

CERTIFICATES OF FREE SALE: AN OVERVIEW AND CHALLENGES FACED BY REGULATORS AND EXPORTERS

**World Trade Organization (WTO) thematic session on
Conformity Assessment Procedures**

25 February 2020

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Certificate of Free Sale (CoFS)



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INTRODUCTION

- An official doc issued by the gov or a gov authorized authority of exporter, attesting that a specific product meets the domestic regulatory requirements of the exporting Member/ Country and that a product is freely available for purchase by the general public at domestic market.
- A CoFS is assumed to be a mandatory legal requirement in terms of an importing Member's domestic legislation imposed at the border of the importing Member.
- A CoFS underpins the market access.
- Alternative terminologies for a CoFS are Free Sale Certificate, Certificate of Free Trade, Certificate of Export, Export Certificate and Certificate of a Foreign Government.



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Background

- Some countries, incl WTO members, require that exports possess CoFS in order to receive custom clearance and market access.
- Without the CoFS, custom clearance and market access is refused/denied.
- Main products that need CoFS for market access range from Agric, certain chemicals & pharm products, cosmetics and food.
- CoFS is set out to validate:
 - The products exported comply with the appl. regulations & safe for human consumption;
 - Sold in the domestic market;
 - Traded by an authorised and registered entity.
- Certain countries insist that issuance of the CoFS be done by the gov or relevant regulatory gov authority.



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Premising a CoFS in the WTO TBT agreement

- **Technical Regulation:** “*Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method*”
 - it *may as well be* construed and/or partly consistent with the last part of the 1st sentence of the **technical regulation** definition as defined by the WTO TBT agreement. However, the part on “(1) *product characteristics or their related processes and production methods* and (2) *including the entire second sentence of the definition*” is amiss and/or perhaps debatable.
- **Conformity assessment procedure:** “any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled”.
 - CoFS seem to form part of conformity assessment procedures as the “attestation that a product complies with the relevant requirements in the technical regulations for the exporting Member”, fall squarely within the said definition.



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RSA highlights on the WTO provisions

- The rights and obligations of importing Members to ensure that regulatory and conformity assessment measures introduced for addressing legitimate policy objectives, do not create unnecessary obstacles to international trade.
- In line with the WTO DSB and Appellate Body findings on the rights and obligations of WTO Members in terms of the TBT Agreement provisions which in all cases concern measures introduced by an importing Member.
- Specific Trade Concerns raised by Members in meetings of the CTBT, form a substantial part of the regular work of the Triennial WTO TBT Committee meetings.
- Thus, the onus to regulate for legitimate policy objectives, as provided for in TBT Agreement Article 2.2, is on the importing Member for its domestic market and *definitely not on the exporting Member.*
- Exporting Member is obliged to ensure the product they export comply with statutory product performance requirements of the importing Member.



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Challenges of CoFS

- a) CoFS requirement compliance within WTO rules, TBT agreement and GATT. Article 2.1 of the TBT agreement states that “**Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other Member.**” This article contains both a MFN and a national treatment requirement that form the fundamental principles of multilateral trading system.
- The importing Member, complies fully with the applicable technical regulations of the exporting Member, and not with that of the importing Member, **the compliance with the WTO MFN principle is therefore compromised if not questionable.**
 - The CoFS may create multiple product characteristics for like products.
 - Furthermore, it seems not in compliant with Article 2.8 of the TBT agreement due to the absence of clear product performance requirements.



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Challenges

- b) Sometimes exporters manufacture specifically for the export market only and becomes impossible to verify compliance with applicable DTR since such specifications do not exist.
- Inter. standards have a voluntary application in terms of the TBT Agreement Annex 1, point 2 thus, demonstrating compliance with inter. standards through testing and certification, can only be done at CABs in a position to do so, which may even be situated in the territory of another Member.
 - Therefore, CABs are not mandated or in a position to issue CoFS, resulting in a *de facto* **ban on the importation** of such products by importing Member requiring a CoFS.
 - Exporting Members may have a STR not based on INTER. standards or relevant parts as it would be an ineffective or inappropriate means for the fulfilment of the legitimate policy objective being pursued.
 - Exporters may also manufacture in accordance with the applicable international standard or in part for export purposes & such would not be able to acquire a CoFS.



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Challenges

d) The integration of different economies from PTAs negotiated in terms of GATT 1994, Article XXIV or the enabling clause as well as from existing or emerging global value chains, the final product being exported may not have origin in the Member from which the product is exported.

- In the cases of transshipment and trans-loading, it is not possible for the exporting Member to issue a CoFS declaring compliance with domestic technical regulations. And hence, denied market access.
- Additionally, will not be treated as like products originating from other Members.
- This is in effect seemingly constitutes a ***de facto* import ban contrary to the provisions of GATT 1994 Articles I and XI** for respective MFN treatment and elimination of quantitative restriction restrictions



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Challenges

e) The national treatment requirement in Article 2.1 of the TBT Agreement, is equally important in the application of the TBT Agreement provisions.

- What technical regulations and conformity assessment procedures the products requiring the CoFS should comply with?
- Where an importing Member does not have manufacturing capacity of a specific product for which a CoFS is required, the attestation that the product complies with the applicable technical regulations of the exporting Member is also not in line with the *national treatment principle*, as technical regulations are not *always harmonized amongst exporting Members and different product performance requirements may apply in the different exporting Members*.



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Challenges

f) Members requesting CoFS seldom provide info on legitimate objective for the requirement for importation is compliance with the exporting Member's technical regulations.

- Exporters may have different technical regulations to address different policy objectives.
- Product performance characteristics may not be the same for like product in different countries.
- The policy objective of the CoFS requirement is not clear and perhaps questionable.
- Lack of a clear policy objective, appropriate technical regulations and conformity assessment procedures on the part of some importing Members requiring CoFS, **raise the question whether the CoFS requirement is not perhaps an unnecessary obstacle to international trade?**



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Challenges

g) CoFS also act as conformity assessment procedures.

- Article 5.1 of the TBT agreement “*Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members*”.
- Article 5.1 requires that Members ensure their central government bodies apply this provision.
- Thus, the obligation is on the importing Member to institute conformity assessment procedures and not the exporting Member as is required to be attested to in CoFS.



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Challenges

h) The request for CoFS by an importing Member is inconsistent with article 5.4 of the TBT Agreement.

- In some instances, the CoFS requirement might suggest that CGBs of importing Members did not use relevant guides or recommendations issued by ISBs or relevant parties.
- Where a need arises, why are the Members requiring CoFS for certain imports, not make use of the Article 2.2's right to regulate through using appropriate technical regulations?



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Challenges

- i) Having explained that some countries insist that the issuance of the CoFS must be done by the government or relevant regulatory government authority. This means that government assumes product liability.
- Application of CoFS by Members seems not consistent with the TBT Agreement in terms of transparency provisions such as 2.9, 2.10, 2.11 and 2.12. (Notification).



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Recommendations

RSA proposal to the WTO TBT Committee:

- Convene a technical discussion and assessment of the CoFS with a view to determine whether it is consistent with the provisions of the WTO TBT Agreement.
- Irrespective of whether it is found to be consistent or not, the WTO TBT Committee should provide the associated guidelines to encourage uniformity in application.
- Reemphasize the use of technical regulations, when considering the risks posed by unregulated products, to address legitimate policy objectives for national security requirements, the protection of: human health or safety, animal or plant life or health, and the environment product quality requirements, the prevention of deceptive practices.



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Recommendations

- Reiterate that Members shall “*ensure their TR & CAPs are based on relevant IS, guides or recommendations issued by ISBs where they exist or their completion is imminent; except in cases where such IS or relevant parts thereof would be an ineffective or inappropriate manner for the fulfilment of the legitimate objectives pursued*”.
- Encourage Members with financial, human and technological resource constraints for the development of appropriate **TR & CAPs**, to request technical assistance from other Members, or the use and adoption of **TR & CAPs** already adopted by other Members in addressing a similar regulatory objective;
- Recommend to Members requiring CoFS to accompany certain imports into their market, to replace it with appropriate technical regulations and conformity assessment procedures as a matter of urgency.



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Thank you!



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