

Technical note on the WTO Trade Facilitation Agreement

Article 4: Procedures for appeal or review

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CHAPTER 4 APPEAL OR REVIEW PROCEDURES

Procedures for appeal or review: Article 4

Sometimes customs' administrative rulings are based on omissions which may not fully comply with the law. Affected traders may seek a review of the ruling, with recourse to an independent mechanism for review and/or appeal and, where appropriate, for the correction of administrative actions or omissions.

Article 4 creates an obligation that each WTO Member shall provide right of appeal and review to any person dissatisfied with an administrative decision issued by customs.

Members must provide any person within its territory the right to administrative review/appeal and/or to judicial appeal of decisions made by the customs authority.

The measure

ARTICLE 4 PROCEDURES FOR APPEAL OR REVIEW

1. Each Member shall provide that any person to whom customs issues an administrative decision³ has the right, within its territory, to:

- (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;
- and/or
- (b) a judicial appeal or review of the decision.

2. The legislation of a Member may require that an administrative appeal or review be initiated prior to a judicial appeal or review.

3. Each Member shall ensure that its procedures for appeal or review are carried out in a non-discriminatory manner.

4. Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1(a) is not given either:

- (a) within set periods as specified in its laws or regulations; or
- (b) without undue delay,

the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.⁴

³ An administrative decision: a decision with a legal effect that affects the rights and obligations of a specific person in an individual case. It covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. To address such failure, Members may maintain an alternative administrative mechanism or judicial recourse, to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1(a).

⁴ Nothing in this paragraph shall prevent a Member from recognizing administrative silence on appeal or review as a decision in favor of the petitioner in accordance with its laws and regulations.

5. Each Member shall ensure that the person referred to in paragraph 1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to procedures for appeal or review where necessary.

6. Each Member is encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs.

Understanding the measure

What is covered?

Core obligation

This measure requires that WTO Members provide right of appeal and/or review to any person aggrieved by an administrative decision issued by the customs authority. A footnote to paragraph 4.1 clarifies that administrative decisions are those issued for an individual specific case, as opposed to administrative regulations which are generally applicable.

A footnote to paragraph 4.4 notes that Members can recognize a non-decision – an administrative silence – with regard to the appeal or review submitted, as a decision in favour of the petitioner, in case it is so provided in the domestic legislation.

The mandatory nature of this measure affects only administrative decisions issued by customs, however the expression ‘is encouraged’ in paragraph 4.5 suggests that Members make a ‘best endeavour’ effort to extend the provision to other border agencies’ administrative decisions.

Two-track appeal or review

This measure provides for a two-track appeal and review process. Allowing for national legal frameworks, this measure obliges Members to allow affected persons to have recourse to:

- An administrative appeal or review; and/or
- A judicial appeal or review of the decision.

For the administrative track, the TFA specifies that the request of appeal or review must be addressed to an administrative authority higher than, or independent of, the official or office that issued the contested decision.

The double conjunction ‘and/or’ was introduced to allow the petitioner appeal to both administrative and judicial tracks or have direct access to just one channel.

Although legislation of some Members allow judicial appeal at any stage, other legislations stipulate that all stages of an administrative appeal must be exhausted before the right to judicial appeal can be used. This is why the TFA also refers to the scenario where administrative routes have to be exhausted first before having access to the judicial route.

Non-discriminatory processes of appeal or review

This measure requests WTO Members to ensure that appeal or review procedures are carried out in a non-discriminatory manner. To enhance transparency and fairness of rules, this measure also requires WTO Members to provide the petitioner with the rationale of the administrative decision issued, so as to enable recourse to appeal or review procedures.

Administrative decisions adopted by other border agencies

The measure also encourages WTO Members to apply the same provisions of appeal and/or review to administrative decisions issued by border agencies other than customs agencies.

What is not covered?

The measure does not explain how the procedures for appeal or review will be integrated within each Member's legal framework. As each Member has its own legal system in place, flexibility is provided regarding the means of implementation.

Benefits and opportunities for stakeholders

A functioning appeal and review system ensures a fairer and more transparent application of the laws administered and enforced by customs and – potentially – other border agencies.

In cases of delay in the appeal or review procedure, traders have recourse to the next higher level within the administrative or judicial body to shorten waiting times to obtain a decision.

With a well-functioning and fair legal system, this measure will not only improve traders' confidence regarding the application of regulatory requirements but would also signal a positive investment climate, attracting more inward investments in the longer term.

This multiple-stage appeal or review system will also encourage government authorities to take faster decisions, promoting better employment of time, human and financial public resources.

Implementation

Implementation checklist

The following checklist may be used to estimate the level of compliance with the measure:

- Legislation provides rights to any aggrieved person within the country's territory for administrative and/or judicial appeal against administrative decisions made by customs and possibly other border agencies.
- Those procedures are laid down in a non-discriminatory manner.
- In case of undue delay or missed deadline, the appellant is provided with an opportunity to bring the case to the higher administrative level or judicial appeal.
- Customs or other border agencies provide, upon request, the reasoning of the decision to the appellant, as well as the applicable appeal procedures available.

Preparing a national implementation plan

The following template may be used as a basis for a national implementation plan:

Implementation sequence	Actions suggested
	Preparatory phase
	Enact a legal framework regulating the appeal and review procedures, if not yet established.
	If needed, take legal or administrative measures to allow for a two-track appeal or review system.
	Where this measure affects other border agencies in addition to customs, these agencies may need to review procedures and set up new processes to allow implementation.
	Conduct thorough business process analysis of existing procedures and test their user-friendliness and efficiency.
	Set-up phase
	Put in place a protocol of coordination with all relevant agencies so that the appeal or review system can work smoothly.
	Management and follow-up phase
	Train customs, border agencies and judiciary officials and provide them with necessary tools for implementation.
	Carry out a public awareness campaign to enable wider understanding of the benefits of the system.
	Carry out reasonable and regular reviews of formalities, business processes and documentation requirements relating to appeal and review.
	Enable users to give feedback and evaluation on the implementation of this measure.
Average time for implementation	Between 18 months to two years.
Leading implementation agency	Customs is most commonly chosen as the leading implementation agency. The ministry of justice can be engaged as an important stakeholder for the judicial appeal/review process.

Key challenges

Uncertainty in the national legal and/or administrative framework to define appeal and/or review procedures can hamper traders' access to this right. Lack of dedicated human and financial resources for customs' appeal or review offices can also affect the implementation of the measure, especially the lack of technical or financial resources to manage ICT-enabled systems.

Key factors for success

A clear national legal and/or administrative framework is crucial to ensure successful implementation. A clear definition of appeal/review procedures, legal requirements and filing procedures is fundamental, especially how and when it is possible to access the judicial track if administrative tracks must first be exhausted. Strong inter-agency cooperation will ensure that the simplest and quickest processes are adopted, allowing traders and other concerned stakeholders to obtain fast and fair appeals or review decisions.