sector involvement in hydromet services has grown rapidly and a global "weather enterprise" has emerged.
363. Against this background, the 70th Session of the Executive Council and 18th World Meteorological Congress in June 2019 agreed a "Declaration on Public-Private Engagement in the Global Weather Enterprise". This Declaration recognizes the need to strengthen the entire weather, climate and water services value chain – from acquisition and exchange of observations and information, through data processing and forecasting, to service delivery – to meet growing societal needs, including disaster risk reduction.
364. In this section, a trade policy perspective is used to discuss issues that may emerge when

forging such inclusive partnerships in the generation, delivery and use of meteorological data and services, notably as regards warnings of potential hazards. Useful to note in this regard is the Disaster Risk Reduction Programme of the World Meteorological Organization (WMO) which seeks to support preparedness through early warning systems; provide hazard information for risk assessments, prevention, response and recovery, and risk transfer across sectors; mitigate existing risks and prevent the creation of new risks; respond to user requirements; and, cooperate and engage in disaster risk governance structures at all levels.<sup>204</sup>

365. Access to imports is essential for NHMS and the private sector who would otherwise be unable to source their technical equipment, spare parts and services needed to build and maintain the observation infrastructure they need to offer forecasting and delivery services. One estimate is that NMHS maintain and operate more than US\$ 10 billion in global hydromet infrastructure.<sup>205</sup> The private sector is also now investing in its own observation networks. Import policy can play an important role in determining the cost of purchasing such equipment, particularly in the private sector who may not enjoy the same exemptions as public sectors from tariff and taxes (e.g. sales tax) or charges. In turn, this raises two issues: import policy with regard to hydromet equipment and intellectual property protection.
366. An analysis of the Harmonized System (HS) of Tariff Nomenclature highlights two HS codes of particular interest for hydromet equipment: HS 9015 covering surveying equipment including hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances; and HS 9025 covering hydrometers and similar floating instruments, thermometers, pyrometers, barometers, etc. Using WTO's Tariff Analysis Online database highlights that average applied tariff rates on this category of goods is 4.0% globally for surveying equipment and 4.3% for hydrometers.<sup>206</sup> Bound tariff rates in Members' schedules are considerably higher at 25.1% - and with a number of Members having left these tariff lines unbound in their schedules. There is also significant variation between Members with rates applied as low as 0.2% (Switzerland and USA) and as high as 35% (Bahamas) in practice.
367. Liberalizing trade in hydro-meteorological equipment is among the trade measures that

201 The general trend towards liberalization and increased competition in the telecommunication services sector and subsectors is described in World Bank, InfoDev, ITU, "Telecommunication Regulation Handbook", 11<sup>th</sup> ed. (World Bank, April 2011) 12 ff.

202 WMO, "Valuing Weather and Climate: Economic Assessment of Meteorological and Hydrological Services", WMO-No. 1153 (2015), available at [https://www.wmo.int/pages/prog/amp/pwsp/documents/wmo\\_1153\\_en.pdf](https://www.wmo.int/pages/prog/amp/pwsp/documents/wmo_1153_en.pdf)

203 A Thorpe, "The Weather Enterprise: A global public-private partnership", WMO bulletin Vol 65(2)-2016, available at: <https://public.wmo.int/en/resources/bulletin/weather-enterprise-global-public-private-partnership>.

204 <https://www.wmo.int/pages/prog/drr/>.

205 WMO, "Valuing Weather and Climate", above.

206 HS - 9015 - Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders.

- could be taken to support growth in the global weather enterprise. Between January 2014 and December 2016, a group of 46 WTO members were actively engaged in negotiations, known as the Environmental Goods Agreement or EGA, to slash duties on products used in a variety of environmentally-related functions.<sup>207</sup>
368. The resumption and successful conclusion of the negotiations, which have not been active since December 2016, could give an additional boost to trade in environmental goods. The benefits of the EGA would be extended to the entire WTO membership, meaning all WTO members would enjoy improved access to the markets of EGA participants.<sup>208</sup>
369. The role of trade in promoting the dissemination of hydromet goods and services is closely related to its role in fostering innovation. Trade, backed by an appropriate system for the protection of intellectual property, strengthens the incentives to innovate through its effects on the size of the market, competition and cross-border flows of knowledge.
370. The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) is intended to incentivize productive investment in innovation. It also provides a means of defining and structuring partnerships that enable the development, commercialization and widespread diffusion of technologies. The TRIPs Agreement is relevant to a broad range of economic activity in the global weather enterprise. Hydromet equipment can enjoy protections for trademarks (articles 15-21), industrial designs (Article 25-26), patents (articles 27-34) and protection of undisclosed information (so-called trade secrets covered by Article 39).
371. From a policy perspective, the intellectual property system aims at a mutually beneficial “balance” between legitimate private interests, specifically a rationale to invest resources into the development of new environmentally sound technologies, and the wider public interest so that beneficial technologies, such as hydromet equipment and services, can be disseminated and put to work. The patent system in particular is founded on the principle that exclusive rights need to be matched by effective disclosure of new technologies so that others can learn how to put them into effect. The resulting patent information provides a valuable platform for innovators, adaptors and users of technology to track and gain access to cutting edge technologies.<sup>209</sup>
372. At the Second Symposium on Natural Disasters and Trade on 14 December 2018, Dr Alan Rogers discussed obstacles faced by hydromet companies to doing business across borders. He noted that in some jurisdictions, weather observations by organizations other than the national meteorological service were illegal. Provision of meteorological services by the private sector was outlawed in some countries. Regulation of the global weather enterprise is still nascent.<sup>210</sup> Interesting also to note in this regard is that “Weather-related services” are not listed in the W/120 services classification list, nor in the provisional version of UN CPC, used by most Members for the purpose of scheduling their GATS commitments. “Weather forecasting and meteorological services” are now listed in CPC version 2.1 under “Scientific and other technical services” (CPC 83430).
373. Against this background, consideration of market access and domestic regulation issues impinging on the global weather enterprise could merit attention. A first step in this direction could be a dialogue between the Secretariats of the WTO and the WMO, involving also other relevant stakeholders. Given that many hydromet services are still provided by public bodies a discussion would cover issues relating both to the GATS and also the Revised GPA.
374. A further dimension that could be explored as part of a policy dialogue involves issues related to data. One of the defining characteristics of weather services is its dependence on observational data collected from around the globe. No one nation could provide even basic services to its citizens without continuous, real-time access to such data internationally.<sup>211</sup> The June 2019 WMO Declaration on Public-Private Engagement in the Global Weather Enterprise urges all stakeholders to “promote free and unrestricted international data sharing, based on national circumstances, with intellectual property rights duly respected”.
375. A policy dialogue with WMO would potentially serve two purposes. First, it would contribute to implementation of the World Meteorological Organization’s (WMO’s) 2019 Declaration on Public-Private Engagement. Second, such a policy dialogue could prove useful to Members engaged in exploratory discussions on environmental services in the Council for Trade in Services in Special Session.

207 WTO and UN Environment, “Making trade work for the environment, prosperity and resilience” (2018), available at: [https://www.wto.org/english/res\\_e/publications\\_e/unereport2018\\_e.htm](https://www.wto.org/english/res_e/publications_e/unereport2018_e.htm).

208 WTO and UN Environment (2018), above.

209 Ibid.

210 Dr Alan Rogers, quoted at the Second Symposium on Natural Disasters and Trade, WTO, 14 December 2018. Summary report available at: [https://www.wto.org/english/tratop\\_e/devel\\_e/sympnaturaldisaster141218\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/sympnaturaldisaster141218_e.htm)

211 Policy Framework for public private engagement, [EC-70], Seventieth Session, 20-22 June 2018, World Meteorological Organization Available at: [WMO Policy Framework on Public-Private Engagement](#).

## 5.4 Do's and don'ts – a checklist of disaster resilience and trade measures

376. From the preceding analysis, a possible "checklist" of actions available to both disaster-affected Members and their trading partner(s) can be elicited. This list is neither definitive, nor exhaustive and is proposed as a basis for further discussion.

### 5.4.1 Trade measures that could be taken by disaster-prone Member(s) to strengthen resilience

- Ex-ante preparation and publication of emergency legislation covering areas with a trade dimension would assist disaster preparedness. Areas where such *ex ante* action could be taken include *inter alia*: customs and other border measures and government procurement processes and procedures.
- Training in, and implementation of, business continuity standards across both private and public organizations as part of disaster preparedness planning. Customs and other border agencies should be included as a priority.
- Base regulations, conformity assessment procedures and standards (including for building codes and regulations) on international standards and best practice through other standards and technical regulations, including building standards. Such measures should be based on performance-based criteria (e.g. ability to withstand a certain wind speed), rather than on specific design or descriptive characteristics.
- To help support recovery in the agriculture sector, a range of measures can be taken that fall within the ambit of Annex 2 of the AoA and as such fall outside the ambit of Members' domestic support commitments reduction commitments, such as research and development in connection with natural disasters to foster the uptake of innovation and technology by the agricultural sector; pest and disease control, early warning and inspection systems and services for better monitoring, control and resilience; training, extension and advisory services to upgrade farm household preparedness in rural areas; rural infrastructure services (including water supply, drainage, disaster-resistant works, etc.). The provision of disaster insurance may help address the broader issue of the insurance protection gap.
- Mutual recognition agreements on professional qualifications, including as part of regional trading agreements, would help facilitate the entry of relief qualified personnel across all stage of disaster response, recovery and resilience, particularly when based on existing international standards.

- Improving disaster resilience is highly dependent upon the availability of various services, e.g. environmental services, health services, engineering services, telecommunication and weather-related services.
- Financial services play a critical role in resilience, in particular insurance. Innovation in insurance products for sovereign coverage could be extended to the private sector. Reviewing restrictions on reinsurance and national treatment or quantitative restrictions on market access for foreign insurers may be relevant as part of actions to close the insurance protection gap.

### 5.4.2 Trade measures that could be taken by trading partner(s) of a disaster-prone Member to strengthen resilience

- Assistance facilitating the participation of developing and least-developed disaster-prone Members in standardizing bodies would give vulnerable countries the opportunity to provide relevant inputs to the elaboration of international standards on building materials coherent with a build back better approach. It would also facilitate the domestic regulatory process for the adoption of technical regulations whose consistency with the TBT Agreement is rebuttably presumed. The same can be said of SPS measures pursuant to Article 3 of the SPS Agreement, including the provisions for adaptation of measures to regional conditions under article 6.
- Action to build-in additional market access into the design of trade preference schemes that can be automatically triggered in the event of a disaster merit consideration – as could also the development of a decision under which such measures could alternately be notified.
- The global weather enterprise offers significant potential to mitigate the impact of natural hazards through early warning alerts, a greater reliance of satellite earth observation technology, and other services. Unlocking the potential of the sector to provide these services requires appropriate regulatory framework at national, regional and global level comprising such elements as international standards, trade in services and intellectual property protection. A dialogue between the Secretariats of the WTO and the WMO is recommended, together with consideration of the trade issues faced by the global weather enterprise within the appropriate WTO bodies dealing with environmental goods and services liberalization.



# Annexes





## Annex 1

# Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance (IFRC, 2007)

## Introduction

### 1. Purpose and Scope

1. These Guidelines are non-binding. While it is hoped that States will make use of them to strengthen their laws, policies and/or procedures related to international disaster response, as appropriate, the Guidelines do not have a direct effect on any existing rights or obligations under domestic law.
2. They draw from many existing international instruments, including United Nations General Assembly Resolutions 46/182 of 1991 and 57/150 of 2002, the Measures to Expedite International Relief of 1977 and the Hyogo Framework for Action of 2005.
3. Their purpose is to contribute to national legal preparedness by providing guidance to States interested in improving their domestic legal, policy and institutional frameworks concerning international disaster relief and initial recovery assistance. While affirming the principal role of domestic authorities and actors, they recommend minimum legal facilities to be provided to assisting States and to assisting humanitarian organizations that are willing and able to comply with minimum standards of coordination, quality and accountability. It is hoped that the use of these Guidelines will enhance the quality and efficiency of international disaster relief and initial recovery assistance in order to better serve disaster-affected communities.
4. These Guidelines are not intended to apply to situations of armed conflict or disasters that occur during armed conflicts, or to imply changes in any rules governing relief in those contexts. They are also not intended to recommend any changes to, or affect the meaning or implementation of, any existing international law or agreements, including but not limited to:
  - a) International humanitarian, human rights and refugee law;
  - b) The legal personality and status of States, inter-governmental organizations, the
  - c) International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross; International law related to privileges and immunities;
  - d) The Statutes and regulations of the International Red Cross and Red Crescent Movement and existing legal arrangements between the individual components of the Movement and States; and
  - e) Existing agreements between States or between States and assisting actors.

### 2. Definitions

For the purposes of these Guidelines,

1. "Disaster" means a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature or human activity, whether developing suddenly or as the result of long-term processes but excluding armed conflict.
2. "Disaster relief" means goods and services provided to meet the immediate needs of disaster-affected communities.
3. "Initial recovery assistance" means goods and services intended to restore or improve the pre-disaster living conditions of disaster-affected communities, including initiatives to increase resilience and reduce risk, provided for an initial period of time, as determined by the affected State, after the immediate needs of disaster-affected communities have been met.
4. "Goods" means the supplies intended to be provided to disaster-affected communities for their relief or initial recovery.
5. "Services" means activities (such as rescue and medical care) undertaken by disaster relief and initial recovery personnel to assist disaster-affected communities.
6. "Equipment" means physical items, other than goods, that are necessary for disaster relief or initial recovery assistance, such as vehicles and radios.
7. "Personnel" means the staff and volunteers providing disaster relief or initial recovery assistance.
8. "Affected State" means the State upon whose territory persons or property are affected by a disaster.
9. "Assisting State" means a State providing disaster relief or initial recovery assistance, whether through civil or military components.
10. "Originating State" means the State from which disaster relief and initial recovery personnel, goods and equipment begin travel to the affected State.

11. "Transit State" means the State through whose territorial jurisdiction disaster relief or initial recovery assistance has received permission to pass on its way to or from the affected State in connection with disaster relief or initial recovery assistance.
12. "Assisting humanitarian organization" means a foreign, regional, intergovernmental or international non-profit entity whose mandate and activities are primarily focused on humanitarian relief, recovery or development.
13. "Eligible assisting humanitarian organization" means an assisting humanitarian organization determined to be eligible to receive legal facilities pursuant to Part V by the originating, transit or affected State, as applicable.
14. "Assisting actor" means any assisting humanitarian organization, assisting State, foreign individual, foreign private company providing charitable relief or other foreign entity responding to a disaster on the territory of the affected State or sending in-kind or cash donations.

## Part I: Core Responsibilities

### 3. Responsibilities of Affected States

1. Affected States have the primary responsibility to ensure disaster risk reduction, relief and recovery assistance in their territory. National Red Cross and Red Crescent Societies, as auxiliaries to the public authorities in the humanitarian field, and domestic civil society actors play a key supporting role at the domestic level.
  2. If an affected State determines that a disaster situation exceeds national coping capacities, it should seek international and/or regional assistance to address the needs of affected persons.
  3. Affected States have the sovereign right to coordinate, regulate and monitor, disaster relief and recovery assistance provided by assisting actors on their territory, consistent with international law.
  4. Responsibilities of Assisting Actors
    1. Assisting actors and their personnel should abide by the laws of the affected State and applicable international law, coordinate with domestic authorities, and respect the human dignity of disaster-affected persons at all times.
    2. Assisting actors should ensure that their disaster relief and initial recovery assistance is provided in accordance with the principles of humanity, neutrality and impartiality, and in particular:
      - a) Aid priorities are calculated on the basis of need alone;
      - b) Provided without any adverse distinction (such as in regard to nationality, race, ethnicity, religious beliefs, class, gender, disability, age and political opinions) to disaster-affected persons;
- c) Provided without seeking to further a particular political or religious standpoint, intervene in the internal affairs of the affected State, or obtain commercial gain from charitable assistance;
  - d) Not used as a means to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief or initial recovery assistance.
3. To the greatest extent practicable, their disaster relief and initial recovery assistance should also be:
    - a) Responsive to the special needs, if any, of women and particularly vulnerable groups, which may include children, displaced persons, the elderly, persons with disabilities, and persons living with HIV and other debilitating illnesses;
    - b) Adequate for the needs of affected persons and consistent with any applicable international standards of quality;
    - c) Coordinated with other relevant domestic and assisting actors;
    - d) Provided and conducted in a manner that is sensitive to cultural, social and religious customs and traditions;
    - e) Carried out with adequate involvement of affected persons, including women, youth and the elderly, in their design, implementation, monitoring and evaluation;
    - f) Provided by competent and adequately trained personnel;
    - g) Commensurate with their organisational capacities;
    - h) Building upon and conducted in a manner that strengthens local disaster risk reduction, relief and recovery capacities and reduces future vulnerabilities to disasters;
    - i) Carried out so as to minimize negative impacts on the local community, economy, job markets, development objectives and the environment; and
    - j) Provided in a transparent manner, sharing appropriate information on activities and funding.

### 5. Additional Responsibilities of All States

1. States providing funding to other assisting actors should encourage them to act in a manner consistent with the provisions of paragraph 4.
2. All States should actively encourage members of the public interested in contributing to international disaster relief or initial recovery to make financial

donations where possible or otherwise donate only those types of relief goods expressly requested by the affected State.

## **6. Responsibilities Concerning Diversion and the Intended Use of Resources**

1. States and assisting humanitarian organizations should cooperate to prevent unlawful diversion, misappropriation, or fraud concerning disaster relief or initial recovery goods, equipment or resources and initiate proceedings as appropriate.
2. Affected States should use funds and relief goods donated to them, and which they have accepted in relation to a disaster, in a manner consistent with the expressed intent with which they were given.

## **Part II: Early Warning and Preparedness**

### **7. Early Warning**

1. In order to minimize transboundary impacts and maximize the effectiveness of any international assistance that might be required, all States should have procedures in place to facilitate the expeditious sharing of information about disasters, including emerging hazards that are likely to cause disasters, with other States and assisting humanitarian organizations as appropriate, including the United Nations' Emergency Relief Coordinator.

### **8. Legal, Policy and Institutional Frameworks**

1. As an essential element of a larger disaster risk reduction programme, States should adopt comprehensive legal, policy, and institutional frameworks and planning for disaster prevention, mitigation, preparedness, relief and recovery which take full account of the auxiliary role of their National Red Cross or Red Crescent Society, are inclusive of domestic civil society, and empower communities to enhance their own safety and resilience. States, with the support, as appropriate, of relevant regional and international organizations, should devote adequate resources to ensure the effectiveness of these frameworks.
2. These frameworks should also adequately address the initiation, facilitation, transit and regulation of international disaster relief and initial recovery assistance consistent with these Guidelines. They should allow for effective coordination of international disaster relief and initial recovery assistance, taking into account the role of the United Nations Emergency Relief Coordinator as central focal point with States and assisting humanitarian organizations concerning United Nations emergency relief operations. They should also clearly designate domestic governmental entities with responsibility and authority in these areas. Consideration should be given to establishing a national focal point to liaison between international and government actors at all levels.

3. Where necessary and appropriate, national governments should encourage other domestic actors with authority over areas of law or policy pertinent to international disaster relief or initial recovery assistance, such as provincial or local governments and private regulatory bodies, to take the necessary steps at their level to implement the Guidelines.

### **9. Regional and International Support for Domestic Capacity**

1. With a view to increasing resilience and reducing the need for international disaster relief and initial recovery assistance, the international community, including donors, regional and other relevant actors, should support developing States, domestic civil society actors and National Red Cross and Red Crescent Societies to build their capacities to prevent, mitigate, prepare for and respond to disasters domestically.
2. The international community should also support developing States to build the capacity to adequately implement legal, policy and institutional frameworks to facilitate international relief and initial recovery assistance. This support should be provided to States in a coordinated manner among the relevant actors.

## **Part III: Initiation and Termination of International Disaster Relief and Initial Recovery Assistance**

### **10. Initiation**

1. Disaster relief or initial recovery assistance should be initiated only with the consent of the affected State and in principle, on the basis of an appeal. The affected State should decide in a timely manner whether or not to request disaster relief or initial recovery assistance and communicate its decision promptly. In order to make this decision, the affected State should promptly assess needs. Consideration should be given to undertaking joint needs assessments with the United Nations and other assisting humanitarian organisations.
2. Requests and offers for assistance should be as specific as possible as to the types and amounts of goods as well as the services and expertise available or required, respectively. Affected States may also wish to indicate particular types of goods and services likely to be offered that are not needed.
3. Affected States should make available to assisting actors adequate information about domestic laws and regulations of particular relevance to the entry and operation of disaster relief or initial recovery assistance.

## 11. Initiation of Military Relief

1. Military assets should be deployed for disaster relief or initial recovery assistance only at the request or with the express consent of the affected State, after having considered comparable civilian alternatives. Prior to any such deployment, terms and conditions (including such issues as the duration of deployment, whether they must be unarmed or may be armed the use of their national uniforms, and mechanisms for cooperation with civilian actors) are to be agreed by the affected and assisting States.

## 12. Termination

1. When an affected State or an assisting actor wishes to terminate disaster relief or initial recovery assistance, it should provide appropriate notification. Upon such notification, the affected State and the assisting actor should consult with each other, bearing in mind the impact of such termination on disaster-affected communities.

## Part IV: Eligibility for Legal Facilities

### 13. Facilities for Assisting States

1. It is recommended that transit and affected States grant, at a minimum, the legal facilities described in Part V to assisting States with respect to their disaster relief or initial recovery assistance.

### 14. Facilities for Assisting Humanitarian Organizations

1. Subject to existing international law, it is the prerogative of originating, transit and affected States to determine which assisting humanitarian organizations will be eligible to receive the legal facilities described in Part V with respect to their disaster relief or initial recovery assistance.
2. It is recommended that States establish criteria for assisting humanitarian organizations seeking eligibility for legal facilities. These criteria should include a showing by the organization of its willingness and capacity to act in accordance with the responsibilities described in paragraph 4 of these Guidelines.
3. Any additional requirements imposed on assisting humanitarian organizations should not unduly burden the provision of appropriate disaster relief and initial recovery assistance.
4. Determination of eligibility by the State granting the facilities should be possible in advance of a disaster, or as soon as possible after its onset. Applicable procedures and mechanisms should be as simple and expeditious as possible. They should be clearly described and information about them should be made freely available. They might include the use of a national roster, bilateral agreements or reliance upon international or regional systems of accreditation, if available.

5. Retention of the legal facilities in Part V should be made dependent on ongoing compliance with the provisions of subsection 2 of this paragraph. However, entitlement to legal facilities should not be changed arbitrarily, retroactively or without notice appropriate to the circumstances.

### 15. Facilities for Other Assisting Actors

1. Affected States may also wish to extend, upon request, some of the legal facilities in Part V to assisting actors other than those covered by paragraphs 13 and 14, such as private companies providing charitable relief, provided this does not negatively affect operations of assisting humanitarian organizations or assisting States. Any actor receiving such facilities should be required to abide, at a minimum, by the same conditions described in paragraph 4.

## Part V: Legal Facilities for Entry and Operations

*It is recommended that States provide the legal facilities described in paragraphs 16-24 to assisting States and eligible assisting humanitarian organizations. It is understood that the granting of these facilities will be subject to the interests of national security, public order, public and environmental health, and public morals of the concerned affected, originating and transit States. Measures to protect such interests should be tailored to the exigencies of the specific disaster and consistent with the humanitarian imperative of addressing the needs of affected communities.*

*Where specific facilities recommended here are within the competence of authorities other than the national government, the national government should, where possible and appropriate, encourage those authorities to provide the relevant facilities to assisting States and eligible assisting humanitarian organizations.*

### 16. Personnel

1. With regard to disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations, affected States should:
  - a) Grant visas and any necessary work permits, ideally without cost, renewable within their territory, for the time necessary to carry out disaster relief or initial recovery activities;
  - b) In disaster relief operations, waive or significantly expedite the provision of such visas and work permits;
  - c) Establish expedited procedures for temporary recognition of professional qualifications of foreign medical personnel, architects, and engineers, drivers licences and other types of licenses and certificates that are necessary for the performance of disaster relief or initial recovery functions and that have been certified as genuine by the concerned assisting State or eligible assisting humanitarian organization, for

the time necessary to carry out disaster relief or initial recovery activities;

- d) Facilitate freedom of access to and freedom of movement in and from the disaster-affected area, bearing in mind the safety of disaster relief and initial recovery personnel.
2. Upon request, originating and transit States should likewise waive or promptly issue, ideally without cost, exit or transit visas, as appropriate, for the disaster relief and initial recovery personnel of eligible assisting humanitarian organizations.
3. Assisting States and eligible assisting humanitarian organizations should consider to what degree disaster relief and initial recovery objectives can be met through hiring local staff.

### 17. Goods and Equipment

1. With regard to disaster relief and initial recovery goods and equipment exported or imported by, or on behalf of, assisting States and eligible assisting humanitarian organizations, originating, transit and affected States should:
  - a) Exempt them from all customs duties, taxes, tariffs or governmental fees;
  - b) Exempt them from all export, transit, and import restrictions;
  - c) Simplify and minimize documentation requirements for export, transit and import;
  - d) Permit re-exportation of any equipment or unused goods which the assisting State or assisting humanitarian organization owns and wishes to retain.
2. With regard to disaster relief goods and equipment only, originating, transit and affected States should additionally:
  - a) Waive or reduce inspection requirements. Where waiver is not possible, clear relief goods and equipment rapidly and as a matter of priority, through a "preclearance" process where feasible; and
  - b) Arrange for inspection and release outside business hours and/or at a place other than a customs office as necessary to minimize delay, in accordance with the safety regulations of the affected State. Assisting States and eligible assisting humanitarian organizations should respect any routes and delivery points prescribed by the affected State.
3. In order to benefit from the facilities above, assisting States and assisting humanitarian organizations should, in accordance with agreed international standards, appropriately pack, classify and mark disaster relief and initial recovery goods and equipment, and include detailed manifests with each shipment. They should additionally inspect all such goods and equipment to ensure their quality,

appropriateness for the needs in the affected State, and conformity with the national law of the affected State and international standards.

4. Assisting States and eligible assisting humanitarian organizations should assume responsibility for removing or disposing of any unwanted and unused relief and initial recovery goods, particularly if they may pose a threat to human health or safety, or the environment.

### 18. Special Goods and Equipment

In addition to the facilities described in paragraph 17:

1. Affected States should grant temporary recognition to foreign registration and plates with regard to vehicles imported by assisting States and eligible assisting humanitarian organizations or on their behalf in disaster relief and initial recovery assistance.
2. Affected States should waive or expedite the granting of any applicable licenses and reduce any other barriers to the use, import or export of telecommunications and information technology equipment by assisting States and assisting humanitarian organizations or on their behalf in disaster relief and initial recovery assistance. Without discrimination against or negative impact to domestic relief actors, affected States should also grant (or where, appropriate, encourage other domestic actors to grant) assisting States and eligible assisting humanitarian organizations priority access to bandwidth, frequencies and satellite use for telecommunications and data transfer associated with disaster relief operations.
3. Originating, transit and affected States should reduce legal and administrative barriers to the exportation, transit, importation and re-exportation of medications and medical equipment by assisting States and eligible assisting humanitarian organizations or on their behalf in disaster relief and initial recovery assistance, to the extent consistent with public safety and international law. Assisting States and eligible assisting humanitarian organizations should take all reasonable steps to ensure the quality, appropriateness and safety of any such medications and equipment and in particular:
  - a) Any medications they import should be approved for use in the originating and affected State;
  - b) Medications they use in their own operations should be:
    - i) transported and maintained in appropriate conditions to ensure their quality and;
    - ii) guarded against misappropriation and abuse.
  - c) Any medications they donate for use by others in the affected State should be:
    - i) at least twelve months from their expiration

date upon arrival, unless otherwise agreed by receiving authorities;

- ii) transported and maintained in appropriate conditions to ensure their quality until they reach the affected State; and
  - iii) appropriately labelled in a language understood in the affected State with the International Nonproprietary Name or generic name, batch number, dosage form, strength, name of manufacturer, quantity in the container, storage conditions and expiry date.
4. Originating, transit and affected States should consider whether normal requirements regarding fumigation and prohibitions and restrictions on food imports and exports by assisting States and eligible assisting humanitarian organizations in disaster relief operations can be modified or reduced.

### 19. Transport

1. Originating, transit and affected States should grant, without undue delay, permission for the speedy passage of land, marine and air vehicles operated by an assisting State or eligible assisting humanitarian organization or on its behalf, for the purpose of transporting disaster relief or initial recovery assistance and, ideally, waive applicable fees.
2. In particular, permission should be granted for overflight, landing and departure of aircraft. Such aircraft should also be authorized to operate within the territory of the affected State as required for the delivery of assistance.
3. Any applicable exit, transit and entry visas for the operating personnel of such transport vehicles should be promptly issued.

### 20. Temporary Domestic Legal Status

1. Affected States should grant relevant entities of assisting States and eligible assisting humanitarian organizations, upon entry or as soon as possible thereafter, at least a temporary authorization to legally operate on their territory so as to enjoy the rights, *inter alia*, to open bank accounts, enter into contracts and leases, acquire and dispose of property and instigate legal proceedings, for the purpose of providing disaster relief and initial recovery assistance.
2. Assisting States and eligible assisting humanitarian organizations should also be granted the right to freely bring the necessary funds and currencies in or out of the country through legal means and to obtain legal exchange rates in connection with their disaster relief or initial recovery assistance.
3. Affected States should allow assisting States and

eligible assisting humanitarian organizations to legally hire and terminate the contracts of local personnel.

### 21. Taxation

1. Affected States should provide exemptions to assisting States and eligible assisting humanitarian organizations from value-added and other taxes or duties directly associated with disaster relief and initial recovery assistance.

### 22. Security

1. Affected States should take appropriate measures to address the safety and security of disaster relief and initial recovery personnel of assisting States and eligible assisting humanitarian organizations and of the premises, facilities, means of transport, equipment and goods used in connection with their disaster relief or initial recovery assistance. Assisting States and assisting humanitarian organizations should also take appropriate steps in their own planning and operations to mitigate security risks.

### 23. Extended Hours

1. Affected States should endeavour to ensure, when necessary, that State operated offices and services essential to the timely delivery of international disaster relief function outside of normal business hours.

### 24. Costs

1. The costs of providing international disaster relief or initial recovery assistance pursuant to these Guidelines should normally be borne by the assisting State or assisting humanitarian organization. However, assisting States may agree in advance with the affected State for the reimbursement of certain costs and fees, or for the temporary loan of equipment.
2. Affected States should consider, when it is in their power and to the extent possible under the circumstances, providing certain services at reduced or no cost to assisting States and eligible assisting humanitarian organizations, which may include:
  - a) In-country transport, including by national airlines;
  - b) Use of buildings and land for office and warehouse space; and
  - c) Use of cargo handling equipment and logistic support.

## Annex 2

# Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (IFRC, 2013)

## Chapter I General Provisions

### Article 1 Short Title

- a. This Act shall be known as the Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.
- b. This Act may also be cited as the International Disaster Assistance Act of [YEAR].
- d. The provisions of this Act do not apply to situations of armed conflict or to Disasters that occur in an area of [country name] also affected by an armed conflict. International assistance provided in those circumstances is governed by [International Humanitarian Law or Act Implementing the Geneva Conventions].

### Article 2 Purpose and Scope of the Act

- a. This Act [implements Articles \*\*\* of the Constitution of country name.] It is based on the understanding that [country name/states/territories] bears [bear] the primary responsibility to respond to Disasters on its/[their] territory, but that International Disaster Assistance may sometimes be required to supplement domestic efforts.
- b. This Act sets out procedures, roles and responsibilities related to the facilitation and regulation of International Disaster Assistance provided to [country name] in the event of a Disaster on its territory, as well as for International Disaster Assistance transiting through [country name]'s territory to aid another affected state.
- c. In particular, this Act:
  - i) sets out roles and responsibilities for key ministries and departments concerned with the facilitation and regulation of International Disaster Assistance;
  - ii) establishes procedures for initiating, coordinating, and terminating International Disaster Assistance;
  - iii) establishes the mechanism for recognition of eligibility for Legal Facilities for certain Assisting Actors;
  - iv) specifies the Legal Facilities to be provided to such Eligible Actors;
  - v) specifies that minimum standards are expected from Assisting Actors providing International Disaster Assistance; and
  - vi) facilitates the transit of International Disaster Assistance to other countries affected by a Disaster.

### Article 3 Definitions

For the purposes of this Act:

“Assisting Actor” means any Assisting International Actor and any Assisting Domestic Actor responding to a Disaster in [country name].

“Assisting Domestic Actor” means any not-for-profit entity established under the laws of [country name], which is responding to a Disaster in the territory of [country name].

“Assisting International Actor” means any foreign state, organization, entity or individual responding to a Disaster on the territory of [country name] or transiting through the territory of [country name] to respond to a Disaster in another country.

“Assisting State” means any foreign government that is providing Disaster Relief or Initial Recovery Assistance to [country name], whether through its civilian or military institutions.

“Disaster” [is defined as set out in Article \*\*\* of the [national disaster management act] [or means a serious disruption of the functioning of society, which poses a significant, widespread threat to human life, health, property or the environment, whether arising from accident, nature, or human activity, whether developing suddenly or as the result of long-term processes, but excluding armed conflict.]

“Disaster Relief” means the Goods, Equipment, Services and Internationally Donated Funds provided to meet the immediate humanitarian needs of Disaster affected communities, including rescue.

“Domestic Non-Governmental Organization” or “Domestic NGO” means any non-governmental, not-for-profit entity, which has its headquarters in [country name] and whose mandate and activities are focused on humanitarian relief, recovery or development.

“Eligible Actor” means any Assisting Actor that has been determined to be eligible to receive Legal Facilities, in accordance with Chapters V and VI of this Act.

“Equipment” means physical items, other than Goods, which come from international sources and are

designated for use in Disaster Relief or Initial Recovery Assistance, including, but not limited to, vehicles, medical, and telecommunications equipment.

“Foreign Components of the International Red Cross and Red Crescent Movement” means foreign National Red Cross or Red Crescent Societies, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross.

“Foreign Non-Governmental Organization” or “Foreign NGO” means any nongovernmental, not-for-profit entity not headquartered in *[country name]*, whose mandate and activities are focused on humanitarian relief, recovery or development.

“Goods” means supplies from international sources intended to be provided to Disaster affected communities for their relief or initial recovery.

“Initial Recovery Assistance” means Goods, Equipment, Services and Internationally Donated Funds intended to restore or improve the pre-Disaster living conditions of Disaster affected communities, including initiatives to increase resilience to Disasters and reduce Disaster risk.

“International Disaster Assistance” means Disaster Relief and Initial Recovery Assistance that is provided by Assisting International Actors, or imported or otherwise brought to *[country name]* from abroad by or on behalf of Assisting Domestic Actors.

“International Disaster Relief Period” means the period following a Disaster, as described in Article 8 and Article 9 of this Act, during which the relevant Legal Facilities described in Chapter VI are made available to Eligible Actors for the purpose of providing Disaster Relief.

“International Initial Recovery Period” means the period following a Disaster, as described in Article 8 and Article 10 of this Act, during which the relevant Legal Facilities described in Chapter VI are made available to Eligible Actors for the purpose of providing Initial Recovery Assistance.

“Internationally Donated Funds” means any funds donated by foreign persons or entities directly to the Government of *[country name]* or to an Assisting Domestic Actor for purposes of Disaster Relief or Initial Recovery Assistance.

“International Personnel” means the staff and volunteers of any Assisting Actor providing Disaster Relief or Initial Recovery Assistance in *[country name]*, being persons who are neither citizens of *[country name]* nor domiciled in *[country name]* prior to their recruitment by the Assisting Actor.

“Legal Facilities” means the special entitlements and exemptions that are made available to Eligible Actors under Chapter VI of this Act.

“Locally Engaged Personnel” means nationals of or persons domiciled in *[country name]* who are recruited as staff or volunteers by Assisting International Actors to provide Disaster Relief or Initial Recovery Assistance.

“Services” means activities undertaken by Assisting Actors to assist Disaster-affected communities with their relief or initial recovery, such as search and rescue activities, medical care, protection activities and information.

“Transit Facilities” means the special entitlements and exemptions that are made available to Assisting International Actors under Chapter VIII of this Act.

“Transit Facilities Period” means the period following a Disaster in another country, as described in Article 62 of this Act, during which the relevant Legal Facilities described in Chapter VIII are made available to Assisting Actors for the purpose of providing Disaster Relief or Initial Recovery Assistance.

“Transport” means the land, air or water vehicles operated by or on behalf of Assisting Actors to transport International Personnel, Goods and Equipment across an international border for the purpose of providing Disaster Relief or Initial Recovery Assistance.

#### **Article 4 Existing Rights, Privileges and Immunities**

Nothing in this Act shall be interpreted to limit or reduce any existing rights, privileges or immunities that may be enjoyed by an Assisting Actor as separately recognized by other laws or agreements of *[country name]*, including the *[International Organisations Act and the Diplomatic/Consular Relations Act]* and any status or headquarters agreement between *[country name]* and an Assisting Actor.

## **Chapter II Initiation and Termination of International Disaster Assistance**

#### **Article 5 Assessment of the Need for International Disaster Assistance**

- a. Immediately after the onset of a major Disaster, and after consultation with relevant *[provincial/district/state]* and local authorities, the *[relevant disaster management authority]* shall make a determination, based on initial estimates of needs and damage, as to whether domestic capacities are likely to be sufficient to attend to the needs for Disaster Relief and Initial Recovery Assistance. This determination may also be made, at the discretion of the *[relevant disaster management authority]*, prior to the onset of an imminent major Disaster.
- b. In the event of a determination that domestic response capacities are not likely to be sufficient due to the scale of the Disaster, the *[relevant disaster management authority]* shall advise the *[President/Prime Minister]* and recommend that an immediate request be made for International Disaster Assistance.
- c. If such a recommendation is made, the *[relevant disaster management authority]* shall, after consultation with relevant *[provincial/district/state]* and local authorities, develop a preliminary list of Goods, Equipment and Services required. The



*[relevant disaster management authority]* shall make this list available to potential Assisting International Actors immediately upon the commencement of an International Disaster Relief Period pursuant to Article 8. The list shall be updated as needed to reflect new information and changing circumstances.

- d. A determination that domestic capacities are likely to be sufficient and that International Disaster Assistance is therefore unnecessary may be reviewed and rescinded by the *[relevant disaster management authority]* at any time, in light of updated information.

#### **Article 6** *Requests for International Disaster Assistance*

- a. Upon the advice of the *[relevant disaster management authority]*, the *[President/Prime Minister]* may make a request for International Disaster Assistance. That request may be specifically directed to particular international actors, or it may be a general request directed to the international community as a whole. *[In the latter case, the request shall be directed to the [relevant regional organization and] the United Nations Emergency Relief Coordinator for assistance in dissemination to potential Assisting International Actors.]*
- b. The request shall be accompanied by:
- i) information as to the extent and type of assistance required, based on the list prepared by the *[relevant disaster management authority]* pursuant to Article 5, unless gathering such information would lead to undue delay in issuing the request; and
  - ii) information on the procedures for Assisting International Actors to make offers or provide assistance pursuant to Article 7.

#### **Article 7** *Offers and Acceptance of International Assistance*

- a. Except as otherwise provided in subsection [d], Assisting International Actors may provide International Disaster Assistance in *[country name]* only if they have made an offer that has been accepted pursuant to this Article.
- b. Assisting States and intergovernmental organizations *[including the United Nations]* interested in providing International Disaster Assistance shall direct offers to the Ministry of Foreign Affairs *[through the appropriate [country name] embassy]*. Offers should indicate, in general terms, the type, amount, means of delivery and estimated duration of assistance to be provided. The Ministry of Foreign Affairs shall then consult with the *[relevant disaster management authority]* about such offers. Upon the direction of the *[relevant disaster management authority]*, the Ministry of Foreign Affairs may accept such offers, in whole or in part.

- c. Assisting States planning to provide aid through military actors shall make such offers according to *[regulations to be made under this Act / agreement between [country name] and the Assisting States / relevant regional agreement]*. They may be accepted, in whole or in part, with the specific conditions set out in *[the aforementioned regulations / agreement]*.

- d. In the event of a general request for International Disaster Assistance made pursuant to Article 6(a), Assisting International Actors that have previously been found or deemed eligible for Legal Facilities pursuant to Chapter V of this Act are not required to make formal offers. However, they shall comply with the terms of the general request and shall inform the *[relevant disaster management authority]* of the type, amount and estimated duration of assistance to be provided *[at least \*\* hours]* in advance of their arrival. This provision shall not apply to Assisting States or intergovernmental organizations.

- e. In the absence of a general request for International Disaster Assistance, Assisting International Actors may make unsolicited offers to the Ministry of Foreign Affairs *[through, the appropriate [country name] embassy]*. The Ministry of Foreign Affairs shall consult with the *[relevant disaster management authority]* and, upon its direction, may accept such offers, in whole or in part.

- f. The *[relevant disaster management authority]* shall determine whether to accept or reject offers of International Disaster Assistance with urgency appropriate to the circumstances.

#### **Article 8** *International Disaster Relief and Initial Recovery Periods*

- a. The International Disaster Relief and Initial Recovery Periods shall both commence simultaneously upon the issuance of a request for International Disaster Assistance under Article 6, or upon acceptance of an offer under Article 7, and shall continue until terminated pursuant to Article 9 or Article 10, as appropriate.
- b. The Legal Facilities described in Chapter VI shall only be effective during the International Disaster Relief and Initial Recovery Periods.

#### **Article 9** *Termination of the International Disaster Relief Period*

- a. When, on the basis of updated needs assessments and other information, and in consultation with Assisting Actors, the *[relevant disaster management authority]* is satisfied that the need for Disaster Relief is coming to an end, it shall advise the *[President/Prime Minister/ high level committee or council on national disaster management]* to approve a termination date for the International Disaster Relief Period, with due consideration for the impact on on-going relief activities. This termination shall not affect the on-going validity of the International Initial Recovery Period.

- b. The termination date shall be announced to Assisting Actors no later than *[\*\*]* days prior to the proposed date. The announcement shall also include information about the anticipated on-going needs for Goods and Services related to Initial Recovery Assistance, if any.
- c. Upon the issuance of an announcement pursuant to this Article, the *[relevant disaster management authority]* shall consult with Assisting Actors actively involved in Disaster Relief work in order to reduce any negative impact from the termination and, where necessary, to ensure an adequate handover of responsibilities.

**Article 10** *Termination of the International Initial Recovery Period*

- a. When, on the basis of updated needs assessments and other information, and in consultation with Assisting Actors, the *[relevant disaster management authority]* is satisfied that the need for Initial Recovery Assistance is coming to an end, it shall advise the *[President/Prime Minister/ high level committee or council on national disaster management]* to approve a termination date for the International Initial Recovery Period, with due consideration for the impact on on-going initial recovery activities.
- b. The termination date shall be announced to Assisting Actors no later than *[90]* days prior to the proposed date.
- c. Upon the issuance of an announcement pursuant to this Article, the *[relevant disaster management authority]* shall consult with Assisting Actors actively involved in Initial Recovery Assistance work in order to reduce any negative impact from the termination and, where necessary, to ensure an adequate handover of responsibilities.

**Article 11** *International support for the [country name] National [Red Cross/Red Crescent] Society*

- a. Notwithstanding the provisions of Article 7, and in line with its fundamental principles and auxiliary role as set out in *[National Red Cross/Red Crescent act or decree]*, the *[country name Red Cross/Red Crescent] Society* may request assistance from any of the Foreign Components of the International Red Cross and Red Crescent Movement to supplement its disaster relief and recovery work at any time. The *[national disaster management agency]* shall be informed of any such request.
- b. In the event that a general request for international assistance has not yet been made pursuant to Article 6, the *[national disaster management agency]* may, upon request of the *[country name Red Cross/Red Crescent] Society*, approve the commencement of the international disaster relief and initial recovery periods with respect to assistance from the Foreign Components of the International Red Cross and Red Crescent Movement. These periods shall continue until terminated pursuant to Article 9 or Article 10, as appropriate.

## Chapter III Coordination and Preparedness for International Disaster Assistance

**Article 12** *Coordination Duties and Powers of the Focal Point Agency*

- a. The *[relevant disaster management authority]* established by the *[national disaster management act]* shall serve as a central focal point agency for liaison between the government of *[country name]* and Assisting International Actors, promoting the effective facilitation, coordination and oversight of International Disaster Assistance pursuant to this Chapter. As such, the *[relevant disaster management authority]* shall serve as the main counterpart for any applicable international or regional coordination mechanisms, including those of the United Nations.
- b. The *[relevant disaster management authority]* shall inform Assisting Actors and relevant national, *[provincial/district/state]* and local governmental agencies of their rights and responsibilities under this Act and orient them to other laws, rules or procedures especially relevant to Disaster Relief and Initial Recovery Assistance.
- c. *[During the International Disaster Relief and Initial Recovery Periods,]* the *[relevant disaster management authority]* may *[request/order]* any relevant governmental body to undertake actions or make available assets or premises required to facilitate the work of Assisting International Actors to provide Disaster Relief or Initial Recovery Assistance. Such bodies *[shall/may]* comply to the fullest extent possible within their legal mandates. Any *[request/order]* that may impose a substantial burden on the cooperating agency may be reviewed at its *request* by the *[appropriate high-level official]*.
- d. *[During the International Disaster Relief and Initial Recovery Periods,]* the *[relevant disaster management authority]* may request any private actor to undertake voluntary actions, at their own expense, as needed to facilitate the work of Assisting International Actors to provide Disaster Relief or Initial Recovery Assistance. This may include a request to lower or waive fees or charges for key services required by Assisting International Actors and/or to extend operating hours for their provision.
- e. The *[relevant disaster management authority]* shall ensure that attention is paid as appropriate to potential international assistance in simulations, exercises and training that it organizes.

**Article 13** *Taskforce on International Disaster Assistance Preparedness*

- a. A Taskforce on International Disaster Assistance Preparedness (hereinafter “the Taskforce”) is hereby established under the chairmanship of the *[relevant disaster management authority]*, with the primary role of enhancing preparedness for implementation of this Act in case of a Disaster requiring International Disaster Assistance.

- b. The Taskforce shall be composed of representatives from:
- i) the *[relevant disaster management authority]*;
  - ii) *[other appropriate governmental ministries, agencies and/or departments]*;
  - iii) the [country name Red Cross/Red Crescent] Society;
  - iv) *[domestic NGOs active in disaster management]*; and
  - v) such other members as the *[relevant disaster management authority]* may invite to participate, including but not limited to relevant officials from *[provincial/district/state]* and local government offices, and other national stakeholders, as well as relevant United Nations agencies, regional organizations, Foreign NGOs, or Foreign Components of the International Red Cross and Red Crescent Movement.
- c. The Taskforce shall provide technical advice on preparedness for the facilitation of International Disaster Assistance to the *[relevant disaster management authority]* as requested. In fulfilling this role, the Taskforce shall:
- i) prepare and update manuals, guidelines, plans or other procedures related to the entry and coordination of Disaster Relief and Initial Recovery Assistance;
  - ii) compile and update information on existing bilateral, regional and international coordination mechanisms applicable to *[country name]*, and provide advice to the *[relevant disaster management authority]* on the further development of such mechanisms;
  - iii) develop and maintain a list of personnel nominated by the relevant ministries to participate in Single Window International Facilitation Teams (SWIFTs), as described in Article 14, and assist the *[relevant disaster management authority]* to convene the SWIFTs immediately upon the commencement of an International Disaster Relief Period pursuant to Article 8, if required for the volume of International Disaster Assistance expected;
  - iv) *[advise the relevant disaster management authority on the development of/develop]* quality standards for Disaster Relief and Initial Recovery Assistance, as described in Chapter IV of this Act;
  - v) develop, in accordance with Chapter IV of this Act, procedures, documentation requirements and information about the responsibilities of Assisting Actors under this Act; and
  - vi) undertake other tasks related to International Disaster Assistance, as requested by the *[relevant disaster management authority]* or *[other relevant authority]*.
- d. The Taskforce shall meet:
- (i) immediately upon the commencement of an International Disaster Relief Period pursuant to Article 8, to ensure the effective operation of the SWIFTs described in Article 14 and to advise the *[relevant disaster management authority]* on the application of relevant procedures, manuals and other technical materials concerning the facilitation of International Disaster Assistance; and
  - (ii) otherwise as necessary, and in any event, no less frequently than once per year, to review national preparedness for implementing the provisions of this Act and to carry out the functions assigned to it pursuant to this Article.
- Article 14** *Single Window International Facilitation Teams (SWIFTs)*
- a. Single Window International Facilitation Teams (SWIFTs) shall be established in accordance with this Article, for the purpose of consolidating and expediting the legal requirements concerning entry of incoming International Personnel, Goods, Equipment and Transport, as well as the application process for eligibility, as described in Chapter V.
  - b. In consultation with the Taskforce on International Disaster Assistance Preparedness, the *[relevant disaster management authority]* shall establish the number, membership, functions, authorities and operating procedures for the SWIFTs, consistent with this Act and other relevant legislation.
  - c. The SWIFTs shall be composed of representatives of relevant ministries and agencies, from the list established and updated by the Taskforce on International Disaster Assistance Preparedness in accordance with Article 13.
  - d. Upon the commencement of an International Disaster Relief Period pursuant to Article 8, SWIFTs shall be deployed to primary points of entry for International Disaster Assistance, including, as circumstances dictate, relevant airports, seaports and land border crossing points.
  - e. In the absence of a SWIFT team at a particular border crossing, officials involved in regulating the entry of International Personnel, Goods, Equipment and Transport shall nevertheless apply the relevant provisions of this Act.

**Article 15** *Operational Coordination of Assisting International Actors*

- a. National [provincial/district/state] and local authorities shall endeavour to integrate the role of Assisting International Actors into their contingency planning and mechanisms for operational coordination of Disaster Relief and Initial Recovery Assistance efforts [calling, as appropriate, on the assistance and advice of the UN Emergency Relief Coordinator]. In particular, they shall endeavour to facilitate the work of Assisting International Actors, while balancing the urgent needs of people affected by Disaster and necessary safeguards relating to public safety and health, coordination and oversight.
- b. Assisting International Actors shall cooperate and coordinate with national, [provincial/district/state] and local authorities in their Disaster Relief and Initial Recovery Assistance. In particular, they shall provide them with such information as is available to them on the needs of Disaster-affected persons, and on the location, type and extent of their Disaster Relief and Initial Recovery Assistance operations, as required for a coordinated and effective response.
- c. With due consideration for the need to adequately coordinate and oversee their work, no [country name] official shall seek to prevent Assisting International Actors from acting according to humanitarian principles, as set out in Article 16.
  - i) Assisting International Actors shall cooperate with any international or regional mechanisms for coordination that have been specifically approved for a particular operation by the [relevant disaster management authority], including those of [appropriate regional organization and] the United Nations.
  - ii) seek to further a particular political or religious standpoint or interfere in internal matters irrelevant to the Disaster response;
  - iii) seek to obtain commercial gain from their assistance; or
  - iv) gather sensitive information of a political, economic or military nature that is irrelevant to Disaster Relief or Initial Recovery Assistance.
- d. In addition, non-governmental organizations shall comply with the principle of independence. In particular, they shall not act as instruments of the foreign policy of any government.

**Article 17** *Respect for the Dignity and Privacy of Persons Affected by Disaster*

- a. Assisting Actors providing International Disaster Assistance shall respect the dignity of persons affected by a Disaster. In particular, they shall consult with the beneficiaries of their assistance in the design, implementation, monitoring and evaluation of the Disaster Relief and Initial Recovery Assistance they provide.
- b. Assisting Actors shall respect the privacy of persons affected by a Disaster in their data management. They shall share personally-identifiable information about their beneficiaries only when essential to provide humanitarian assistance, avoid duplication in aid, or prevent fraud.

**Article 18** *Quality of Goods and Services*

- a. Assisting Actors shall ensure that the Goods and Services they provide are appropriate to the needs and circumstances of persons affected by the Disaster and in compliance with the requirements of this Act and all applicable laws of [country name].
- b. Except as described in subsection (c) of this Article, Assisting Actors shall additionally make their best efforts, in light of all of the circumstances, to ensure that the Goods and Services they provide conform to the minimum standards in the Sphere Project Humanitarian Charter and Minimum Standards in Humanitarian Response”
- c. If an Assisting Actor believes that the circumstances make it impractical or unwise for it to make any attempt to conform with a significant aspect of the Sphere Standards, it may so inform the [relevant disaster management authority] and seek its advance approval for an exemption from the requirement of subsection (b) of this Article. [Alternative Article 18(b) & (c): Assisting Actors shall additionally comply with technical quality standards as contained by regulations to be developed by the [relevant disaster management authority], in consultation with the Technical Taskforce on International Disaster Assistance, within [six months] of the entry into force of this Act.]

**Chapter IV** **General Responsibilities of Assisting Actors****Article 16** *Principles of International Disaster Assistance*

- a. The government of [country name] bears the primary responsibility for responding to disasters on its territory. Assisting Actors' role is to supplement and complement domestic efforts.
- b. Assisting Actors shall comply with national law and respect the culture of communities they assist.
- c. Assisting Actors shall comply with the principles of humanity, neutrality and impartiality in providing International Disaster Assistance. In particular, they shall establish their aid priorities on the basis of need alone and they shall not:
  - i) engage in any adverse distinctions, exclusions or preferences based on status, such as nationality, race, ethnicity, religion, class, gender, sexual orientation, disability, age or political opinion;

**Article 19** *Removal or Disposal of Unusable Goods, Non-Functioning Equipment and other Waste*

Assisting Actors shall ensure that any Goods or Equipment they import for the purpose of Disaster Relief or Initial Recovery Assistance, which are or which become unusable, as well as any other waste products (including hazardous waste) produced by them in the course of their Disaster Relief or Initial Recovery Assistance operations, are removed, destroyed, recycled or otherwise disposed of in a safe, environmentally sensitive and effective manner, in compliance with [country name]'s law, and at their own cost.

## Chapter V Eligibility for Legal Facilities

**Article 20** *Provision of Legal Facilities to Eligible Actors*

- a. The Legal Facilities described in Chapter VI are available only to Eligible Actors as described in this Chapter and are effective only during the International Disaster Relief and Initial Recovery Periods. Unless otherwise stated in Chapter VI, the Legal Facilities are equally effective during both of those periods.
- b. All of the Legal Facilities described in Chapter VI shall be available to Assisting International Actors deemed eligible pursuant to Article 21, or approved as eligible pursuant to Article 22.
- c. The Legal Facilities described in Parts 1 to 5 of Chapter VI only shall be available to Assisting Domestic Actors deemed eligible pursuant to Article 21 or approved as eligible pursuant to Article 22, with respect to International Personnel, Goods, Equipment and Transport they bring to the country from abroad to provide Disaster Relief or Initial Recovery Assistance.

**Article 21** *Deemed Eligibility for Legal Facilities for Certain Assisting Actors*

- a. Upon the commencement of an International Disaster Relief Period pursuant to Article 8, the following Assisting Actors shall be deemed eligible to receive the Legal Facilities described in Chapter VI of this Act without a further application process pursuant to Article 22:
  - i) Assisting States;
  - ii) relevant intergovernmental organizations, including United Nations and regional organizations;
  - iii) the [country name Red Cross/Red Crescent] Society and Foreign Components of the International Red Cross and Red Crescent Movement; and
  - iv) any other Assisting Actor that the [relevant disaster management authority] wishes to deem eligible.

- b. In order to facilitate access to the Legal Facilities, the [relevant disaster management authority] shall provide Assisting Actors described in subsection (a) a certificate of eligibility, upon their request.

**Article 22** *Application for Eligibility for Legal Facilities by Assisting Actors*

- a. With the exception of those deemed eligible pursuant to Article 21, Assisting Actors seeking eligibility shall apply in accordance with this Article. Assisting International Actors may apply only if they are recognized as a legal person in a foreign country or under international law.
- b. The eligibility of private businesses for Legal Facilities shall be limited to assistance from which they make no profit or other commercial gain.
- c. Applications for eligibility may be made in advance of any Disaster, or after the onset of a Disaster. In the event that eligibility for Legal Facilities is granted in advance of a Disaster, it will remain valid for [5 years], after which a new application is required. The Legal Facilities will enter into legal effect only during an International Disaster Relief or Initial Recovery Period.
- d. All Assisting Actors seeking eligibility shall submit:
  - i) certified copies of documents evidencing their legal personality in a foreign jurisdiction or under international law, in the case of Assisting International Actors, or under the laws of [country name], in the case of Assisting Domestic Actors;
  - ii) the name and full contact details of the authorized representative of the organization and the address of its headquarters, if any, in [country name];
  - iii) documentation relating to their previous experience and current capacity in providing effective Disaster Relief or Initial Recovery Assistance;
  - iv) documentation of adequate liability insurance; and
  - v) an undertaking relating to their organizational commitment and practices concerning the responsibilities set out in Chapter IV.

**Article 23** *Eligibility Determination and Certificates*

- a. The [relevant disaster management authority] shall respond to any application under Article 22 by either approving it and issuing a certificate of eligibility for the relevant Chapter VI Legal Facilities, or by giving notice that the application has not been approved.
  - i) For applications made during the International Disaster Relief Period, the

*[relevant disaster management authority]* shall respond no later than *[specified time]* after receipt of all required documents.

- ii) For applications made after the termination of an International Disaster Relief Period but during an International Initial Recovery Period, the *[relevant disaster management authority]* shall respond no later than *[specified time]* after receipt of all required documents.
- b. Upon approval of an application pursuant to Article 22 or upon the request of an Assisting Actor deemed eligible pursuant to Article 21, the *[relevant disaster management authority]* shall issue a certificate indicating that the Assisting Actor is eligible for the relevant Chapter VI Legal Facilities. In the case of a Domestic Assisting Actor, the certificate shall state that the eligibility extends to the Legal Facilities in Parts 1 to 5 of Chapter VI.
- c. A certificate issued in accordance with this Article shall be valid for a period of *[5 years]* from the date of issue and may be renewed through a new decision under Article 21 or Article 22.

#### **Article 24 Termination of Eligibility for Legal Facilities**

Eligibility of Assisting Actors for the relevant Chapter VI Legal Facilities may be terminated upon the request of the Eligible Actor concerned or upon the termination of the Legal Facilities for failure to comply with this Act, pursuant to Article 57.

## **Chapter VI Legal Facilities for Eligible Actors**

### **Part 1 International Personnel**

#### **Article 25 Disaster Visa**

- a. The International Personnel of Eligible Actors shall be entitled to a Disaster Visa, unless national security or public health and safety concerns related to the particular individual preclude it. Disaster Visas shall be issued without a fee for an initial period of *[three months]*, and renewable without a fee for periods of up to *[six months]* from within *[country name]*, then as often as necessary throughout the International Disaster Relief and Initial Recovery Periods.
- b. During the International Disaster Relief Period, Disaster Visas shall be issued to the International Personnel of Eligible Actors, upon arrival at the point of entry *[or by prior application to the appropriate embassy, which shall adjudicate them within [specified time]]*.
- c. After the termination of the International Disaster Relief Period but during the International Initial Recovery Period, Disaster Visas shall be issued by prior application to the appropriate *[country name]* embassy, which shall adjudicate them within *[specified time]*.

- d. Holders of the Disaster Visa shall be allowed to undertake Disaster Relief and Initial Recovery Assistance work for their sponsoring entities during the International Disaster Relief and Initial Recovery Periods without the requirement to seek a separate residence or work permit.

*[Alternative Article 25 Visa Waiver – The International Personnel of Eligible Actors shall be entitled to waiver of entry visa requirements, including any associated fees or charges. International Personnel who enter [country name] under this Disaster visa waiver, shall be allowed to undertake Disaster Relief and Initial Recovery Assistance work for their sponsoring entities without the requirement to seek a separate residence or work permit. As long as they continue as International Personnel of their sponsoring entities, they shall be entitled to remain in or re-enter the territory as often as necessary throughout the International Disaster Relief and Initial Recovery Periods. After that time, they may apply for a relevant visa from within the country.]*

#### **Article 26 Recognition of Foreign Professional Qualifications**

- a. Eligible Actors wishing to deploy International Personnel for tasks requiring legal recognition of their foreign professional qualifications shall certify the validity of those qualifications under the law of the country where they were obtained and the competence of their Personnel for the tasks envisaged.
- b. Within *[six months]* of the entry into force of this Act, the *[relevant authority]* shall establish lists of countries and/or educational institutions whose *[health professionals, architectural, engineering and other relevant professionals]* may be given automatic recognition of their foreign qualifications when certified by an Eligible Actor pursuant to subsection (a) of this Article. The lists shall be reviewed at least *[once per year]* and published *[electronically]*.
- c. The *[relevant authority]* shall also establish expedited procedures to be applied for the assessment and recognition of the foreign qualifications of the International Personnel originating from countries or institutions not included on the above-mentioned lists, when certified by their sponsoring Eligible Actor pursuant to subsection (a) of this Article.
- d. Recognition of qualifications under this Article shall exempt International Personnel of Eligible Actors from any obligations for compulsory membership of professional associations or other professional registration processes within *[country name]* until the end of the International Initial Recovery Period.
- e. Recognition of qualifications under this Article shall remain valid until the end of the International Initial Recovery Period, absent individual criminal conduct, or other professional misconduct sufficient to bar the individual from professional practice in *[country name]*.

**Article 27** *Recognition of Foreign Driving Licenses*

The [relevant authority] shall accord temporary recognition of the foreign driving licenses of the International Personnel of Eligible Actors, during the International Disaster Relief and Initial Recovery Periods.

**Article 28** *Facilitation of Access*

The International Personnel of Eligible Actors shall be allowed access to Disaster affected areas and persons requiring Disaster Relief or Initial Recovery Assistance, subject to coordination requirements pursuant to Article 15 and limitations based on national security, public order or public health, weighed in the context of the urgency of the Disaster needs. They shall be permitted to provide their Goods and Services directly to affected persons.

**Part 2** *Entry of International Disaster Goods and Equipment***Article 29** *Customs Facilitation and Priority Treatment*

As further described in this Part, the [customs authority] shall facilitate the rapid importation of consignments of Goods and Equipment by Eligible Actors and shall accord them priority treatment in handling.

**Article 30** *Duty of Compliance by Eligible Actors*

In order to benefit from the Legal Facilities in this Part, Eligible Actors shall:

- a. declare that all the Goods and Equipment they seek to import under this Part are exclusively for Disaster Relief or Initial Recovery Assistance and that they comply with any relevant standards under national law, including as provided in this Act or its regulations; and
- b. pack, classify and mark their consignments in accordance with the requirements described in this part and as directed by the [customs authority].

**Article 31** *Representation to Customs*

Eligible Actors may make representations directly to the [customs authority] with respect to their International Disaster Assistance consignments or through a designated third party acting on their behalf.

**Article 32** *Exemption from Import Duties, Taxes and Restrictions*

Consignments of Goods and Equipment by or on behalf of Eligible Actors shall benefit from:

- a. exemption from all duties and taxes;
- b. waiver of economic prohibitions and restrictions except for categories of special Goods and Equipment as provided in Part 3 of this Act; and
- c. clearance without regard to the country of origin or the country from which the Goods have arrived,

subject to monitoring for reasons of public health and security.

**Article 33** *Simplification of Documentation Requirements*

The [customs authority] shall:

- a. clear or release consignments of Goods and Equipment sent by or on behalf of Eligible Actors on the basis of a [simplified / provisional goods declaration] providing the minimum information necessary for the [customs authority] to identify the Goods and Equipment and subject, when deemed necessary, to completion of a more complete declaration within a specified period;
- b. allow a single goods declaration for all imports of Goods or Equipment by or on behalf of Eligible Actors;
- c. allow the goods declaration and any supporting documents relating to consignments of Goods or Equipment sent by or on behalf of Eligible Actors to be lodged [electronically and] without any fee;
- d. allow the lodging and registering or checking of the goods declaration and supporting documents prior to the arrival of consignments of Goods or Equipment sent by or on behalf of Eligible Actors, to facilitate their release upon arrival; and
- e. waive any requirement of translation of details in documents relating to consignments of Goods or Equipment sent by or on behalf of Eligible Actors unless it is absolutely necessary for the purposes of release or clearance.

**Article 34** *Extended Hours for Customs*

During the International Disaster Relief Period only, the [customs authority] shall:

- a. upon request, and without additional charges, carry out the functions necessary for the release or clearance of consignments of Goods or Equipment imported by or on behalf of Eligible Actors outside their designated hours of business and/or away from customs offices when necessary; and
- b. coordinate with the business hours and competencies of any other relevant [departments/ ministries] involved in the approval of incoming consignments and, whenever possible, carry out joint operations, such as joint customs controls, including participation in SWIFTs, if established under Article 14.

**Article 35** *Inspections and Customs Security*

During the International Disaster Relief Period only, the [customs authority] shall:

- a. on the basis of risk analysis, take only such action as it deems essential to ensure compliance with customs and related laws for the purpose of

checking the goods declaration of a consignment sent by or on behalf of Eligible Actors;

- b. use risk analysis, preferably on the basis of advance information, to determine which consignments of Goods and Equipment imported by or on behalf of Eligible Actors shall be inspected and the extent of that inspection; and
- c. waive, as feasible, any customs security that would normally be required in respect of consignments of Goods and Equipment imported by or on behalf of Eligible Actors. However, if, in an exceptional case, customs security is deemed necessary, it shall accept as security an undertaking from the relevant Eligible Actor or, where appropriate, a general customs security.

#### **Article 36** *Agreements on Pre-Positioning of Stock*

The *[relevant authority]* may enter into an agreement with an Eligible Actor to extend the relevant Legal Facilities of this Part to pre-positioning of stocks in *[country name]*, in preparation for potential Disaster, or after a specific Disaster warning.

#### **Part 3** *Expedited Entry and Use Restrictions for Specific International Disaster Goods and Equipment*

##### **Article 37** *Telecommunications Equipment*

- a. Eligible Actors shall be permitted to import telecommunications Equipment for the purpose of Disaster Relief or Initial Recovery Assistance without restrictions, except as required for purposes of national security or public order.
- b. Upon notification of the names, frequencies, as applicable, and locations of intended use of such telecommunications Equipment imported by Eligible Actors, the *[relevant telecommunications authority]* shall waive any licensing requirements or fees for their use.
- c. The *[relevant telecommunications authority]* shall also grant Eligible Actors the same level of priority as domestic emergency responders in access to bandwidth, frequencies and satellite use for telecommunications and data transfer associated with Disaster Relief and Initial Recovery Assistance.

##### **Article 38** *Medications*

- a. Eligible Actors shall be permitted to import medications and medical Equipment for the purpose of Disaster Relief or Initial Recovery Assistance so long as they conform to the requirements of this Article.
- b. Any such medications and medical Equipment shall be appropriate to the needs of the Disaster-affected persons, and shall be legal for use in the country of origin according to its laws as well as in *[country name]* according to *[appropriate law on pharmaceuticals]*. Pursuant to subsections (c) and

(d) below, a distinction shall otherwise be made between medications intended to be donated for the use of others and those that Eligible Actors intend to use directly in providing medical Services.

- c. Medications that Eligible Actors intend to use directly in providing medical services in Disaster Relief or Initial Recovery Assistance, shall be:
  - i) transported and maintained by the Eligible Actor in appropriate conditions at all times to ensure their quality; and
  - ii) guarded against misappropriation and abuse.
- d. Medications intended for donation for the use of others shall be:
  - i) at least 12 months from their expiry date upon arrival, unless otherwise specifically agreed by the *[relevant health authority]*;
  - ii) transported and maintained by the Eligible Actor in appropriate conditions to ensure their quality until they reach their intended domestic recipients; and
  - iii) appropriately labelled in a language understood in the affected State with the International Non-proprietary Name or generic name, batch number, dosage form, strength, name of manufacturer, quantity in the container, storage conditions and expiry date.

##### **Article 39** *Food*

Food imported by Eligible Actors shall be admitted pursuant to expedited procedures set out by regulations to be developed within *[6 months]* of the entry into force of this Act by the *[relevant agricultural or health authority]*.

##### **Article 40** *Imported Vehicles*

The *[relevant transportation authority]* shall grant temporary recognition to foreign registration and plates to vehicles imported by Eligible Actors pending the provision of local registration and plates.

*[Alternative Article 40: The [relevant transportation authority] shall expedite the granting of local registration and [temporary] plates for vehicles imported by Eligible Actors.]*

##### **Article 41** *Search Dogs*

Search dogs imported temporarily by Eligible Actors shall be admitted without the need for quarantine so long as they meet the conditions and requirements of special regulations to be developed within *[6 months]* of the entry into force of this Act by the *[relevant authority]*.

#### **Part 4** *Permitted Disposition of Equipment and Unused Goods*



**Article 42** *Disposition of Equipment and Unused Goods*

- a. This part sets out the permitted disposition of Goods or Equipment for which Eligible Actors have received waivers or exemptions from fees, duties, taxes or other charges pursuant to this Chapter and which remain in their possession as of the end of their Disaster Relief and Initial Recovery Assistance operations.
- b. Such Goods and Equipment may be:
  - i) retained by Eligible Actors that are not-for-profit entities and used or distributed by them for humanitarian, development or charitable purposes in *[country name]*;
  - ii) re-exported pursuant to Article 43;
  - iii) donated pursuant to Article 44; or
  - iv) disposed of pursuant to Article 19.
- c. Additionally, such Goods and Equipment may be sold, but only:
  - i) after the termination of the Initial Recovery Period; and
  - ii) with payment of all fees, duties, taxes or charges that were previously waived or exempted for these items under this Chapter.

**Article 43** *Re-Export of Goods and Equipment*

Eligible Actors that import Equipment or Goods benefitting from the Legal Facilities in this Chapter are permitted to re-export any Equipment or unused Goods and to do so without the imposition of any taxes, export duties, or similar charges, provided that:

- a. re-export is commenced no later than *[three months]* after the termination of the International Initial Recovery Period; and
- b. they provide documentary evidence that the Equipment and Goods in question were originally imported for the purpose of Disaster Relief or Initial Recovery Assistance pursuant to this Chapter.

**Article 44** *Donation of Unused Goods and Equipment*

When they are no longer needed for their Disaster Relief or Initial Recovery Assistance, Eligible Actors are permitted to donate any imported or locally purchased Goods and Equipment without the imposition of any taxes, fees, duties, or similar charges on either the donor or the beneficiary, provided that:

- a. the donation is made no later than *[three months]* after the termination of the International Initial Recovery Period;
- b. the Eligible Actor provides documentary evidence to *[the relevant authority with copies to the beneficiary]*

of the identity of the importer or purchaser, the date of import or purchase, and the fact that the item or group of items was imported or purchased pursuant to the Legal Facilities in this Chapter;

- c. the beneficiary of the donation is a not-for-profit charitable or humanitarian organization established in *[country name]*, *[or an appropriate governmental agency of country name]* and it is willing to accept the donation.

**Part 5** *Transport***Article 45** *Facilitation of Means of Transport*

Ground, air and water transport vehicles operated by or on behalf of Eligible Actors to transport International and Locally Engaged Personnel, Goods, or Equipment for the purposes of Disaster Relief or Initial Recovery Assistance shall be:

- a. accorded priority treatment for passage, including, as appropriate, priority in air traffic routing and landing permissions;
- b. exempt from any applicable taxes, levies, duties, fees or charges normally imposed by governmental entities of *[country name]*, including, but not limited to:
  - i) overflight, landing, parking, taking off and navigation service fees;
  - ii) demurrage and docking fees; and
  - iii) road tolls; and
- c. exempt from any prohibitions, limitations or restrictions in respect of their arrival, overflight, landing, stay and departure, other than those necessary to guarantee national security, public safety or public health.

**Article 46** *Entry of Transport Operators*

The *[relevant authorities]* shall endeavour to reduce and expedite any procedures for the entry of drivers, pilots and crew of Transport vehicles operated by or on behalf of Eligible Actors.

**Article 47** *Notice of Transport*

To facilitate the provision of the Legal Facilities in this Part, Eligible Actors or their carriers shall:

- a. inform the *[relevant aviation authority]* in advance of the intended route of flights, type and call signs of the aircraft, number of crew members, the character of the cargo, time-table of flights, and the list of all passengers, and shall comply with any directions from the *[relevant aviation authority]* as to air traffic control and landing procedures; and
- b. inform the *[relevant marine authority]* in advance, of the intended port or location of arrival of each water vessel, the type, make and registration number of

each vessel, the number of personnel operating and on board each vessel and the equipment, facilities and other materials on board each vessel, and shall comply with any directions from the *[relevant authority]* as to the control of incoming vessels or docking procedures.

#### **Part 6** *Legal Capacity and Employment*

##### **Article 48** *Legal Capacity of Assisting International Actors*

The status of eligibility for Legal Facilities of an Assisting International Actor includes such legal capacity as may be relevant for the exercise of its functions and the fulfilment of its purposes in providing Disaster Relief or Initial Recovery Assistance in accordance with the laws of *[country name]* during the International Disaster Relief and Initial Recovery Periods, in particular the capacity to:

- a. open bank accounts;
- b. enter into contracts and leases;
- c. acquire and dispose of immovable and movable property;
- d. receive and disburse private and public funds;
- e. instigate legal proceedings; and
- f. engage and terminate Locally Engaged Personnel, as set out in Article 49 of this Act.

##### **Article 49** *Engagement and Termination of Locally Engaged Personnel*

- a. Subject to Article 4 of this Act, and except as provided in this Article, all Eligible Assisting International Actors shall comply with the applicable law in *[country name]* with regard to the employment of Locally Engaged Personnel, being persons normally resident or domiciled in *[country name]*.
- b. Eligible Assisting International Actors shall not be required to make any separate registration as employers, including for the purposes of taxation, social security, and social insurance registration requirements relating to the employment of Locally Engaged Personnel.
- c. Notwithstanding any provisions of labour and employment laws to the contrary, Eligible Assisting International Actors may:
  - i) recruit any individual legally entitled to perform the work envisaged in *[country name]* through a non-discriminatory process; and
  - ii) engage local personnel pursuant to fixed-term contracts, which may be of short duration, and may be renewed as required without creating an open-ended obligation.

##### **Article 50** *Jurisdiction over International Personnel*

Notwithstanding any public order or provisions of labour and employment laws to the contrary, the courts, administrative tribunals and officials of *[country name]* shall not seek to exercise jurisdiction concerning contracts between Eligible Assisting International Actors and International Personnel engaged by them, where such contracts contain choice of law provisions that establish the exclusive jurisdiction of a foreign or international court, tribunal or other mechanism.

#### **Part 7** *Taxation of Eligible Assisting International Actors*

##### **Article 51** *Value-Added Tax (VAT)[and other similar taxes]*

- a. The supply of Disaster Relief and Initial Recovery Assistance by an Eligible Assisting International Actor shall be exempt from all VAT, service taxes and similar taxes, duties, levies and governmental fees where such supply takes place during the International Disaster Relief or Initial Recovery Periods. Eligible Assisting International Actors shall also be exempt from registration for VAT during the same periods.
- b. In providing this Legal Facility, the *[relevant taxation authority]* shall take all practical steps to ensure that local suppliers suffer no negative financial or administrative impact in providing goods or services to Eligible Assisting International Actors.
- c. The rate of VAT in respect of the supply of merchandise or a service to an Eligible Assisting International Actor in connection with its Disaster Relief or Initial Recovery Assistance shall be zero where such supply is of a value exceeding *[specific value]*. Accordingly, a supplier of such goods and services shall not be required to account for, and shall not charge the relevant Eligible Assisting International Actor, any VAT in respect of such supplies.

*[Alternative options for Article 51(c): VAT – exemption approach The supply of merchandise or a service to an Eligible Assisting International Actor in connection with its Disaster Relief or Initial Recovery Assistance shall be exempt from VAT where such supply is of a value exceeding [specific value] and, accordingly, a supplier shall not be required to account for, and shall not charge the relevant Eligible Assisting International Actor, any VAT in respect of such supplies. VAT – deemed no supply approach The supply of merchandise or a service to an Eligible Assisting International Actor in connection with its Disaster Relief or Initial Recovery Assistance shall be disregarded for the purposes of VAT where such supply is of a value exceeding [specific value] and, accordingly, a supplier shall not be required to account for, and shall not charge the relevant Eligible Assisting International Actor, any VAT in respect of such supplies.]*

##### **Article 52** *Income Tax [and other similar taxes]*

- a. The activities of an Eligible Assisting International Actor carried on for the purpose of providing Disaster Relief or Initial Recovery Assistance

shall be disregarded for tax purposes during the International Disaster Relief and Initial Recovery Periods and, accordingly, any actual or deemed income or gain arising from such activities shall not be subject to any taxes, duties, levies or governmental fees having similar effect.

- b. The activities of the International Personnel of Eligible Assisting International Actors carried on in connection with the provision of Disaster Relief or Initial Recovery Assistance shall be disregarded for tax purposes during the International Disaster Relief and Initial Recovery Periods and, accordingly, taxes, duties, levies or governmental fees having similar effect shall not be payable in respect of such activities.
- c. The International Personnel of an Eligible Assisting International Actor shall not be treated as resident in *[country name]* or as having any other connection with *[country name]* relevant for taxation purposes by reason of their presence in *[country name]* or activities undertaken there during the International Disaster Relief and Initial Recovery Periods. Accordingly, such International Personnel shall not be subject to or required to account for any taxes, duties, levies, social security contributions and governmental fees or employment levies having similar effect.

#### **Article 53** *Property, Assets [and other similar] Taxes*

During the International Disaster Relief or Initial Recovery Periods, no taxes, duties, levies or governmental fees having similar effect shall accrue or be payable by Eligible Assisting International Actors in connection with:

- a. land, a building or any part of a building where such land, building or part thereof is wholly or primarily used by an Eligible Assisting International Actor for the purpose of Disaster Relief or Initial Recovery Assistance; and
- b. the assets of an Eligible Assisting International Actor.

#### **Part 8** *Currency and Banking*

#### **Article 54** *Facilitation to Bring Necessary Funds and Currencies into the Country*

The *[relevant authority]* shall facilitate the entry of such funds and currencies required by Eligible Assisting International Actors to provide Disaster Relief and Initial Recovery Assistance.

#### **Article 55** *Preferential Exchange Rates*

The *[relevant authority]* shall make available to Eligible Assisting International Actors the best available legal exchange rates into the state's currency for funds to be used for the purpose of providing Disaster Relief or Initial Recovery Assistance

## Chapter VII Supervision, Reporting and Sanctions

#### **Article 56** *Supervision of Assisting Actors*

- a. The *[relevant disaster management authority or ombudsman]* shall be responsible for monitoring the compliance of Assisting Actors with their responsibilities under this Act, and in particular Chapter IV.
- b. To facilitate the *[relevant disaster management authority's or ombudsman's]* oversight, it may require Assisting Actors to report to it, at reasonable intervals, about the Disaster Relief and Initial Recovery Assistance they provide. These reports shall be made publicly available *[through electronic means]*.
- c. Any reporting requirements imposed by the *[relevant disaster management authority or ombudsman]* under this Article shall be designed so as to reduce any administrative burden on Assisting Actors to the minimum necessary.

#### **Article 57** *Non-Compliance by Assisting Actors*

- a. If, on the basis of information it deems credible, the *[relevant disaster management authority or ombudsman]* suspects that any Assisting Actor has failed to materially comply with its responsibilities under this Act, and in particular its responsibilities under Chapter IV, it shall immediately consult with the Assisting Actor and seek clarification or explanation. If still unsatisfied, the *[relevant disaster management authority or ombudsman]* shall provide written notice of non-compliance along with a decision either:
  - i) to require the Assisting Actor to bring itself into compliance within a specified period of time, with or without temporary suspension of its eligibility, if any, for Legal Facilities under Chapter VI;
  - ii) to revoke the Assisting Actor's eligibility, if any, for Legal Facilities under Chapter VI;
  - iii) in the case of deliberate misrepresentation or fraud, to impose fines to be set out by implementing regulation; or
  - iv) in the most extreme cases concerning an Assisting International Actor, to revoke *[country's name]* consent for it to provide Disaster Relief or Initial Recovery Assistance in response to the Disaster.
- b. In the event of a decision to revoke pursuant to subsection (a)[iv] of this Article, if the Assisting International Actor lacks a legal basis independent of this Act to remain in the country, it may be required to depart, as of a date no sooner than *[30]* days from the date of the notice.

- c. Decisions to suspend or revoke Legal Facilities pursuant to subsections (a)(i) or (a)(ii) of this Article may not be given retroactive effect, except in cases of fraud or criminal misconduct attributable to the Assisting International Actor.
- d. The Assisting Actor may appeal any negative decision to *[an ombudsman or other appropriate agency]*.
- e. Nothing in this Article precludes the prosecution of Assisting International Actors or their International and Locally Engaged Personnel for criminal offences or for the imposition of civil liability under the laws of *[country name]*.

**Article 58** *Transparency as to Internationally Donated Funds*

- a. Internationally Donated Funds received by the Government of *[country name]* for the purposes of Disaster Relief and Initial Recovery Assistance may be accepted by *[the relevant governmental body or bodies]*. They shall be:
  - i) *[included in the national disaster management fund established by the national disaster management act, the procedures for which shall be set out by regulation; and]*
  - ii) subject to audit by the *[appropriate authority]* no later than *[six months]* after the termination of the International Disaster Relief Period or *[three months]* after the termination of the International Initial Recovery Period. The results of these audits shall be made publicly available *[by electronic means]*.
- b. Internationally Donated Funds received by Assisting Domestic Actors for the purposes of Disaster Relief and Initial Recovery Assistance shall be:
  - i) maintained in a dedicated account for Disaster Relief or Initial Recovery Assistance; and
  - ii) subjected to an external audit no later than *[six months]* after the termination of the International Disaster Relief Period or *[three months]* after the termination of the International Initial Recovery Period, whichever is sooner. The results of these audits shall be reported to *[appropriate authority]* and made publicly available *[by electronic means]*.

**Article 59** *Annual Reporting on Implementation*

The *[relevant disaster management authority]* shall report annually to the *[relevant committee of the]* Parliament on steps taken to implement this Act, including preparedness measures taken prior to a Disaster.

**Article 60** *Sanction for Non-Compliance by Officials*

Officials of *[country name]* that fail to abide by their responsibilities under this Act may be subject to

*[discipline pursuant to a civil service code, and/or] a fine of up to [amount]. This Article is without prejudice to any civil or criminal liability under other laws that might also attach to the official's actions or omissions*

## Chapter VIII Transit of International Disaster Assistance

**Article 61** *Facilitation for Transit*

In the event a Disaster occurs in another country for which International Disaster Assistance is required the *[relevant customs, immigration, and transport authorities]* shall facilitate the speedy transit or transshipment across national territory of International Disaster Assistance by Assisting International Actors, including International Personnel, Goods, Equipment and Transport, in order to reach the affected country, as further described in this Part.

**Article 62** *Transit Facilities Period*

- a. When, after seeking the views of the relevant authorities of a Disaster affected country, the *[relevant authority]* is satisfied that Disaster Relief or Initial Recovery Assistance is likely to be required and that the transit or transshipment of International Personnel, Goods or Equipment through its territory is likely to be helpful, the *[relevant authority]* may declare the beginning of a Transit Facilities Period.
- b. The Transit Facilities Period shall continue until terminated by the *[relevant authority]*, when it is satisfied that Transit Facilities are no longer required.
- c. The termination of a Transit Facilities Period shall be announced to Assisting International Actors no later than *[time period]* prior to the proposed date.
- d. The Transit Facilities described in this Chapter shall be effective only during the Transit Facilities Period.

**Article 63** *Entitlement to Transit Facilities*

- a. Subject to subsection (b), all Assisting International Actors shall be entitled to the Transit Facilities provided in this Chapter upon declaration that the International Personnel, Equipment and Goods that they seek to send in transit through *[country name]* are for the purpose of providing Disaster Relief or Initial Recovery Assistance to a Disaster-affected country.
- b. The *[relevant authority]* may deny Transit Facilities to any Assisting International Actor, in case of actual or suspected fraud or if necessary to safeguard national security or public health. The denial of Transit Facilities may be appealed pursuant to the process described in Article 57 of this Act.

**Article 64** *Disaster Transit Visa*

The International Personnel of Eligible Actors entering *[country name]* for the purpose of transit to a Disaster-

affected country shall be entitled to a *[single entry]* Disaster Transit Visa on arrival, unless national security or public health and safety concerns related to the particular individual preclude it. Disaster Transit Visas shall be issued without a fee.

*[Alternative Article 64: International Personnel entering [country name] for the purpose of transit to a Disaster-affected country shall be entitled to waiver of entry visa requirements, including any associated fees or charges [on the condition that they exit the territory of [country name] within a period of [number of days].*

**Article 65** *Goods and Equipment in Transit and Transshipment*

The provisions of Parts 2 and 3 of Chapter VI shall apply, mutatis mutandis, to consignments of Goods and Equipment by Eligible Actors, when placed under customs transit or transshipment to an affected country.

**Article 66** *Transport for Transit and Transshipment*

The provisions of Part 5 of Chapter VI shall also apply, mutatis mutandis, to the ground, air and water vehicles of Eligible Actors in transit through the territorial lands, waters or airspace of *[country name]* to provide Disaster Relief or Initial Recovery Assistance to an affected country

## Chapter IX Implementation, Transitional and Final Provisions

**Article 67** *Implementing Regulations*

The *[relevant authorities]* may make regulations concerning all matters which are required or permitted to be prescribed, or which are necessary to carry this Act into effect or to give effect to any power, function, duty, or authority under this Act.

**Article 68** *Repeals and Revocations*

*[Names of relevant acts and sections / The legislative provisions listed in Schedule [#]] are repealed from [date].*

**Article 69** *Severability*

Each of the articles of this Act is severable. If any such article is or becomes illegal, invalid or unenforceable in any respect, that shall not affect or impair the legality, validity or enforceability of the other articles of this Act.

**Article 70** *Entry into Force*

This Act shall enter into force on [date / the [cardinal number] day following its publication in the [title of official publication].

**Article 71** *Transitional Provisions*

The *[relevant authority]* may make such transitional, transitory or savings provisions as are necessary for the implementation of this Act

## Annex 3

### Istanbul Convention on Temporary Admission (26 June 1990) Annex B.9 concerning goods imported for humanitarian purposes

#### Chapter I

#### Definition

##### Article 1

For the purposes of this Annex:

- a) the term "goods imported for humanitarian purposes" means: medical, surgical and laboratory equipment and relief consignments;
- b) the term "relief consignments" means: all goods, such as vehicles and other means of transport, blankets, tents, prefabricated houses or other goods of prime necessity, forwarded as aid to those affected by natural disaster and similar catastrophes.

#### Chapter II Scope

##### Article 2

Goods imported for humanitarian purposes shall be granted temporary admission in accordance with Article 2 of this Convention. (Note of the Author: According to Article 2 of the Istanbul Convention, temporary admission implies relief from import duties and taxes and from import restrictions or prohibitions of economic character)

#### Chapter III Miscellaneous Provisions

##### Article 3

For the facilities granted by this Annex to apply:

- a) goods imported for humanitarian purposes must be owned by a person established outside the territory of temporary admission and must be loaned free of charge;
- b) medical, surgical and laboratory equipment must be intended for use by hospitals and other medical institutions which, finding themselves in exceptional circumstances, have urgent need of it, provided this equipment is not available in sufficient quantity in the territory of temporary admission;
- c) relief consignments must be dispatched to persons approved by the competent authorities in the territory of temporary admission.

##### Article 4

1. Whenever possible, an inventory of the goods together with a written undertaking to reexport, may be accepted for medical, surgical and laboratory equipment, in lieu of a Customs document and security.
2. Temporary admission of relief consignments shall be granted without a Customs document or security being required. However, the Customs authorities may require an inventory of the goods, together with a written undertaking to re-export.

##### Article 5

1. The period for the re-exportation of medical, surgical and laboratory equipment shall be determined in accordance with the needs.
2. The period for the re-exportation of relief consignments shall be at least twelve months from the date of temporary admission.

## Annex 4

### International Convention on the Simplification and Harmonization of Customs Procedures (WCO Revised Kyoto Convention), Specific Annex J, Chapter 5

#### Relief consignments

##### Definition

For the purposes of this Chapter:

“relief consignments” means:

- goods, including vehicles and other means of transport, foodstuffs, medicaments, clothing, blankets, tents, prefabricated houses, water purifying and water storage items, or other goods of prime necessity, forwarded as aid to those affected by disaster; and
- all equipment, vehicles and other means of transport, specially trained animals, provisions, supplies, personal effects and other goods for disaster relief personnel in order to perform their duties and to support them in living and working in the territory of the disaster throughout the duration of their mission.

##### Principles

###### 1. Standard

Clearance of relief consignments shall be governed by the provisions of this Chapter and, insofar as applicable, by the provisions of the General Annex.

###### 2. Standard

Clearance of relief consignments for export, transit, temporary admission and import shall be carried out as a matter of priority.

##### Field of application

###### 3. Standard

In the case of relief consignments the Customs shall provide for:

- lodging of a simplified Goods declaration or of a provisional or incomplete Goods declaration subject to completion of the declaration within a specified period;
- lodging and registering or checking of the Goods declaration and supporting documents prior to the arrival of the goods, and their release upon arrival;
- clearance outside the designated hours of business or away from Customs offices and the waiver of any charges in this respect; and
- examination and/or sampling of goods only in exceptional circumstances.

###### 4. Recommended Practice

Clearance of relief consignments should be granted without regard to the country of origin, the country from which arrived or country of destination.

###### 5. Recommended Practice

In the case of relief consignments any economic export prohibitions or restrictions and any export duties or taxes otherwise payable should be waived.

###### 6. Recommended Practice

Relief consignments received as gifts by approved organizations for use by or under the control of such organizations, or for distribution free of charge by them or under their control, should be admitted free of import duties and taxes and free of economic import prohibitions or restrictions.

## Annex 5

### Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (18 June 1998)

#### The States Parties to this Convention,

*Recognizing* that the magnitude, complexity, frequency and impact of disasters are increasing at a dramatic rate, with particularly severe consequences in developing countries,

*recalling* that humanitarian relief and assistance agencies require reliable, flexible telecommunication resources to perform their vital tasks,

*further recalling* the essential role of telecommunication resources in facilitating the safety of humanitarian relief and assistance personnel,

*further recalling* the vital role of broadcasting in disseminating accurate disaster information to at-risk populations,

*convinced* that the effective, timely deployment of telecommunication resources and that rapid, efficient, accurate and truthful information flows are essential to reducing loss of life, human suffering and damage to property and the environment caused by disasters,

*concerned* about the impact of disasters on communication facilities and information flows,

*aware* of the special needs of the disaster-prone least developed countries for technical assistance to develop telecommunication resources for disaster mitigation and relief operations,

*reaffirming* the absolute priority accorded emergency life-saving communications in more than fifty international regulatory instruments, including the Constitution of the International Telecommunication Union,

*noting* the history of international cooperation and coordination in disaster mitigation and relief, including the demonstrated life-saving role played by the timely deployment and use of telecommunication resources,

*further noting* the Proceedings of the International Conference on Disaster Communications (Geneva, 1990), addressing the power of telecommunication systems in disaster recovery and response,

*further noting* the urgent call found in the Tampere Declaration on Disaster Communications (Tampere, 1991) for reliable telecommunication systems for disaster mitigation and disaster relief operations, and for an international Convention on Disaster Communications to facilitate such systems,

*further noting* United Nations General Assembly Resolution 44/236, designating 1990-2000 the International Decade for Natural Disaster Reduction, and Resolution 46/182, calling for strengthened international coordination of humanitarian emergency assistance,

*further noting* the prominent role given to communication resources in the Yokohama Strategy and Plan of Action for a Safer World, adopted by the World Conference on Natural Disaster Reduction (Yokohama, 1994),

*further noting* Resolution 7 of the World Telecommunication Development Conference (Buenos Aires, 1994), endorsed by Resolution 36 of the Plenipotentiary Conference of the International Telecommunication Union (Kyoto, 1994), urging governments to take all practical steps for facilitating the rapid deployment and the effective use of telecommunication equipment for disaster mitigation and relief operations by reducing and, where possible, removing regulatory barriers and strengthening cooperation among States,

*further noting* Resolution 644 of the World Radiocommunication Conference (Geneva, 1997), urging governments to give their full support to the adoption of this Convention and to its national implementation,

*further noting* Resolution 19 of the World Telecommunication Development Conference (Valletta, 1998), urging governments to continue their examination of this Convention with a view to considering giving their full support to its adoption,

*further noting* United Nations General Assembly Resolution 51/194, encouraging the development of a transparent and timely procedure for implementing effective disaster relief coordination arrangements, and of ReliefWeb as the global information system for the dissemination of reliable and timely information on emergencies and natural disasters,

*with reference* to the conclusions of the Working Group on Emergency Telecommunications regarding the critical role of telecommunications in disaster mitigation and relief,

*supported* by the work of many States, United Nations entities, governmental, intergovernmental, and non-governmental organizations, humanitarian agencies, telecommunication equipment and service providers, media, universities and communication- and disaster-related organizations to improve and facilitate disaster-related communications,

*desiring* to ensure the reliable, rapid availability of telecommunication resources for disaster mitigation and relief operations, and

*further desiring* to facilitate international cooperation to mitigate the impact of disasters,

*have agreed as follows:*



**Article 1** *Definitions*

Unless otherwise indicated by the context in which they are used, the terms set out below shall have the following meanings for the purposes of this Convention:

1. State Party. means a State which has agreed to be bound by this Convention.
2. Assisting State Party. means a State Party to this Convention providing telecommunication assistance pursuant hereto.
3. Requesting State Party. means a State Party to this Convention requesting telecommunication assistance pursuant hereto.
4. This Convention. means the Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.
5. The depositary. means the depositary for this Convention, as set forth in Article 16.
6. Disaster. means a serious disruption of the functioning of society, posing a significant, widespread threat to human life, health, property or the environment, whether caused by accident, nature or human activity, and whether developing suddenly or as the result of complex, long term processes.
7. Disaster mitigation. means measures designed to prevent, predict, prepare for, respond to, monitor and/or mitigate the impact of, disasters.
8. Health hazard. means a sudden outbreak of infectious disease, such as an epidemic or pandemic, or other event posing a significant threat to human life or health, which has the potential for triggering a disaster.
9. Natural hazard. means an event or process, such as an earthquake, fire, flood, wind, landslide, avalanche, cyclone, tsunami, insect infestation, drought or volcanic eruption, which has the potential for triggering a disaster.
10. Non-governmental organization. means any organization, including private and corporate entities, other than a State or governmental or intergovernmental organization, concerned with disaster mitigation and relief and/or the provision of telecommunication resources for disaster mitigation and relief.
11. Non-State entity. means any entity, other than a State, including non-governmental organizations and the Red Cross and Red Crescent Movement, concerned with disaster mitigation and relief and/or the provision of telecommunication resources for disaster mitigation and relief.
12. Relief operations. means those activities designed to reduce loss of life, human suffering and damage

to property and/or the environment caused by a disaster.

13. Telecommunication assistance. means the provision of telecommunication resources or other resources or support intended to facilitate the use of telecommunication resources.
14. Telecommunication resources. means personnel, equipment, materials, information, training, radio-frequency spectrum, network or transmission capacity or other resources necessary to telecommunications.
15. Telecommunications. means any transmission, emission, or reception of signs, signals, writing, images, sounds or intelligence of any nature, by wire, radio, optical fibre or other electromagnetic system.

**Article 2** *Coordination*

1. The United Nations Emergency Relief Coordinator shall be the operational coordinator for this Convention and shall execute the responsibilities of the operational coordinator identified in Articles 3, 4, 6, 7, 8, and 9.
2. The operational coordinator shall seek the cooperation of other appropriate United Nations agencies, particularly the International Telecommunication Union, to assist it in fulfilling the objectives of this Convention, and, in particular, those responsibilities identified in Articles 8 and 9, and to provide necessary technical support, consistent with the purposes of those agencies.
3. The responsibilities of the operational coordinator under this Convention shall be limited to coordination activities of an international nature.

**Article 3** *General Provisions*

1. The States Parties shall cooperate among themselves and with non-State entities and intergovernmental organizations, in accordance with the provisions of this Convention, to facilitate the use of telecommunication resources for disaster mitigation and relief.
2. Such use may include, but is not limited to:
  - a) the deployment of terrestrial and satellite telecommunication equipment to predict, monitor and provide information concerning natural hazards, health hazards and disasters;
  - b) the sharing of information about natural hazards, health hazards and disasters among the States Parties and with other States, non-State entities and intergovernmental organizations, and the dissemination of such information to the public, particularly to at-risk communities;

- c) the provision of prompt telecommunication assistance to mitigate the impact of a disaster; and
- d) the installation and operation of reliable, flexible telecommunication resources to be used by humanitarian relief and assistance organizations.
3. To facilitate such use, the States Parties may conclude additional multinational or bilateral agreements or arrangements.
4. The States Parties request the operational coordinator, in consultation with the International Telecommunication Union, the depositary, and other relevant United Nations entities and intergovernmental and nongovernmental organizations, to use its best efforts, in accordance with the provisions of this Convention, to:
- a) develop, in consultation with the States Parties, model agreements that may be used to provide a foundation for multinational or bilateral agreements facilitating the provision of telecommunication resources for disaster mitigation and relief;
- b) make available model agreements, best practices and other relevant information to States Parties, other States, non-State entities and intergovernmental organizations concerning the provision of telecommunication resources for disaster mitigation and relief, by electronic means and other appropriate mechanisms;
- c) develop, operate, and maintain information collection and dissemination procedures and systems necessary for the implementation of the Convention; and
- d) inform States of the terms of this Convention, and to facilitate and support the cooperation among States Parties provided for herein.
5. The States Parties shall cooperate among themselves to improve the ability of governmental organizations, non-State entities and intergovernmental organizations to establish mechanisms for training in the handling and operation of equipment, and instruction courses in the development, design and construction of emergency telecommunication facilities for disaster prevention, monitoring and mitigation.
- State Party shall inform the operational coordinator as soon as possible.
2. A State Party requesting telecommunication assistance shall specify the scope and type of assistance required and those measures taken pursuant to Articles 5 and 9 of this Convention, and, when practicable, provide the State Party to which the request is directed and/or the operational coordinator with any other information necessary to determine the extent to which such State Party is able to meet the request.
3. Each State Party to which a request for telecommunication assistance is directed, either directly or through the operational coordinator, shall promptly determine and notify the requesting State Party whether it will render the assistance requested, directly or otherwise, and the scope of, and terms, conditions, restrictions and cost, if any, applicable to such assistance.
4. Each State Party determining to provide telecommunication assistance shall so inform the operational coordinator as soon as possible.
5. No telecommunication assistance shall be provided pursuant to this Convention without the consent of the requesting State Party. The requesting State Party shall retain the authority to reject all or part of any telecommunication assistance offered pursuant to this Convention in accordance with the requesting State Party's existing national law and policy.
6. The States Parties recognize the right of requesting States Parties to request telecommunication assistance directly from non-State entities and intergovernmental organizations, and the right of non-State entities and intergovernmental organizations, pursuant to the laws to which they are subject, to provide telecommunication assistance to requesting States Parties pursuant to this Article.
7. A non-State entity or intergovernmental organization may not be a requesting State Party, and may not request telecommunication assistance under this Convention.
8. Nothing in this Convention shall interfere with the right of a State Party, under its national law, to direct, control, coordinate and supervise telecommunication assistance provided under this Convention within its territory.

#### **Article 4** *Provision of Telecommunication Assistance*

1. A State Party requiring telecommunication assistance for disaster mitigation and relief may request such assistance from any other State Party, either directly or through the operational coordinator. If the request is made through the operational coordinator, the operational coordinator shall immediately disseminate this information to all other appropriate States Parties. If the request is made directly to another State Party, the requesting

#### **Article 5** *Privileges, Immunities, and Facilities*

1. The requesting State Party shall, to the extent permitted by its national law, afford to persons, other than its nationals, and to organizations, other than those headquartered or domiciled within its territory, who act pursuant to this Convention to provide telecommunication assistance and who have been notified to, and accepted by, the requesting State Party, the necessary privileges, immunities, and facilities for the performance of their proper functions, including, but not limited to:

- a) immunity from arrest, detention and legal process, including criminal, civil and administrative jurisdiction of the requesting State Party, in respect of acts or omissions specifically and directly related to the provision of telecommunication assistance;
  - b) exemption from taxation, duties or other charges, except for those which are normally incorporated in the price of goods or services, in respect of the performance of their assistance functions or on the equipment, materials and other property brought into or purchased in the territory of the requesting State Party for the purpose of providing telecommunication assistance under this Convention; and
  - c) immunity from seizure, attachment or requisition of such equipment, materials and property.
2. The requesting State Party shall provide, to the extent of its capabilities, local facilities and services for the proper and effective administration of the telecommunication assistance, including ensuring that telecommunication equipment brought into its territory pursuant to this Convention shall be expeditiously licensed or shall be exempt from licensing in accordance with its domestic laws and regulations.
  3. The requesting State Party shall ensure the protection of personnel, equipment and materials brought into its territory pursuant to this Convention.
  4. Ownership of equipment and materials provided pursuant to this Convention shall be unaffected by their use under the terms of this Convention. The requesting State Party shall ensure the prompt return of such equipment, material and property to the proper assisting State Party.
  5. The requesting State Party shall not direct the deployment or use of any telecommunication resources provided pursuant to this Convention for purposes not directly related to predicting, preparing for, responding to, monitoring, mitigating the impact of or providing relief during and following disasters.
  6. Nothing in this Article shall require any requesting State Party to provide its nationals or permanent residents, or organizations headquartered or domiciled within its territory, with privileges and immunities.
  7. Without prejudice to their privileges and immunities in accordance with this Article, all persons entering the territory of a State Party for the purpose of providing telecommunication assistance or otherwise facilitating the use of telecommunication resources pursuant to this Convention, and all organizations providing telecommunication assistance or otherwise facilitating the use of telecommunication resources pursuant to this Convention, have a duty to respect the laws and regulations of that State Party. Such persons and organizations also shall have a duty not to interfere in the domestic affairs of the State Party into whose territory they have entered.
  8. Nothing in this Article shall prejudice the rights and obligations with respect to privileges and immunities afforded to persons and organizations participating directly or indirectly in telecommunication assistance, pursuant to other international agreements (including the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the General Assembly on 21 November 1947) or international law.

#### **Article 6** *Termination of Assistance*

1. The requesting State Party or the assisting State Party may, at any time, terminate telecommunication assistance received or provided under Article 4 by providing notification in writing. Upon such notification, the States Parties involved shall consult with each other to provide for the proper and expeditious conclusion of the assistance, bearing in mind the impact of such termination on the risk to human life and ongoing disaster relief operations.
2. States Parties engaged in providing or receiving telecommunication assistance pursuant to this Convention shall remain subject to the terms of this Convention following the termination of such assistance.
3. Any State Party requesting termination of telecommunication assistance shall notify the operational coordinator of such request. The operational coordinator shall provide such assistance as is requested and necessary to facilitate the conclusion of the telecommunication assistance.

#### **Article 7** *Payment or Reimbursement of Costs or Fees*

1. The States Parties may condition the provision of telecommunication assistance for disaster mitigation and relief upon agreement to pay or reimburse specified costs or fees, always bearing in mind the contents of paragraph 9 of this Article.
2. When such condition exists, the States Parties shall set forth in writing, prior to the provision of telecommunication assistance:
  - a) the requirement for payment or reimbursement;
  - b) the amount of such payment or reimbursement or terms under which it shall be calculated; and
  - c) any other terms, conditions or restrictions applicable to such payment or reimbursement, including, but not limited to, the currency in

- which such payment or reimbursement shall be made.
3. The requirements of paragraphs 2 b) and 2 c) of this Article may be satisfied by reference to published tariffs, rates or prices.
  4. In order that the negotiation of payment and reimbursement agreements does not unduly delay the provision of telecommunication assistance, the operational coordinator shall develop, in consultation with the States Parties, a model payment and reimbursement agreement that may provide a foundation for the negotiation of payment and reimbursement obligations under this Article.
  5. No State Party shall be obligated to make payment or reimbursement of costs or fees under this Convention without having first expressed its consent to the terms provided by an assisting State Party pursuant to paragraph 2 of this Article.
  6. When the provision of telecommunication assistance is properly conditioned upon payment or reimbursement of costs or fees under this Article, such payment or reimbursement shall be provided promptly after the assisting State Party has presented its request for payment or reimbursement.
  7. Funds paid or reimbursed by a requesting State Party in association with the provision of telecommunication assistance shall be freely transferable out of the jurisdiction of the requesting State Party and shall not be delayed or withheld.
  8. In determining whether to condition the provision of telecommunication assistance upon an agreement to pay or reimburse specified costs or fees, the amount of such costs or fees, and the terms, conditions and restrictions associated with their payment or reimbursement, the States Parties shall take into account, among other relevant factors:
    - a) United Nations principles concerning humanitarian assistance;
    - b) the nature of the disaster, natural hazard or health hazard;
    - c) the impact, or potential impact, of the disaster;
    - d) the place of origin of the disaster;
    - e) the area affected, or potentially affected, by the disaster;
    - f) the occurrence of previous disasters and the likelihood of future disasters in the affected area;
    - g) the capacity of each State affected by the disaster, natural hazard or health hazard to prepare for, or respond to, such event; and
    - h) the needs of developing countries.
  9. This Article shall also apply to those situations in which telecommunication assistance is provided by a non-State entity or intergovernmental organization, provided that:
    - a) the requesting State Party has consented to, and has not terminated, such provision of telecommunication assistance for disaster mitigation and relief;
    - b) the non-State entity or intergovernmental organization providing such telecommunication assistance has notified to the requesting State Party its adherence to this Article and Articles 4 and 5; and
    - c) the application of this Article is not inconsistent with any other agreement concerning the relations between the requesting State Party and the non-State entity or intergovernmental organization providing such telecommunication assistance.

#### **Article 8** *Telecommunication Assistance Information Inventory*

1. Each State Party shall notify the operational coordinator of its authority(ies):
  - a) responsible for matters arising under the terms of this Convention and authorized to request, offer, accept and terminate telecommunication assistance; and
  - b) competent to identify the governmental, intergovernmental and/or non-governmental resources which could be made available to facilitate the use of telecommunication resources for disaster mitigation and relief, including the provision of telecommunication assistance.
2. Each State Party shall endeavour to inform the operational coordinator promptly of any changes in the information provided pursuant to this Article.
3. The operational coordinator may accept notification from a non-State entity or intergovernmental organization of its procedures for authorization to offer and terminate telecommunication assistance as provided in this Article.
4. A State Party, non-State entity or intergovernmental organization may, at its discretion, include in the material it deposits with the operational coordinator information about specific telecommunication resources and about plans for the use those resources to respond to a request for telecommunication assistance from a requesting State Party.
5. The operational coordinator shall maintain copies of all lists of authorities, and shall expeditiously disseminate such material to the States Parties, to other States, and to appropriate non-State entities and intergovernmental organizations, unless a

State Party, non-State entity or intergovernmental organization has previously specified, in writing, that distribution of its material be restricted.

6. The operational coordinator shall treat material deposited by non-State entities and intergovernmental organizations in a similar manner to material deposited by States Parties.

#### **Article 9** *Regulatory Barriers*

1. The States Parties shall, when possible, and in conformity with their national law, reduce or remove regulatory barriers to the use of telecommunication resources for disaster mitigation and relief, including to the provision of telecommunication assistance.
2. Regulatory barriers may include, but are not limited to:
  - a) regulations restricting the import or export of telecommunication equipment;
  - b) regulations restricting the use of telecommunication equipment or of radio-frequency spectrum;
  - c) regulations restricting the movement of personnel who operate telecommunication equipment or who are essential to its effective use;
  - d) regulations restricting the transit of telecommunication resources into, out of and through the territory of a State Party; and
  - e) delays in the administration of such regulations.
3. Reduction of regulatory barriers may take the form of, but shall not be limited to:
  - a) revising regulations;
  - b) exempting specified telecommunication resources from the application of those regulations during the use of such resources for disaster mitigation and relief;
  - c) pre-clearance of telecommunication resources for use in disaster mitigation and relief, in compliance with those regulations;
  - d) recognition of foreign type-approval of telecommunication equipment and/or operating licenses;
  - e) expedited review of telecommunication resources for use in disaster mitigation and relief, in compliance with those regulations; and
  - f) temporary waiver of those regulations for the use of telecommunication resources for disaster mitigation and relief.
4. Each State Party shall, at the request of any other State Party, and to the extent permitted by its national law, facilitate the transit into, out of and

through its territory of personnel, equipment, materials and information involved in the use of telecommunication resources for disaster mitigation and relief.

- a) 5. Each State Party shall notify the operational coordinator and the other States Parties, directly or through the operational coordinator, of:
  - a) measures taken, pursuant to this Convention, for reducing or removing such regulatory barriers;
  - b) procedures available, pursuant to this Convention, to States Parties, other States, non-State entities and/or intergovernmental organizations for the exemption of specified telecommunication resources used for disaster mitigation and relief from the application of such regulations, pre-clearance or expedited review of such resources in compliance with applicable regulations, acceptance of foreign type-approval of such resources, or temporary waiver of regulations otherwise applicable to such resources; and
  - c) the terms, conditions and restrictions, if any, associated with the use of such procedures.
6. The operational coordinator shall regularly and expeditiously make available to the States Parties, to other States, to non-State entities and to intergovernmental organizations an up-to-date listing of such measures, their scope, and the terms, conditions and restrictions, if any, associated with their use.
7. Nothing in this Article shall permit the violation or abrogation of obligations and responsibilities imposed by national law, international law, or multilateral or bilateral agreements, including obligations and responsibilities concerning customs and export controls.

#### **Article 10** *Relationship to Other International Agreements*

This Convention shall not affect the rights and obligations of States Parties deriving from other international agreements or international law.

#### **Article 11** *Dispute Settlement*

1. In the event of a dispute between States Parties concerning the interpretation or application of this Convention, the States Parties to the dispute shall consult each other for the purpose of settling the dispute. Such consultation shall begin promptly upon the written declaration, delivered by one State Party to another State Party, of the existence of a dispute under this Convention. The State Party making such a written declaration of the existence of a dispute shall promptly deliver a copy of such declaration to the depositary.
2. If a dispute between States Parties cannot be settled within six (6) months of the date of delivery

of the written declaration to a State Party to the dispute, the States Parties to the dispute may request any other State Party, State, non-State entity or intergovernmental organization to use its good offices to facilitate settlement of the dispute.

3. If neither State Party seeks the good offices of another State Party, State, non-State entity or intergovernmental organization, or if the exercise of good offices fails to facilitate a settlement of the dispute within six (6) months of the request for such good offices being made, then either State Party to the dispute may:

- a) request that the dispute be submitted to binding arbitration; or
- b) submit the dispute to the International Court of Justice for decision, provided that both States Parties to the dispute have, at the time of signing, ratifying or acceding to this Convention, or at anytime thereafter, accepted the jurisdiction of the International Court of Justice in respect of such disputes.

4. In the event that the respective States Parties to the dispute request that the dispute be submitted to binding arbitration and submit the dispute to the International Court of Justice for decision, the submission to the International Court of Justice shall have priority.

5. In the case of a dispute between a State Party requesting telecommunication assistance and a non-State entity or intergovernmental organization headquartered or domiciled outside of the territory of that State Party concerning the provision of telecommunication assistance under Article 4, the claim of the non-State entity or intergovernmental organization may be espoused directly by the State Party in which the non-State entity or intergovernmental organization is headquartered or domiciled as a State-to-State claim under this Article, provided that such espousal is not inconsistent with any other agreement between the State Party and the non-State entity or intergovernmental organization involved in the dispute.

6. When signing, ratifying, accepting, approving or acceding to this Convention, a State may declare that it does not consider itself bound by either or both of the dispute settlement procedures provided for in paragraph 3 above. The other States Parties shall not be bound by a dispute settlement procedure provided for in paragraph 3 with respect to a State Party for which such a declaration is in force.

#### **Article 12** *Entry into Force*

1. This Convention shall be open for signature by all States which are members of the United Nations or of the International Telecommunication Union at the Intergovernmental Conference on Emergency Telecommunications in Tampere on 18 June 1998,

and thereafter at the headquarters of the United Nations, New York, from 22 June 1998 to 21 June 2003.

2. A State may express its consent to be bound by this Convention:

- a) by signature (definitive signature);
- b) by signature subject to ratification, acceptance or approval followed by deposit of an instrument of ratification, acceptance or approval; or
- c) by deposit of an instrument of accession.

3. The Convention shall enter into force thirty (30) days after the deposit of instruments of ratification, acceptance, approval or accession or definitive signature of thirty (30) States.

4. For each State which signs definitively or deposits an instrument of ratification, acceptance, approval or accession, after the requirement set out in paragraph 3 of this Article has been fulfilled, this Convention shall enter into force thirty (30) days after the date of the definitive signature or consent to be bound.

#### **Article 13** *Amendments*

1. A State Party may propose amendments to this Convention by submitting such amendments to the depositary, which shall circulate them to the other States Parties for approval.

2. The States Parties shall notify the depositary of their approval or disapproval of such proposed amendments within one hundred and eighty (180) days of their receipt.

3. Any amendment approved by two-thirds of all States Parties shall be laid down in a Protocol which is open for signature at the depositary by all States Parties.

4. The Protocol shall enter into force in the same manner as this Convention. For each State which signs the Protocol definitively or deposits an instrument of ratification, acceptance, approval or accession, after the requirements for the entry into force of the Protocol have been fulfilled, the Protocol shall enter into force for such State thirty (30) days after the date of the definitive signature or consent to be bound.

#### **Article 14** *Reservations*

1. When definitively signing, ratifying or acceding to this Convention or any amendment hereto, a State Party may make reservations.

2. A State Party may at any time withdraw its prior reservation by written notification to the depositary. Such withdrawal of a reservation becomes effective immediately upon notification to the depositary.

**Article 15** 1. A State Party may denounce this Convention by written notification to the depositary

2. Denunciation shall take effect ninety (90) days following the date of deposit of the written notification.
3. At the request of the denouncing State Party, all copies of the lists of authorities and of measures adopted and procedures available for reducing regulatory measures provided by any State Party denouncing this Convention shall be removed from use by the effective date of such denunciation.

**Article 16** *Depositary*

The Secretary-General of the United Nations shall be the depositary of this Convention.

**Article 17** *Authentic Texts*

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary. Only the English, French and Spanish authentic texts will be made available for signature at Tampere on 18 June 1998. The depositary shall prepare the authentic texts in Arabic, Chinese and Russian as soon as possible thereafter.

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