

## NEGOTIATING A TRADE FACILITATION AGREEMENT: CONSIDERATIONS AND LESSONS FROM WTO JURISPRUDENCE

### SYNOPSIS

This note discusses the lessons learned from WTO jurisprudence on trade facilitation articles under the GATT (i.e. Articles V, VIII and X GATT) and on other articles and WTO agreements that embody language similar to the one currently under negotiations.

The analysis indicates that:

- The WTO panel and appellate body have actively addressed articles V, VIII and X GATT, and often found WTO Members in violation of their obligations under these articles.
- The design of the rules under the trade facilitation draft negotiating text is overly-prescriptive in many areas and could intrude on national policy and regulatory space.
- The rules under a future trade facilitation agreement could potentially introduce multiple grounds based on which laws and regulations of Member States would be challenged.
- The nature of the substantive content under a future trade facilitation agreement would give the WTO dispute settlement bodies a significant role in defining the scope and outreach of the disciplines.

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## I. INTRODUCTION

1. The negotiations of a trade facilitation agreement under the World Trade Organization (WTO) were launched pursuant to the 2004 July Framework Package (referred to as the post-Cancun decision). They are based on a mandate<sup>1</sup> to “clarify and improve” relevant aspects of trade facilitation articles under the GATT 1994, including Articles V, VIII and X GATT<sup>2</sup> (See Annex A for text of articles). The negotiations aim at further expediting the movement, release, and clearance of goods, including goods in transit.

2. Obligations under a new agreement on trade facilitation are different from undertaking voluntary steps towards facilitating trade based on guidelines developed at the multilateral level, such as the case with the World Customs Organization Conventions<sup>3</sup>. Compliance under the WTO is enforced through the dispute settlement mechanism (DSM) and through sectoral cross retaliation among countries.

3. The WTO DSM is meant to ensure bringing members’ practices into conformity with WTO law, and consequently is perceived as central to preserving the overall functioning of the organization<sup>4</sup>. Yet, the high degree of indeterminacy that the WTO agreements possess due to the textual ambiguity or ‘constructive vagueness’ that is relied upon by WTO members in the process of reaching an agreement<sup>5</sup> provides more space for the WTO panels and appellate body to actively interpret the articles of the agreements. In the case of a future trade facilitation agreement, the complexities of the substantive content that could be adopted would give the WTO dispute settlement bodies (DSB) a significant role in defining the scope and extent of the provisions.

4. By June 2013, the 16<sup>th</sup> revision of the trade facilitation negotiating text has been undertaken; many elements were still unsettled and vague at the time<sup>6</sup>. Negotiators from both developed and developing countries continue to deal with core questions, such as the needed

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<sup>1</sup> See: Annex D of the “July package” ([WT/L/579](#)).

<sup>2</sup> Article V provides for hassle-free movement of transit goods through the territory of other WTO Members. Article VIII seeks to rationalize and simplify border procedures, formalities and charges. Article X requires prompt publication of trade laws and regulations and their uniform, impartial and reasonable administration.

<sup>3</sup> See South Centre analytical note (June 2013) “How Far Does The Trade Facilitation Negotiation text (Rev.16) Go Beyond The WCO Revised Kyoto Convention (RKC)?”

<sup>4</sup> Mitsuo Matsuhita/Thomas Schoenbaum/Petros Mavroidis; *The World Trade Organization – Law, Practice and Policy*, 2<sup>nd</sup> ed; see Article 3.3 DSU on General Provisions.

<sup>5</sup> Alvarez-Jimenez, Alberto; “The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?”; *Journal of International Economic Law* (17 April 2009); taken from Alvarez article in regards to “constructive ambiguity”, a statement by Julio Lacarte, one of original members of the AB: “As you all are well aware, since you all are participants in this deadly art of drafting the negotiations will sometimes fall back on what is called constructive vagueness, constructive ambiguity to pull together different positions when you have to come to a final deal at the end of conference, and you have to do something, and you know your text is not very clear, but it’s the only text that everybody would approve, so in the end you take it. But then, that is the kind of text that the AB eventually has to interpret”.

<sup>6</sup> At that time the negotiating text included around 600 brackets in the text that needs to be addressed before an agreement is arrived at.

balance between on one hand arriving at a trade facilitation agreement under the multilateral trade body, and on the other hand securing policy space and flexibility to adopt and implement commitments commensurate with Members' capacity to do so. Accordingly, the legal wording and language of a potential trade facilitation agreement play a central role in achieving these objectives.

5. Discussing the interface between future disciplines on trade facilitation and the Members' policy and regulatory space requires considering the interpretive practice of the WTO DSB in relation to the GATT trade facilitation articles (i.e. Articles V, VIII and X GATT). Moreover, lessons could be learned from WTO jurisprudence tackling other articles and WTO agreements that embody language similar to the one currently under negotiations.

## II. WTO JURISPRUDENCE ON ARTICLES V, VIII AND X GATT

6. The WTO jurisprudence tackling the three GATT articles (i.e. articles V, VIII and X GATT) that are the basis of the negotiations helps clarify the direction of the WTO panel and Appellate Body in addressing the language on which the trade facilitation agreement is being based.

7. Dozens of dispute settlement cases have been raised based on legal grounds under Articles V, VIII and X GATT (See Annex B for a list of the cases). The WTO panel and appellate body have actively addressed and interpreted this language, and often found WTO Members in violation of their obligations under these articles.

8. For example, the WTO panels in each of the cases Argentina-Textiles and Apparel, US-Certain EC Products, China-Raw Materials, and EEC-Bananas II have actively addressed Members' obligations under Article VIII GATT on fees and formalities connected with importation and exportation. Overall, the panels have undertaken an expansive approach to addressing Members' obligations when it comes to stipulations under this Article, including in regard to Members' obligations to limit the amount of fees and formalities imposed on or in connection with importation and exportation to the approximate cost of services rendered.

9. Furthermore, the panel and Appellate Body actively addressed Members' obligations under Article X GATT on publication and administration of trade regulations. In multiple cases, the WTO DSB found Members in violation of their obligations under this article. In some cases, Members were found in violation for not publishing a certain law, regulation, judicial decision or administrative ruling that fell within the scope of the provision. In others, Members were found in violation for not doing that in a manner that is 'prompt' or that 'enable governments and traders to become acquainted with them'<sup>7</sup>.

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<sup>7</sup> See cases: EC-Poultry, EC-Selected Customs Matters, Dominican Republic-Import and Sale of Cigarettes, EC-IT Products, Thailand-Cigarettes (Philippines), China-Raw Materials, US- Underwear, Japan- Film, US- Hot-Rolled Steel, US- Shrimp, EC- Bananas III, Argentina- Hides and Leather, US- COOL.

### III. WTO JURISPRUDENCE ON LANGUAGE PROPOSED UNDER THE TF NEGOTIATING TEXT

10. The rules currently under negotiations (based on the negotiating text TN/TF/W/165/Rev.16 released in June 2013) if adopted as is could undermine the regulatory capacities and space of WTO Member States, especially developing countries. It could also introduce multiple grounds based on which laws and regulations of Member States could be challenged under the WTO dispute settlement understanding (DSU).

11. The trade facilitation negotiating text is packed with undefined and vague legal terminology as well as 'necessity tests'<sup>8</sup>, beyond what articles V, VIII, and X GATT include (See Annex C). These could establish multiple grounds for challenging a broad range of WTO Members' laws, rules, regulations, and measures that are not limited to customs, but are more broadly trade-related or regulations 'on or in connection with' import, export and transit of goods.

12. For example, Article 1 of the trade facilitation negotiating text addresses publication and availability of information, and seeks to clarify and improve Article X GATT. Under the latter, the only qualification to the manner of publishing an act was 'promptly' and 'in such a manner to enable governments and traders to become acquainted with them' (i.e. with laws, regulations, judicial decisions and administrative rulings). Both these terms were actively addressed by the DSB as previously mentioned.

13. Regarding 'promptness' of publication, the Panel in EC – IT Products<sup>9</sup> found that "the meaning of prompt is not an absolute concept (i.e. not a pre-set period of time applicable in all cases). Rather, an assessment of whether a measure has been published 'promptly' necessarily requires a case-by-case assessment. The case addressed the tariff treatment that the European Union and its member States accord to certain information technology products falling under the Information Technology Agreement (ITA), including the publication of certain amended explanatory notes related to that<sup>10</sup>. The panel<sup>11</sup> recalled Article X:1 of the GATT and noted that the adverb "promptly" is defined as "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then." The Panel then found that in light of the circumstances

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<sup>8</sup> When a 'necessity test' is applied, the WTO DSB consider the following factors (as applied in US- Gambling case: (1) the importance of the interest and value intended to be protected (2) the extent the measure contributes to realization of those ends (3) trade impact of the measure and (4) if reasonable available WTO consistent alternatives exist. A 'necessity test' includes a comparison between the challenged measure and possible alternatives, the results of which are considered in light of the importance of the interests at issue. In this process, the DSB could be involved in questioning the actual interests at hand or the objectives being served by the measure invoked by the state. The appellate body noted that the word 'necessary' refers to a range of degrees of necessity, depending on the connection in which it is used (see AB report Korea- Various measures on Beef, para. 161), whereby the appellate body noted: "at one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end is 'necessary' taken to mean as 'making a contribution to"; See also WTO analytical booklet 2011-2013 page 62.

<sup>9</sup> [Panel Report, EC – IT Products](#), para. 7.1074.

<sup>10</sup> More information on the case can be found at:

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds375\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds375_e.htm)

<sup>11</sup> WT/DS375/R / WT/DS376/R / WT/DS377/R, [Panel Report, EC – IT Products](#), para 7.1074.

and nature of the measures at issue in the EC – IT Products case, publication in the EU Official Journal months later than the measure being discussed was made effective was not “prompt”.

14. In another case, the Panel in Thailand – Cigarettes (Philippines)<sup>12</sup> actively undertook the exercise of evaluating ‘promptness’. The case dealt with a number of Thai fiscal and customs measures affecting cigarettes from the Philippines<sup>13</sup>. The panel found that Thailand acted inconsistently with Article X:3(a) because of delays caused in the Board of Administration decision-making process.

15. Besides the grounds of ‘promptness’, the formulation of Article 1 under the current trade facilitation negotiating text adds grounds that would be prone to interpretation by the DSB, including the requirement to publish in a ‘non-discriminatory’ and in an ‘easily accessible’ manner. Thus, it multiplies the grounds based on which a WTO Member State could be challenged and found in violation of its obligations.

16. Where a Member would bring a challenge based on provisions under a future trade facilitation agreement, the WTO DSB would go beyond considering whether the Member applies the practice stipulated under the agreement. It would undertake a close scrutiny of the manner in which the Member implements its obligation under the agreement<sup>14</sup>.

17. For example, article 3 on ‘advance rulings’ under the 16th revision of the trade facilitation draft consolidated negotiating text (TN/TF/W/165/Rev.16) reads: “1. Each Member shall issue an advance ruling in a reasonable, time bound manner [not exceeding a maximum period of 150 days] to an applicant that has submitted a written request containing all necessary information. If [a Member/the competent authority of a Member] declines to issue an advance ruling it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision...”. A future WTO Panel looking into a challenge brought forward based on those grounds would examine the time span between the moment a Member declines to issue an advance ruling and the time it notifies the applicant in writing of its decision.

18. Article 7.4 of the draft consolidated negotiating text (TN/TF/W/165/Rev.16) addresses ‘risk management’ systems. It reads: “74.3 Each Member shall base risk management on assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, inter alia, HS code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, type of means of transport and purpose of the stay of the goods in the Customs territory...”. “74.4 Each Member shall *design and apply* risk management in a manner as to avoid arbitrary or unjustifiable discrimination [*under the same conditions*], or disguised restrictions to international trade” (emphasis added). In case a challenge is brought on the grounds of such an article, both the design and application of the risk management system would be questioned. The burden of proof would fall on the Member undertaking the design and application of ‘risk management’ to

<sup>12</sup> WT/DS371/R, modified by Appellate Body Report WT/DS371/AB/R, (paras. 7.862-7.988).

<sup>13</sup> More information on the case can be found at:

[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds371\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds371_e.htm)

<sup>14</sup> The term ‘promptly’ is used under several articles of the TF negotiating text, including Articles : 1.1, 3.1, 5.1, 5.2, 7.3, 11.12, 11.17.

prove that it was not done in a manner that is 'arbitrary' or 'unjustifiably discriminatory'. Moreover, in the allocation of risk levels to various products, the Member could be questioned whether products "under the same conditions" have been given different treatment in terms of allocation of risk. It is not clear what the term 'conditions' encompass, and what weight would be given to the different factors stipulated under 7.4.3 in defining the 'condition' of the products being addressed.

19. The inclusion of vague language that is open for interpretation and possible use as grounds to challenge the regulatory capacities and action by Member States is a trend across the various articles negotiated under Section I of the trade facilitation negotiating text<sup>15</sup>.

#### **IV. PROVISIONS PROPOSED UNDER THE TF DRAFT NEGOTIATING TEXT TEND TO BE OVER-PRESCRIPTIVE AND OF A MANDATORY NATURE**

20. The design of the rules under negotiations is over-prescriptive in many areas and could intrude on national policy and regulatory space. For example, Article 6 addressing penalty systems goes a long way into addressing procedures related to conflict of interest and remuneration/ reward systems of government officials, which extend beyond what the GATT stipulates.

21. Other articles propose detailed lists of criteria for designing and applying certain custom practices, or the use of international standards as basis for such practice. This is the case under Article 7 on release and clearance of goods, which addresses the practice of 'risk management' systems and 'authorized operators' who benefit from extra preferences and facilities when it comes to their trade transactions. In both these areas, the negotiating text proposes an open-list of criteria for designing and applying the practice. Previous WTO jurisprudence have shown that the WTO panel and appellate body use such lists as starting points and reference in judging whether the Member have designed and applied its practice in a way that is considered arbitrary or discriminatory, thus unlawful<sup>16</sup>. Such stipulations would limit the space and options for Members to design and apply several of the requirements under a potential trade facilitation agreement, and would be intrusive on national policy space.

22. The negotiating text includes a wide variety of formulations that attempt to qualify the mandatory nature of the provisions. Such language includes "shall, as appropriate", "shall endeavor", "shall to the extent possible", "shall where practicable", "shall to the extent practicable", among others. This language is presented in the negotiations as an alternative to the mandatory term "shall". Thus it is supposed to provide Members with flexibility in regard to the obligations they would carry as a result of a trade facilitation agreement. While a qualified "shall" presents a level of mandatory obligation associated with some flexibility, there is no clarity or certainty on the extent of that flexibility.

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<sup>15</sup> Section I of the draft negotiating text deals with new rules under negotiations, while section II deals with special and differential treatment.

<sup>16</sup> See: US - Tuna II (Mexico); EC - Sardines.

23. The WTO jurisprudence show that the opinions of the DSB have tended to differ in the extent of strictness it applies when interpreting these terms. For example, when addressing the language “shall endeavor”, the panel in some cases has tended to indicate that the language does not hold a ‘result obligation’, thus is not legally binding with respect to what would be the outcome of the action<sup>17</sup>. Nevertheless, the appellate body in other cases was clear that the language would require Members to undertake at least certain steps in light of the provision under consideration, otherwise the Member would be found in violation of its obligation<sup>18</sup>.

**24. Overall, the trade facilitation negotiating text is designed based on mandatory language in most provisions, which includes limited and uncertain flexibilities in some parts. The implications of accepting binding commitments in a new trade facilitation agreement and the cost of non-compliance could be significant. A non-complying Member State may in certain cases have to invest in infrastructure and incur substantial costs to comply with its binding commitments. A member may also accept commitments for activities that may get outsourced to the private sector and over which there might be little control by the government.**

25. The following annexes highlight WTO jurisprudence and opinions by the WTO panel and appellate body on language that is used in the trade facilitation negotiating text and in GATT articles on trade facilitation (i.e. articles V, VIII, and X GATT).

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<sup>17</sup> See: Panel report in US – Wool Shirts and Blouses (paragraph 7.57).

<sup>18</sup> See: Appellate body reports in US – Wheat Gluten; and US – Line Pipe.



## V. ANNEX A: ARTICLES V, VIII, AND X GATT

### Article V : Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.
3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.
5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.\*
6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.
7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

## **Article VIII: Fees and Formalities connected with Importation and Exportation\***

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

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

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

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

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

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

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

## **Article X: Publication and Administration of Trade Regulations**

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance,

warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.  
  
(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.  
  
(c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

## VI. ANNEX B: DISPUTE SETTLEMENT CASES BASED ON THE GROUNDS OF ARTICLE V, VIII, AND X GATT

Examples of dispute settlement cases brought on the grounds of Article V, VIII, and X GATT			
Article concerned: Article VIII Fees and Formalities connected with Importation and Exportation			
	Case	Issues addressed; interpretation and application of the provisions	Interpreted language
1	Argentina – Textiles and Apparel	<p>Addressing a 3 per cent ad valorem “statistical tax” on imports.</p> <p>Panel noted: “An ad valorem duty with no fixed maximum fee, by its very nature, is not ‘limited in amount to the approximate cost of services rendered’. For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited <i>ad valorem</i> charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered”.<sup>19</sup></p> <p>In that case, Argentina also argued that it was collecting the tax for “<i>fiscal</i>” purposes in the context of undertakings it had given to the International Monetary Fund. The panel observed that:</p> <p>“... not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered”.<sup>20</sup></p> <p>The panel observed that the statistical tax at issue “purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports”. The panel found the tax to be a measure designated for fiscal purposes inconsistent with Article VIII</p>	“limited in amount to the approximate cost of services rendered”
2	US – Certain EC Products	Panel considered increased bonding requirements imposed by the United States on imports from the European Communities on 3 March 1999	‘limited in amount to the approximate cost of services rendered’
3	China – Raw Materials	Panel considered China’s auctioning of export quotas for certain minerals, under which enterprises seeking to export must pay a bid-winning price, equal to the bid price multiplied by the bid quantity, for the right to export under the quota	fee or charge on or in connection with exportation.
4	EEC – Bananas II	<p>In <i>EEC – Bananas II</i>, the panel examined whether the banana import licensing procedures at issue were consistent with Article VIII:1(c). According to the panel:</p> <p>“Article VIII:1(c) refers to import formalities and documentation requirements, not to the trade regulations which such formalities or requirements enforce. It further noted that the complaining parties had criticized the complexity of the EEC’s banana import regulations but that they had not submitted any evidence substantiating that the EEC’s import formalities and import documentation requirements, by themselves, were more complex than necessary to enforce these regulations. The Panel therefore found that the complaining parties had not demonstrated that the EEC had acted inconsistently with Article VIII:1(c)”.<sup>21</sup></p>	recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements

<sup>19</sup> Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (“*Argentina – Textiles and Apparel*”), WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1, DSR 1998:III, 1033, para. 6.75.

<sup>20</sup> *Ibid.*, para. 6.78.

<sup>21</sup> Panel Report, *EEC – Import Regime for Bananas* (“*EEC – Bananas II*”), 11 February 1994, unadopted, DS38/R, para. 151.

Article concerned: Article X Publication and Administration of Trade Regulations			
1	EC – Poultry	<p>AB: "<a href="#">Article X</a> relates to the publication and administration of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than to the substantive content of such measures... 22</p> <p>The Appellate Body upheld Panel's finding that import licensing of particular shipments by the European Communities was not inconsistent with <a href="#">Article X</a> because "the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of <a href="#">Article X of GATT</a></p>	<p>'laws, regulations, judicial decisions and administrative rulings of general application'</p> <p>"of general application"</p>
2	EC – Selected Customs Matters	<p>Addressed title as well as the content of the provision</p> <p>Panel: "'[L]aws, regulations, judicial decisions and administrative rulings of general application' described in <a href="#">Article X:1 of the GATT 1994</a> are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application"</p>	<p>Article X</p> <p>"of general application"</p>
3	Dominican Republic – Import and Sale of Cigarettes	<p>Claim regarding failure to publish average-price surveys of cigarettes conducted by the Dominican Republic Central Bank, used to determine the retail selling price for cigarettes and the tax base for the application of the Selective Consumption Tax on cigarettes.</p> <p>The Panel found: "[U]nder its <a href="#">Article X:1</a> obligations, the Dominican Republic should have either published the information related to the Central Bank average-price surveys of cigarettes or, alternatively, publish[ed] its decision to not conduct these surveys and to resort to an alternative method, in such a manner as to enable governments and traders to become acquainted with the method it would use in order to determine the tax base for the Selective Consumption Tax on cigarettes."</p>	<p>"Laws, regulations, judicial decisions and administrative rulings"</p> <p>"shall be published"</p>
4	EC – IT Products	<p>Examined a claim regarding a CNEN (an explanatory note to the EU's Customs Nomenclature).</p> <p>Panel noted: "Substantively, and when read as a whole within the context of <a href="#">Article X:1</a>, the phrase 'laws, regulations, judicial decisions and administrative rulings' reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders.... Accordingly, we consider that the coverage of <a href="#">Article X:1</a> extends to instruments with a degree of authoritativeness issued by certain legislative, administrative or judicial bodies. . Hence, the fact that CNENs are not legally binding under EC law does not preclude them from being contemplated by the terms 'laws, regulations, judicial decisions [or] administrative rulings' under <a href="#">Article X:1</a>"</p> <p>Panel examined the meaning of "made effective" and whether and when the CNEN amendments at issue were "made effective":</p> <p>"[W]e are of the view that the term 'made effective' under <a href="#">Article X:1 of the GATT 1994</a> also covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'. We see no basis to adopt the more restrictive view proposed by the European Communities, which considers that 'made effective. Under <a href="#">Article X:1</a> refers to measures formally adopted under its domestic system, i.e., adoption by the Commission.</p> <p>Regarding promptness of publication, the Panel in EC – IT Products found: "the meaning of prompt is not an</p>	<p>"Laws, regulations, judicial decisions and administrative rulings"</p> <p>"made effective"</p>

<sup>22</sup> Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, ("EC – Poultry"), WT/DS69/AB/R, adopted 23 July 1998, para. 115.

		<p>absolute concept, i.e. a pre-set period of time applicable in all cases. Rather, an assessment of whether a measure has been published ‘promptly’, that is ‘quickly’ and ‘without undue delay’, necessarily requires a case-by-case assessment. Accordingly, we will look at the time span between the moment the CNEN amendments were ‘made effective’ and the time they were ‘published’, and assess whether this is prompt in light of the facts of the case.” (749) The Panel then found that in the circumstances of the case and in light of the nature of the measures at issue, publication in the EU Official Journal eight months later than the measure was made effective was not “prompt”, but that the measures were posted on the EU Comitology website prior to the latest date on which they “became effective” in the sense of <a href="#">Article X:1</a>.</p> <p>Panel also found that publication of the measure at issue among other documents on the EU Comitology website did not meet the requirements of <a href="#">Article X:1</a>.</p> <p>The Panel found: “<a href="#">Article X:2</a> refers simply to ‘measure’ and hence encompasses an even broader category [compared to X.1] – namely, any act or omission by a WTO Member. It follows therefore that the drafters intended to include a broad range of measures that have the potential to affect trade and traders.”</p> <p>Panel addressed as well: Enforcement before official publication</p>	<p>“promptly”</p> <p>“in such a manner as to enable governments and traders to become acquainted with them”</p> <p>“measure of general application” under X.2</p>
5	<p>Thailand Cigarettes (Philippines),</p> <p>–</p>	<p>Regarding publication of rules affecting the effective tax rate on cigarettes. During the panel proceedings the Thai Excise Department explained its methodology for calculating the minimum retail sales prices (MRSPs) for imported and domestic cigarettes; the Panel found that this methodology applied “prospectively and generally” to all potential sales of cigarettes, and therefore fell within the scope of <a href="#">Article X:1</a>.</p> <p>Panel considered a claim regarding failure to publish the methodology for determining MRSPs (an element of the tax rate for cigarettes), discussed at <a href="#">paragraph 514 above</a>. Thailand admitted that it did not publish its methodology as such. The Panel rejected Thailand’s argument that listing eight elements of the MRSP in each published MRSP notice constituted compliance with <a href="#">Article X:1</a>, finding: “The listing of the components consisting of the MRSP would not enable importers to become acquainted with the detailed rules pertaining to the general methodology within the meaning of <a href="#">Article X:1</a>. We are of the view that for importers to become acquainted with the methodology for determining the MRSP, it is important for them to become familiar with, for instance, how the information they provide is processed. Also, they need to be informed on how Thai Excise determines the marketing costs where the information provided by importers is not accepted.”</p> <p>Panel considered a claim regarding failure to sufficiently publish the general rules relating to the right to the release of guarantees deposited by importers for excise and other internal taxes. The Panel evaluated the provisions in the Customs Act and the notices of assessment given to importers, and concluded:      “[D]espite Thailand’s acknowledgment that ‘in essence, guarantees are to be refunded on the final assessment of the goods’, the relevant documents referred to by Thailand in this dispute do not clearly indicate a definite right to the release of guarantees for the internal taxes upon final assessment of the goods. In such circumstances, importers will not be able to become acquainted with the exact nature of the right they have in respect of the release of guarantees for the internal taxes within the meaning of <a href="#">Article X:1</a>.”</p> <p>Panel noted: “The obligations of uniformity, impartiality and reasonableness are legally independent and the WTO Members are obliged to comply with all three requirements. This means that, as the Panel in Dominican Republic – Import and Sale of Cigarettes noted, a violation of any of the three obligations will lead to a violation of the obligations under <a href="#">Article X:3(a)</a>”</p>	<p>“Laws, regulations, judicial decisions and administrative rulings”</p> <p>“shall be published”</p> <p>“in such a manner as to enable governments and traders to become acquainted with them”</p>

		<p>The Panel examined a claim of violation of <a href="#">Article X:3(b)</a> related to delays. In a finding upheld by the Appellate Body, the Panel determined that “the excessive delays that have been caused in the ... appeals before the BoA (the prerequisite step necessary to even reach the Thai Tax Court) are so significant in terms of their duration and frequency that these specific instances can be considered as an indication of the capacity for delays in the system. Therefore, we conclude that Thailand failed to maintain an independent tribunal for the prompt review of customs value determinations inconsistently with <a href="#">Article X:3(b)</a>.” (See: <a href="#">Panel Report, Thailand – Cigarettes (Philippines)</a>, para. 7.1015)</p> <p>“[T]he due process objective reflected in <a href="#">Article X:3 of the GATT 1994</a> suggests that ‘prompt review and correction’ is to be understood as review and correction of administrative action that is performed in a quick and effective manner and without delay. What is quick or performed without delay depends on the context and particular circumstances, including the nature of the specific type of action to be reviewed and corrected.” (See: <a href="#">Appellate Body Report, Thailand – Cigarettes (Philippines)</a>, paras. 203–205).</p>	<p>Article X.3</p> <p>“prompt” under X.3(b)</p>
6	China – Raw Materials,	<p>The Panel examined a claim under <a href="#">Article X:1</a> that China did not publish the total amount of the export quota for zinc; in at least one year, there had been an export prohibition on zinc. The Panel found that China’s failure to set a quota amount was a “law, regulation, judicial decision or administrative ruling”</p> <p>The Panel found that China’s Export Quota Administration Measures, including their allocation rules, fell within the scope of <a href="#">Article X:1</a>. The Panel also found that the measure discussed at <a href="#">paragraph 517</a> (failure to set an export quota amount for zinc) was “of general application” because it affects any enterprise wishing to export zinc quota.</p> <p>Panel found that by failing to publish promptly its decision not to authorize an export quota for zinc in such manner as to enable governments and traders to become acquainted with it, China had violated <a href="#">Article X:1 of the GATT 1994</a></p>	<p>“Laws, regulations, judicial decisions and administrative rulings”</p> <p>“of general application”</p> <p>“promptly” under X.1</p>
7	US – Underwear,	<p>AB: The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application</p>	<p>“of general application”</p>
8	Japan – Film	<p>Panel: requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases.</p>	<p>“of general application”</p>
9	US – Hot-Rolled Steel	<p>Panel ruled that the anti-dumping measure at issue did not constitute a measure “of general application” within the meaning of <a href="#">Article X:1</a>,</p> <p>Panel noted that: we note that Japan has not even alleged, much less established, a pattern of decision-making with respect to the specific matters it is raising which would suggest a lack of uniform, impartial and reasonable administration of the US anti-dumping law.</p>	<p>“of general application”</p>
10	US – Shrimp	<p>AB addressed the general nature of X.3, noting: It is also clear to us that <a href="#">Article X:3 of the GATT 1994</a> establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations which, in our view, are not met here.”</p>	<p>X.3 overall</p>
11	EC – Bananas III	<p>AB: “The text of <a href="#">Article X:3(a)</a> clearly indicates that the requirements of ‘uniformity, impartiality and reasonableness’ do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those</p>	<p>“shall administer” under X.3</p>

		laws, regulations, decisions and rulings.” (Appellate Body Report, EC – Bananas, para. 200.) See also: <a href="#">Appellate Body Report, EC – Poultry</a> , para. 115.	
12	Argentina – Hides and Leather	The Panel examined a claim regarding an Argentine measure authorizing representatives of the domestic leather industry to attend pre-export customs checks on raw hides. The Panel found that <a href="#">Article X:3(a)</a> applied to the measure at issue, because it did not contain “substantive Customs rules for enforcement of export laws”, but rather “provide[d] for a certain manner of applying those substantive rules”.	“shall administer” under X.3
13	US – COOL	<p>The Panel in US – COOL found that, despite the absence of any specific instance of application, the context in which the letter at issue was issued by Secretary Vilsack to industry in general showed a sufficient basis for the letter to constitute an act of administering the COOL measure. In the course of its analysis, the Panel stated:</p> <p>“The term “administer” in Article X:3(a) refers to “putting into practical effect or applying” a legal instrument of the kind described in Article X:1.( Appellate Body Report, EC – Selected Customs Matters, para. 224). We also recall the panel’s observation in Argentina – Hides and Leather regarding the proper scope of Article X:3(a) that the relevant question is “whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994” (See: Panel Reports, US – COOL, para. 7.821)</p> <p>In discussing “reasonable” the Panel noted: “whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it” (see : Panel Reports, US – COOL, paras. 7.850-7.851)</p> <p>Panel addressed the meaning of “uniform” (Panel Reports, US – COOL, para. 7.876): “The term “uniform” is defined as “of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times”. We find guidance for the meaning of “uniform” under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in Argentina – Hides and Leather stated that “uniform administration” requires that Members ensure that their laws are applied consistently and predictably. (Panel Report, Argentina – Hides and Leather, para. 11.83) Additionally, in US – Stainless Steel, the panel noted that, “the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated”.( Panel Report, US – Stainless Steel (Korea), para. 6.51) Based on the dictionary meaning and guidance provided by previous panels, we will assess whether Mexico has established that the concerned shifts in the guidance provided by USDA(United States Department of Agriculture) constitute a non-uniform administration of the COOL measure.”</p>	<p>“administer”</p> <p>“reasonable”</p> <p>“uniform”</p>
<b>Article V: Freedom of Transit</b>			
	Colombia – Ports of Entry		<p>“traffic in transit” in V.1</p> <p>“there shall be freedom of transit” in V.2</p> <p>“No distinction shall be made” in V.2</p> <p>“to all charges, regulations and formalities in connection with transit” in V.5</p>



## VII. ANNEX C: VAGUE TERMS OPEN FOR INTERPRETATION BY THE DSB CURRENTLY USED UNDER TF NEGOTIATING TEXT (REV. 16)

Vague terms open for interpretation by the DSB Currently used under TF negotiating text (Rev. 15)		
Vague terminology used in the negotiations text (Section I, Rev. 15)	Examples of Articles where they appear	WTO jurisprudence <sup>23</sup> Source: WTO Analytical Index and WTO document JOB/SERV/8
Available	1.2.1 (title)	<p>The Appellate Body in Canada – Term of Patent Protection<sup>24</sup>, paragraphs 90-92 upheld that the word "available" means "available, as a matter of right", that is to say, available as a matter of legal right and certainty. The Appellate Body upheld that the use of the word "available" in Article 33 of the TRIPS Agreement does not undermine but, rather, underscores this obligation."</p> <p>→ <u>Note: Following the above ruling, pursuant to Article 2 of the current TF text, Members will be obliged to publish all the information listed under 1.2.1 through the internet.</u></p>
Avoid arbitrary <sup>25</sup> or unjustifiable discrimination	7.4, 7.7	<p>The Panel in <i>US – Poultry (China)</i>, in its discussion of the ordinary meaning of the phrase “arbitrary or unjustifiable”, began by examining the dictionary definitions of the terms “arbitrary” and “unjustifiable”. The Panel stated: A dictionary definition of the term ‘arbitrary’ is ‘based on mere opinion or preference as opp. to the real nature of things, capricious, unpredictable, inconsistent.’ In turn, the term ‘unjustifiable’ is defined as ‘not justifiable, indefensible’ with ‘justifiable’ meaning ‘[c]apable of being legally or morally justified or shown to be just, righteous, or innocent; defensible’ and ‘[c]apable of being maintained, defended, or made good.’ ( <a href="#">Panel Report, US – Poultry (China)</a>, para. 7.259.)</p> <p>The Panel stated: “[I]ndeed, in the context of <a href="#">Article 5.5</a> to show that the distinction in ALOPS is not arbitrary or unjustifiable, a Member must demonstrate that there are differing levels of risk between the comparable situations. We are of the view that such a demonstration requires scientific evidence.” ( <a href="#">Panel Report, US – Poultry (China)</a>, para. 7.263.)</p> <p>→ <u>Note: In the case of Article 7.4 on Risk Management in the TF negotiating text, the burden of proof could fall on the Member undertaking the design and application of risk management to prove that it was not done in manner that is arbitrary or unjustifiably discriminate. Moreover, in the allocation of risk levels to various products, the Member could be questioned whether products “under the same conditions” have been given different treatment in terms of allocation of risk. It is not clear what the term ‘conditions’ encompass, and what weight would be given to the different factors stipulated under 7.4.3 in defining ‘condition’.</u></p> <p><b>Arbitrary or Unjustifiable Discrimination</b></p> <p>The Panel in <i>United States - Certain Measures Affecting Imports of Poultry from China</i>, WT/DS392/R, examined the terms "arbitrary or unjustifiable". This was done on the basis of the customary rules of interpretation set out in the VCLT (Article 31). The <u>Appellate Body also clarified that its</u></p>

<sup>23</sup> It is underlined that the interpretation of flexibility terms is determined in accordance with the rules of interpretation of public international law (see Article 3.2 DSU), including by the precise wording of the provision at issue as well as its context (i.e. the other sentences in a provision, the other provisions in the Agreement, and the specific Agreement itself). Thus, interpretations of the same language could vary across agreements and provisions. Moreover, precise level of obligation of a particular expression will also depend on the specific context in which it is used.

<sup>24</sup> WT/DS170/AB/R

<sup>25</sup> The term ‘not arbitrary’ is usually linked to term ‘objectivity’, and could give rise to a variety of conflicting dimensions with existing regulatory frameworks

		<p><u>findings with respect to the ordinary meaning of "arbitrary or unjustifiable" from the chapeau of Article XX of the GATT 1994 are relevant and provide guidance in interpreting the terms "arbitrary or unjustifiable discrimination".</u></p> <p>Following the analysis conducted under the chapeau of Article XX, the Appellate Body agreed with the panel in <i>Australia - Salmon</i> when, in assessing the second element of Article 5.5 of the SPS Agreement, <u>looked at the measures applied in the specific context of the relevant risks and asserted that if there is no justification for the distinction in sanitary measures and corresponding levels of protection, this distinction could be considered to be "arbitrary or unjustifiable" in the sense of the second element of Article 5.5.</u></p> <p>The Appellate Body Reports in <i>US - Gasoline</i>, <i>US - Shrimp</i>, <i>US - Shrimp (Article 21.5 - Malaysia)</i> show that <u>the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence (see also Appellate Body Report, <i>Brazil - Retreaded Tyres</i>, para. 226).</u></p> <p>In <i>Brazil - Retreaded Tyres</i>, the Appellate Body's analysis of the measures at issue under the chapeau of <a href="#">Article XX</a> focused on whether discrimination that might result from the application of the measures at issue had a <i>legitimate cause or rationale</i> in the light of the objectives listed in the paragraphs of <a href="#">Article XX</a>. Further, the Appellate Body explained that the assessment of whether discrimination is 'arbitrary or unjustifiable' should be made in light of the objectives of the measure and whether the discrimination bears a rational connection to the stated objective of the measure. It is important thus to remember that not all discrimination in the application of measures is necessarily 'arbitrary or unjustifiable' and it is only the arbitrary or unjustifiable inconsistencies that are to be avoided." (<a href="#">Panel Report, US - Poultry (China)</a>, paras. 7.260-7.261)</p> <p>In <i>US - Shrimp (Article 21.5 - Malaysia)</i>, Paragraph 7.258, the Appellate Body highlighted two factors that it found, in that case, to be relevant to an assessment of whether the measure was arbitrary within the meaning of the chapeau of Article XX, <u>namely "rigidity and inflexibility" of the application of the measure; and the fact that the measure is imposed without inquiring into its appropriateness for the conditions prevailing in the exporting countries.</u></p> <p><u>The Appellate Body has found that distinctions in the level of protection can be said to be arbitrary or unjustifiable where the risk is at least equally high between the different situations at issue.</u> The Panel in <i>Australia - Salmon</i>, in a ruling upheld by the Appellate Body, found that, on the basis of the evidence before it, the distinctions in levels of sanitary protection reflected in Australia's treatment of, on the one hand, ocean-caught Pacific salmon and, on the other, herring used as bait and live ornamental finfish, are "arbitrary or unjustifiable" in the sense of the second element of <a href="#">Article 5.5</a>. (<a href="#">Appellate Body Report, Australia - Salmon</a>, para. 155)</p> <p><b>"Unjustifiable" Discrimination</b></p> <p>The Panel Report, <i>Brazil - Measures Affecting Imports of Retreaded Tyres</i>, Paragraph 7.259, provided some guidance on the ordinary meaning of: <b>"unjustifiable</b> Not justifiable, indefensible."</p> <p>Also, the Panel Report, <i>Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i>,<sup>26</sup> Paragraph 11.315, clarified that <u>"Whether or not any discrimination is justifiable, in a given instance, and if so, to what extent, must be ascertained by way of analysis of the specific circumstances of each case."</u></p>
Disguised restrictions to international trade <sup>27</sup>	7.4	This language was addressed under Article 5.5 of the SPS Agreement. The <b>panel in <i>Australia - Salmon</i></b> identified three "warning signals" that, taken together with other factors, can be considered relevant in a decision on the third element of <a href="#">Article 5.5</a> (see: <a href="#">Appellate Body Report, Australia - Salmon</a> , paras. 159, 161, 163 and 165.); the first was the arbitrary or unjustifiable character of the differences in levels of protection, the second was <i>rather substantial difference</i> in levels of protection (between an import prohibition on ocean-caught Pacific salmon, as

<sup>26</sup> WT/DS155/R, and Corr.1,

<sup>27</sup> This terminology stands for a 'necessity test'

		<p>opposed to tolerance for imports of herring used as bait and of live ornamental finfish), the third was the inconsistency of the SPS measure at issue with <a href="#">Articles 5.1</a> and <a href="#">2.2 of the SPS Agreement</a> (i.e the need for an assessment of the risks to human, animal or plant life or health and scientific evidence)</p> <p>The <b>Appellate Body in EC – Hormones</b> agreed that a conclusion on the third element can only be arrived at by examining several other factors including the “warning signals” indicated in <i>Australia – Salmon</i>. However, the Appellate Body cautioned that the application of the three warning signals utilized in <i>Australia – Salmon</i> alone is not necessarily sufficient to prove whether arbitrary or unjustifiable distinctions in a Member’s levels of protection have resulted in discrimination or a disguised restriction on international trade. The Appellate Body stated:  <u>“Evidently, the answer to the question whether arbitrary or unjustifiable differences or distinctions in levels of protection established by a Member do in fact result in discrimination or a disguised restriction on international trade must be sought in the circumstances of each individual case.”</u> (<a href="#">Appellate Body Report, EC – Hormones</a>, para. 240.)</p> <p><b>The Panel in US – Poultry (China)</b> interpreted the Appellate Body’s ruling in <i>EC – Hormones</i> to mean that the Appellate Body did not agree with the analysis of the three warning signals in <i>Australia – Salmon</i>. The Panel observed:  <u>“Therefore, it seems, according to the Appellate Body, that even if the presence of all three warning signals was demonstrated, that would not necessarily support a conclusion that the measure results in discrimination or a disguised restriction on trade.”</u> (<a href="#">Panel Report, US – Poultry (China)</a>, paras. 7.280 and 7.282.)</p> <p>Furthermore, the meaning of “trade-restrictive” is elaborated upon in the context of Article 2.2 of the TBT Agreement.</p>
<p>Legitimate public policy objectives</p>	<p>6.1.5, 7.7.4, 11.3</p>	<p>In <i>EC – Sardines</i>, the Appellate Body agreed with the Panel’s interpretation of the meaning of the phrase “legitimate objectives pursued”. <u>The Panel stated that the “‘legitimate objectives’ referred to in Article 2.4 must be interpreted in the context of Article 2.2”, which provides an illustrative, open list of objectives considered “legitimate”.</u> (<a href="#">Panel Report, EC – Sardines</a>, para. 7.118.) Also, the Panel indicated that <a href="#">Article 2.4 of the TBT Agreement</a> requires an examination and a determination whether the objectives of the measure at issue are “legitimate”. (<a href="#">Panel Report, EC – Sardines</a>, para. 7.122) The Appellate Body further concurred with the Panel in concluding that “the ‘legitimate objectives’ referred to in <a href="#">Article 2.4</a> must be interpreted in the context of <a href="#">Article 2.2</a>” (<a href="#">Panel Report, EC – Sardines</a>, para. 7.118), which refers also to “legitimate objectives”, and includes a description of what the nature of some such objectives can be States to design risk management.</p> <p>On identification of legitimacy of objective, the AB in <i>US- COOL</i> noted while dealing with Article 2.2 TBT Agreement: <u>“with respect to the determination of ‘legitimacy’ of the objective, we note first that a panel’s finding that the objective is among those listed in Article 2.2 will end the inquiry into its legitimacy.</u> If, however, the objective does not fall among those specifically listed, a panel must make a determination of legitimacy. <u>It may be guided by considerations we have set out above, including whether the identified objective is reflected in other provisions of the covered agreements.”</u> (see <i>AB US-COOL</i> report para. 369-372, WTO analytical booklet 2011-2013 page 67)</p> <p>In <i>US – Tuna II (Mexico)</i>, the Appellate Body provided guidance on the concept of a “legitimate objective” for the purposes of Article 2.2, stating (See: Appellate Body Report, <i>US – Tuna II (Mexico)</i>, paras. 313-314):      “Considering, first, the meaning of the term “legitimate objective” in the sense of Article 2.2 of the TBT Agreement, we note that the word “objective” describes a “thing aimed at or sought; a target, a goal, an aim”. The word “legitimate”, in turn, is defined as “lawful; justifiable; proper”. Taken together, this suggests that a “legitimate objective” is an aim or target that is lawful, justifiable, or proper.  <u>Furthermore, we consider that objectives recognized in the provisions of other covered agreements may provide guidance for, or may inform, the analysis of what might be considered to be a legitimate objective under Article 2.2 of the TBT Agreement.</u>  <u>Accordingly, in adjudicating a claim under Article 2.2 of the TBT Agreement, a panel must assess what a Member seeks to achieve by means of a technical regulation. In doing so, it may take into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure. A panel is not bound by a Member’s characterization of the objectives it pursues through the measure, but must independently and objectively assess them.</u> Subsequently, the analysis must turn to the question of whether a particular objective is legitimate, pursuant to the parameters set out above.”</p> <p>→ <u>Note: Such analysis could apply in cases that would challenge the design and application of ‘risk management’ under a potential TF agreement.</u></p>

		<p>→ <u>Note: Under Article 7.4.4 of the current TF negotiating text, the provision establishes a ‘necessity test’ in regard to the criteria used in ‘design’ and ‘application’ of risk management.</u> Building on the EC-Sardines case highlighted above, Article 7.4.4 should be read in view of 7.4.3, which proposes a list (currently bracketed) for <u>criteria to base risk management on. A choice by a member outside the list could be challenged as arbitrary and un-justifiable, limiting the discretion of Members.</u></p> <p>→ <u>Note: Similarly, under 7.7 (authorized operator) the criteria set for determining authorized operators could be challenged, in light of the suggested list of criteria under 7.2, and on the basis of affording or creating arbitrary or unjustifiable discrimination between operators where the same conditions prevail. ‘Where the same conditions prevail’ will also be open for interpretation.</u></p> <p><b>On Burden of proof:</b> in addressing Article 2.2 TBT Agreement, in <i>US – COOL</i> the Appellate Body explained that: "In order to demonstrate that a technical regulation is inconsistent with Article 2.2, <u>the complainant must make a prima facie case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create.</u> A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. <u>It is then for the respondent to rebut the complainant's prima facie case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, "reasonably available", is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective</u> (See: Appellate Body Reports, <i>US – COOL</i>, para. 379).</p>
May	5.1.1, 5.2.1, 7.1, 9.2	<p>The Appellate Body in <i>US – 1916 Act</i><sup>28</sup>, Paragraph 113 stated "'We agree with the first part of the United States' argument, namely, that the verb "may" indicates that it is <b>permissive, rather than mandatory</b>, to impose anti-dumping duties. However, it is not obvious to us, based on the wording of Article VI:2 alone, that the verb "may" also implies that a Member is permitted to impose a measure other than an anti-dumping duty."</p> <p>The term "may" was further illustrated in Paragraph 116 where the Appellate Body stated "[T]he verb "may" in Article VI:2 of the GATT 1994 is, in our opinion, properly understood as <b>giving Members a choice</b> between imposing an anti-dumping duty <i>or not</i>, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty. We find no support in Article VI:2, read in conjunction with Article 9 of the <i>Anti-Dumping Agreement</i>, for the United States' argument that the verb "may" indicates that Members, to counteract dumping, are permitted to take measures other than the imposition of anti-dumping duties."</p>
<ul style="list-style-type: none"> <li>• necessary information</li> <li>• necessary administrative measures</li> <li>• necessary for risk management</li> <li>• Necessary internal controls</li> <li>• Information necessary for release</li> <li>• Minimum necessary</li> <li>• Unnecessary obstacle to trade</li> </ul>	3.1 5.3.4 7.1.3 7.2 8.1 9.1 10.2 5.1, 10.2	<p>When 'necessary' is used as basis for a 'necessity test', the AB considers the following factors (as applied in <i>US- Gambling</i> case): (1) the importance of the interest and value intended to be protected (2) the extent the measure contributes to realization of those ends (3) trade impact of the measure and (4) if reasonable available WTO consistent alternatives exist<sup>29</sup>.</p> <p>A 'necessity test' includes a comparison between the challenged measure and possible alternatives, the results of which are considered in light of the importance of the interests at issue<sup>30</sup>. In this process, the DSB could be involved in questioning the actual interests at hand or the objectives being served by the measure invoked by the state.</p> <p>The AB noted that the word 'necessary' refers to a range of degrees of necessity, depending on the connection in which it is used, (see AB report <i>Korea- Various measures on Beef</i>, para. 161), where the AB noted: "at one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end is 'necessary' taken to mean as 'making a contribution to". (see WTO analytical booklet 2011-2013 page 62)</p> <p>On 'more trade restrictive than necessary; the AB in <i>US- Tuna II (Mexico)</i> dealing with Article 2.2 TBT noted: "The use of comparative</p>

<sup>28</sup> WT/DS136/AB/R, WT/DS162/AB/R,

<sup>29</sup> Look at *US-Gambling* case AB report adopted 20 April 2005 (para. 306).

<sup>30</sup> *US-Gambling* case, AB report adopted April 2005 (para. 307). See also Ortino, Federico (2006) (same as reference 76) pages 14-16.

<ul style="list-style-type: none"> <li>• Less trade restrictive manner</li> <li>• More restrictive on traffic in transit than necessary to fulfill a legitimate objective</li> <li>• more burdensome than necessary</li> </ul>	<p>11.3</p> <p>11.8</p>	<p>'more...than' in second sentence of Article 2.2 suggests that the existence of an 'unnecessary obstacle [] to international trade' in the first sentence may be established on the basis of a comparative analysis of above mentioned factors. In most cases, <u>this would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfillment would create</u>". (US- Tuna II, AB report, paras 318-320)</p> <p>In US – Tuna II (Mexico), the panel considered the question of what constitutes "trade-restrictiveness" within the meaning of Article 2.2: "Turning first to the question of what constitutes 'trade-restrictiveness' in this context, we note that Mexico argues that measures that are 'trade-restrictive' include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports and that the United States agrees with Mexico that a measure that imposes limits on imports or discriminates against them would meet the definition of a measure that is 'trade-restrictive'. We also agree." ( Panel Report, US – Tuna II (Mexico), para. 7.455)</p> <p>➔ <u>Note: in the context of Article 11.3 of the negotiating text (freedom of transit); charges, regulations or formalities in connection with traffic in transit would be evaluated on comparable grounds, in light of their impact in any form on traffic in transit.</u></p>
<p>Non-discriminatory manner</p>	<p>1.1, 4.1.3, 5.1(d), 5.3</p>	<p>The AB in Canada – Wheat Exports and Grain Imports,<sup>31</sup> para 87 concluded that "The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory", and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions <i>per se</i>, and drawing distinctions <i>on an improper basis</i>. Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited. <u>In all cases, a claimant alleging discrimination will need to establish that differential treatment has occurred in order to succeed in its claim.</u>"</p> <p>The panel in US – Sale of Clove Cigarettes,<sup>32</sup> 7.287 used the same reasoning stated above.</p>
<p>On the basis of international standards</p>	<p>7.7.4, 7.7.5, 10.4, 10.5.5</p>	<p>The meaning of "relevant international standards" is elaborated upon in the context of Article 2.4 of the TBT Agreement.</p> <p>The Panel in <i>US – Tuna II (Mexico)</i> considered that the term "international standard" is composed of three elements: (i) a standard; (ii) adopted by an international standardizing/standards organization; and (iii) made available to the public. The Appellate Body in <i>United States – Tuna II (Mexico)</i>,<sup>33</sup> found that in order to constitute an "international standard", a standard has to be adopted by an "international standardizing body".</p> <p>In <i>EC – Sardines</i>, the Appellate Body agreed with the Panel that an international standard is used "as a basis for" a technical regulation "when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation". ( <i>Appellate Body Report, EC – Sardines</i>, paras. 240–245) The Appellate Body cited certain definitions of the term "basis", and concluded that:</p> <p>"From these various definitions, we would highlight the similar terms 'principal constituent', 'fundamental principle', 'main constituent', and 'determining principle' – all of which lend credence to the conclusion that <u>there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other.</u>" ( <i>Appellate Body Report, EC – Sardines</i>, para. 245)<sup>34</sup></p> <p>In addressing the requirement to use international standards, the panel and AB were restrictive in their approach.</p>

<sup>31</sup> WT/DS276/AB/R

<sup>32</sup> WT/DS406/R, modified by Appellate Body Report WT/DS406/AB/R

<sup>33</sup> WT/DS381/AB/R, para 356

<sup>34</sup> In *EC – Sardines*, in its analysis of the terms "as a basis for", the Appellate Body considered its approach to the interpretation of the term "based on" in the context of [Article 3.1 of the SPS Agreement](#) as being relevant for the interpretation of [Article 2.4](#). ( *Appellate Body Report, EC – Sardines*, para. 242) However, it did not consider it necessary to decide in that case whether the term "as a basis", in the context of [Article 2.4 of the TBT Agreement](#), has the same meaning as the term "based on", in the context of [Article 3.1 of the SPS Agreement](#). ( *Appellate Body Report, EC – Sardines*, footnote 169).

		<p>In <i>EC – Sardines</i>, the Appellate Body noted: “<a href="#">Articles 3.1 and 3.3 of the SPS Agreement</a> permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the <i>SPS Agreement</i>, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under <a href="#">Article 2.4 of the TBT Agreement</a>, a Member may depart from a relevant international standard when it would be an ‘ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued’ by that Member through the technical regulation. (<a href="#">Appellate Body Report, EC – Sardines</a>, paras. 274–275.)</p> <p>In regards to <b>burden of proof</b>, the AB added:      “As with <a href="#">Articles 3.1 and 3.3 of the SPS Agreement</a>, there is no ‘general rule-exception’ relationship between the first and the second parts of <a href="#">Article 2.4</a>. Hence, in this case, it is for Peru – as the complaining Member seeking a ruling on the inconsistency with <a href="#">Article 2.4 of the TBT Agreement</a> of the measure applied by the European Communities – to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used ‘as a basis for the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the ‘legitimate objectives’ pursued by the European Communities through the EC Regulation.”(<a href="#">Appellate Body Report, EC – Sardines</a>, paras. 274–275.)</p> <p>→ <u>Note: The TF draft negotiating text, such as Article 7.7.4, uses the language “on the basis of international standards”. It is worth noting that there is a significant difference between “should take into account” and “use them as the basis”; the latter more restrictive and obligatory.</u></p>
Penalty <sup>35</sup> (Penalties)	6.2.2	<p>The Panel in <i>EC – Selected Customs Matters</i><sup>36</sup>, Footnote 838, noted that ““Penalties” is defined as the “charges assessed or action taken by customs in response to a violation of a customs-enforced regulation or law” (page 154).</p>
Progressively	10.6	<p>This term was addressed in the context of the SCM Agreement, Article 27.4, with respect to a developing country Member's obligations during the eight-year period, “[a]ny developing country Member referred to in paragraph 2(b) shall phase out its export subsidies, preferably in a progressive manner.”</p> <p>The Panel in <i>Brazil – Aircraft</i>,<sup>37</sup> para 7.79, defined the word “progressive” as “proceeding step by step, occurring one after another, successive”. The Panel held that Article 27.4 provides that the phase out should “preferably” be performed in a progressive manner. Under this interpretation, a developing country would be required to undertake a phased elimination of its export subsidies, and would be encouraged, but not required, to reduce its subsidies at an increasing rate.” The Panel found that Brazil had failed to comply with certain of the conditions of Article 27.4 of the SCM Agreement.</p> <p>→ <u>Note: Following this ruling, in the context of Article 10.6 as it appears in the TF current negotiating text for example, developing country members, LDCs inclusive, would be obliged to “progressively” eliminate the use of pre-shipment inspections.</u></p>
Promptly	1.1, 3.1, 5.1, 5.2, 7.3, 11.12	<p>Regarding promptness of publication, the Panel in <i>EC – IT Products</i> found: “<u>the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases. Rather, an assessment of whether a measure has been published ‘promptly’, that is ‘quickly’ and ‘without undue delay’, necessarily requires a case-by-case assessment. Accordingly, we will look at the time span between the moment the CNEN amendments were ‘made effective’ and the time they were ‘published’, and assess whether this is prompt in light of the facts of the case.</u>” ( <a href="#">Panel Report, EC – IT Products</a>, para. 7.1074) The Panel then found that in the circumstances of the case and in light of the nature of the measures at issue, publication in the EU Official Journal eight months later than the measure was made effective was not “prompt”, but that the measures were posted on the EU Comitology website prior to the latest date on which they “became effective” in the sense of <a href="#">Article X:1</a>.</p>

<sup>35</sup> Is used in an open manner not specifying whether it is the kind of penalty, assessment of its scope, or value that is being addressed

<sup>36</sup> WT/DS315/R, as modified by Appellate Body Report WT/DS315/AB/R

<sup>37</sup> WT/DS46/R, modified by Appellate Body Report WT/DS46/AB/R

		<p>The Panel in EC-IT<sup>38</sup>, para 7.1074 <u>recalled Article X:1 of the GATT and noted that the adverb "promptly" is defined as "[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then."</u></p> <p>The Panel in Thailand – Cigarettes (Philippines)<sup>39</sup> found that Thailand acted inconsistently with Article X:3(a) because of the delays caused in the Board of Administration decision-making process (paras. 7.862-7.988).</p> <p>→ <u>Note: Hence, in the case of advance rulings under Article 3 of the TF negotiating text for example, a WTO Panel will examine the time span between the moment a Member declines to issue an advance ruling and the time it notifies the applicant in writing of its decision.</u></p>
Reasonable	1.3.4, 2.1, 2.2, 3.1, 3.3, 7.8, 10.1, 10.7, 12.4	<p>In US- COOL, the panel considered meaning of word 'reasonable' under X.3(a) GATT, noting : " in our view, whether an act of administration can be considered reasonable within the meaning of Article X :3 (a) <u>entails a consideration of factual circumstances specific to each case.</u> This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objectives, cause or the rationale behind it. " (Panel report US- COOL, paras 7.850-7.851)</p> <p>On <b>reasonable interval</b>: In US – Clove Cigarettes, the AB noted: "in accordance with the general rules of burden of proof reflected in US- Wool Shirts and Blouses, we consider that under Article 2.12 of the TBT agreement, it is for the complaining Member to establish that the responding Member has not allowed an interval of not less than six months between the publication and the entry into force of the technical regulation at issue. If the complaining Member establishes this prima facie case of inconsistency, it is for the responding Member to rebut the prima facie case of inconsistency..." (AB report, US- Clove Cigarettes, paras 274-275, 279-283)</p> <p>AB noted: "The obligation imposed on Members by Article 2.12 to provide a <u>"reasonable interval" between the publication and the entry into force of their technical regulations carefully balances the interests of, on the one hand, the exporting Member whose producers might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation</u> (Appellate Body Report, US – Clove Cigarettes, paras. 274-275, 279-283)".</p> <p>→ <u>Note: The TF negotiating text currently refers to 'traders and other interested parties' such as under Article 2 on 'prior publication and consultation'. In such context, the balancing exercise between the interests of various involved groups would include multiple interests compared to that of the Member's.</u></p>
Relating (Relating to)	1.1	<p>The Appellate Body in Thailand – Cigarettes (Philippines)<sup>40</sup>, para 194 noted that "relate to" is defined, <i>inter alia</i>, as "[h]ave some connection with, be connected to". In the context of Article X:3(b), the AB considered that measures must have a rational connection with customs matters to fall within the scope of that provision. 195[...] the second sentence of Article X:3(b) refers to "agencies entrusted with administrative enforcement". This suggests that "administrative action" in the sense of Article X:3(b) is action by agencies that "enforce", that is, "apply" relevant rules.</p>
Shall, as appropriate	2.2, 7.1.2, 10.1 (a), 10.2.2	<p>The word "appropriate" is used in Section 1.1 of the Reference Paper on Telecommunications (as inscribed by Mexico in its Schedule of Specific Commitments) and was interpreted by the Panel in Mexico – Telecom<sup>41</sup>s. <u>In this case, the Panel repeated the dictionary definition and indicated that a measure is "appropriate" if it is "specially suitable" or "proper" for achieving the purpose that is pursued.</u> However, the Panel recognized that the word "appropriate" does not mean that in every case the occurrence of anti-competitive practices must be forestalled. The finding clarifies that a WTO Member cannot take measures that would lead to the exact opposite result from what its commitment is intended to achieve. The Panel stated: "The word "appropriate", in its general dictionary sense, means "specially suitable, proper". [footnote omitted] <u>This suggests that "appropriate measures" are those that are suitable for achieving their purpose – in this case that of "preventing a</u></p>

<sup>38</sup> WT/DS375/R / WT/DS376/R / WT/DS377/R

<sup>39</sup> WT/DS371/R, modified by Appellate Body Report WT/DS371/AB/R

<sup>40</sup> WT/DS371/AB/R

<sup>41</sup> See: Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537.



		<p><u>major supplier from engaging in or continuing anticompetitive practices"</u></p> <p>The word "appropriate" is used in a number of provisions in the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). The Panel in <i>China – IP Rights</i><sup>42</sup> noted that, even if WTO Members have freedom in choosing the method of implementing the obligations in the TRIPS Agreement, this did not mean that they were free not to give effect to its obligations or to implement a lower standard. In discussing that, the panel noted: "7.513 The first sentence of Article 1.1 sets out the basic obligation that Members "shall give effect" to the provisions of this Agreement. This means that the provisions of the Agreement are obligations where stated, and the first sentence of Article 61 so states. The second sentence of Article 1.1 clarifies that the provisions of the Agreement are minimum standards only, in that it gives Members the freedom to implement a higher standard, subject to a condition. <u>The third sentence of Article 1.1 does not grant Members freedom to implement a lower standard, but rather grants freedom to determine the appropriate method of implementation of the provisions to which they are required to give effect under the first sentence.</u>"</p> <p>The word "appropriate" is used in Article 4.10 of the Agreement on Subsidies and Countervailing Measures in the expression "appropriate countermeasures". This was interpreted by the Arbitrator in <i>US – Cotton Subsidies (22.6) (SCM 4.11)</i>.<sup>43</sup> The case involved a question what level of countermeasures was appropriate in case of a prohibited subsidy. <u>The Arbitrator made two relevant findings. First, it concluded, on the basis of dictionary definitions of the word "appropriate", that this term conveys a notion of something being "adapted" or "suited" to the situation/circumstances at hand. Second, the Arbitrator indicated that its standard of review in this regard required that "all of the circumstances of a particular case" are taken into account.</u></p> <p>"4.46 These definitions suggest that the adjective "appropriate" conveys the notion of something being "adapted" or "suited" to the particular situation at hand. This very general indication does not provide explicit guidance as to the exact parameters that legitimately may be taken into account in assessing the "appropriateness" of countermeasures in the context of Article 4.10 of the SCM Agreement. <u>Rather, the term suggests that countermeasures should be "adapted" to the particular circumstances, and thus that there may be a degree of legitimate variability in what may be "appropriate", depending on the circumstances of the case...</u> we agree that the term "appropriate" suggests that "all of the circumstances of a particular case" should be taken into account in assessing the "appropriateness" of proposed countermeasures, and that it also suggests a degree of flexibility in what might be considered "appropriate" in a given case"<sup>44</sup>.</p> <p>According to the WTO secretariat (JOB/SERV/8 page 19), "it seems that the use of the concept (appropriate) provides WTO Members with some flexibility or variability in choosing their action (as can be seen in <i>US – Cotton Subsidies (22.6)</i> and <i>China – IP Rights</i>). A WTO Member is obliged to take action that is "suitable" given the circumstances (see <i>US – Cotton Subsidies (22.6)</i> and <i>Japan – Apples</i>) or given the objective that is pursued (see <i>EC – Sardines</i>). However, taking no action at all or taking action that goes directly against the objective would not be seen to be "appropriate" (see <i>Mexico – Telecoms</i>)".</p> <ul style="list-style-type: none"> <li>→ <u>Note: Thus while the use of the term "appropriate" might induce a certain level of flexibility for Members in accepting and implementing a commitment, it would not allow them from refraining from implementation, but to undertake a choices in regards to the appropriate method of implementation or to "adapt" the ways of implementation.</u></li> <li>→ <u>Note: Thus in the case of Article 2 of the TF negotiating text on 'Prior Publication and Consultation', Members would have a margin of flexibility to choose the method that would allow traders and other interested parties to comment on new and amended rules, but would not be allowed to avoid undertaking measures that serve the objective of the provision.</u></li> </ul>
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<sup>42</sup> Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009.

<sup>43</sup> Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009.

<sup>44</sup> See: Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009.



Shall endeavor	3.6, 4.1.4, 7.2, 9.2, 10.3.1, 11.17	<p>The words "shall endeavor" figure in Article 8.1 of the Safeguards Agreement and were interpreted by the Appellate Body in US - Wheat Gluten (and repeated in US - Line Pipe (para. 119)<sup>45</sup>. In these cases, <u>the Appellate Body indicated that the obligation "to endeavour to maintain an adequate balance of concessions" in case of safeguard measures means that the WTO Member in question must at least have provided an adequate opportunity for consultations on the final proposed safeguard measure.</u></p> <p>→ <u>Note: According to the above, Members are obliged to undertake at least certain steps in light of the provision under consideration.</u></p> <p><u>Another reading for "shall endeavor":</u> The Panel in US - Wool Shirts and Blouses addressed language under the ATC (now expired) and arrived at the following conclusion in Paragraph 7.57:</p> <p>"Concerning India's claim that the US restraint is invalid because the Textile Monitoring Body (TMB) did not endorse the measure which the United States attempted to justify in the Market Statement and on which consultations were held, we note that under Article 6.10 of the ATC, the United States, should it be entitled to impose a restraint, could do so without TMB authorization, although it would be required to refer the matter to the TMB for appropriate recommendations.</p> <p>Article 8.9 of the Agreement on Textiles and Clothing (ATC) confirms that the recommendations of the TMB are not binding: "The Members <u>shall endeavor</u> to accept in full the recommendations of the TMB, which shall exercise proper surveillance of the implementation of such recommendations." (emphasis added)</p> <p>We, therefore, reject India's claim that under the ATC a safeguard action can be maintained only if adequately endorsed by the TMB."</p> <p>According to the panel here: Art. 8.9, based on a "shall endeavor" language, does not require the US to accept the TMB's recommendations - that is, it is up to the Member to decide whether or not to accept the TMB's recommendations, which therefore means that the recommendations themselves are not automatically binding on the Member. All that the provision binds the US to do is that the US "endeavor" - i.e. "try" - to accept the TMB recommendations, but it does not bind the US to accept such recommendations.</p> <p>→ <u>Note: So, legally, it would mean that a provision with a "shall endeavor" clause in it is legally binding with respect to what to do - i.e. to try - but not legally binding with respect to what should be the outcome of the action - i.e. whether to accept or not.</u></p>
Shall to the extent possible <sup>46</sup>	1.2, 9.3	<p>This terminology appeared in Article 9:1 of the Arrangement Regarding International Trade in Textiles ("MFA") - which is currently expired - and has been interpreted in <i>EEC - Cotton Yarn</i> (GATT)<sup>47</sup>. In that case, the GATT Panel concluded on the basis of the presence of "as far as possible" that the obligation in Article 9:1 MFA was non-mandatory.</p> <p>On burden of proof, the Panel did not address the question to what extent the EEC would be <i>required to show that it was impossible</i> to limit itself to the trade measures agreed upon in the framework of the MFA, since this was outside its terms of reference.</p> <p>It is worth noting that Article 9:1 of the MFA provides: "In view of the safeguards provided for in this Arrangement the participating countries <i>shall, as far as possible</i>, refrain from taking additional trade measures which may have the effect of nullifying the objectives of this Arrangement". This provision does not put in place a positive obligation on members, but established for a refrain by Members. Accordingly, this might lead to a different interpretation, and a more stricter one in the case where such language "as far as possible" is used in a provision that establishes for</p>

<sup>45</sup> Appellate Body Report, United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403.

<sup>46</sup> "to the extent possible" appears in several areas of WTO agreements, including Article IV GATS; Article 8.3 AD; Article 3.4 LIC and Article 18.3 SCM. Which would stand for a binding obligation; related analysis could be found in WTO document JOB/SERV/8 (Working Party on Domestic Regulation- Treatment of Flexibility Language in Dispute Settlement- Informal Note by the Secretariat);

<sup>47</sup> GATT Panel Report, *European Economic Community - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, adopted 30 October 1995, BISD 42S/17

		<p>positive implementation act on behalf of Members, such as in Article 1.2.1 (publication and availability of information) in the TF negotiating text.</p> <p>→ <u>Note: Such a language under the TF agreement could require that the Member undertaking (or not) a measure under discussion will have to prove that it was impossible otherwise, especially in the case that the Member does not undertake any implementation under the provision.</u></p> <p>Furthermore, a Secretariat Note (JOB/SERV/8) highlights that in the Case <i>Shrimp-Turtle</i><sup>48</sup>, the WTO Appellate body considered the phrase "as far as possible" as whether the Member exercised "good faith efforts in negotiating and trying to conclude multilateral agreements, [but determined that the Member] was not required to actually conclude such agreements (emphasis added)", thus concluded that "as far as possible" expresses a preference, but not a requirement. However, in that case, the expression did not appear in a WTO Agreement, but rather in Principle 12 of the "Rio Declaration on Environment and Development".</p>
Shall, where practicable <sup>49</sup>	1.2 2.1, 6.1, 7.5, 10.5, 11.3, 12.4	<p>The expression "where practicable" is used in paragraph 7 of Annex II of the Anti-Dumping Agreement, and was referred to by the Panel in Mexico - Anti-Dumping Measures on Rice. <u>In this case, when calculating dumping margins for US rice exporters the Mexican authority had based itself only on the information with regard to two US rice exporters identified in the applications for an anti-dumping investigation and on information provided by two other US rice exporters on their own initiative. The authority had not made attempts to check the information from other independent sources. The Panel found a violation because no attempt was made at all.</u> The Panel stated in relevant part<sup>50</sup>:</p> <p>7.167 "[...] In examining the record, we find no basis to consider that the authority made any attempt to check the applicant's information against information obtained from other interested parties or undertook the evaluative, comparative assessment that would have enabled the authority to assess whether the information provided by the applicant was indeed the best information available".</p> <p>→ <u>Note: Thus, the Member State would be expected to undertake steps towards the act stipulated under the provision, and prove that it was not practicable.</u></p> <p>It is worth noting that "whenever practicable" is used in Article 6.4 Anti-Dumping Agreement<sup>51</sup> and was interpreted in <i>US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)</i><sup>52</sup>, in which panel noted that the WTO obligations apply concurrently and cumulatively and concluded that the limited amount of time (claimed by the US as respondent) that was available was not a justification for not providing access to the information.</p>
To the extent practicable	2.1, 2.2, 7.2	"Practicable" is contained in Article 22.3 DSU (on suspension of concession and other obligations) and was interpreted within the expression "if

<sup>48</sup> Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481.

<sup>49</sup> While "to the extent practicable" is only used once, namely in Article XVI:2 of the WTO Agreement, but in that case not to provide flexibility to the Members to implement obligations.<sup>9</sup> Very similar expression "as far as practicable" is used in several instances in WTO Agreements (i.e. Annex C.1 (b) SPS; Article 5.2.2 TBT; Article 6.2 TBT and Annex 3.L TBT)

<sup>50</sup> Panel Report, *Mexico - Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R.

<sup>51</sup> Article 6.4 AD provides: "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."

<sup>52</sup> Panel Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina - Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report, WT/DS268/AB/RW

		<p>that party considers that it is not practicable or effective" by the Arbitrators in <i>EC – Bananas III (Ecuador) (Article 22.6 – EC)</i> and <i>US – Gambling (Article 22.6 – US)</i><sup>53</sup>. The Arbitrators stressed that the concerned Member has a margin of appreciation when considering what is "practicable or effective", noting that there is "certain margin of appreciation to the complaining party concerned in arriving at its conclusions in respect of an evaluation of certain factual elements..." and underlining "the margin of review by the Arbitrators implies the authority to broadly judge whether the complaining party in question has considered the necessary facts objectively".</p> <p>The Arbitrations in <i>EC – Bananas III</i>, para 70 noted that the ordinary meaning of "practicable" is "available or useful in practice; able to be used" or "inclined or suited to action as opposed to speculation etc." The Arbitrations concluded that "an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice as well as suited for being used in a particular case".</p> <p>→ <u>Note: A Member would have the flexibility to consider the factual elements of the context, and try to prove that it was not practicable. While the DSB will undertake a review and scrutiny of the context and arguments presented by the Member.</u></p>
Transparent	7.5, 10.7	The Appellate Body in <i>Chile-Price Band System</i> <sup>54</sup> found that the process put in place by Chile concerning amendments to gradually reduce protection in the domestic wheat and milling sector, including parameters used for the assessment of specific duties, namely floor, ceiling and reference prices, were not transparent.
Undue delay / without delay	4.1.4, 7.9, 11.14	The meaning of "undue delay" is elaborated upon in the context of Annex C.1(a) of the SPS Agreement. The Panel in <i>EC – Approval and Marketing of Biotech Products</i> , <sup>55</sup> Paragraph 7.1495, examined "undue delay" and concluded that: "Regarding the meaning of the phrase "undue delay", we consider that of the dictionary meanings of the term "delay" which have been identified by the United States, there is one which fits naturally with the provisions of Annex C(1)(a), first clause, namely, "(a period of) time lost by inaction or inability to proceed". So far as concerns the term "undue", of the dictionary meanings referred to by the United States we find two to be particularly relevant in the specific context of Annex C(1)(a), first clause - "[g]oing beyond what is warranted [...]" and "unjustifiable". We note that the United States, Canada and the European Communities have all identified "unjustifiable" as a relevant meaning of "undue". This view is supported also by the French version of Annex C(1)(a), first clause, which refers to "retard injustifié". Thus, based on the ordinary meaning of the phrase "without undue delay", we consider that Annex C(1)(a), first clause, requires that approval procedures be undertaken and completed with no unjustifiable loss of time."

<sup>53</sup> Referenced in WTO Secretariat paper JOB/SERV/8, Decision by the Arbitrators, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU, WT/DS27/ARB/ECU, 24 March 2000, DSR 2000:V, 2237. This argumentation was repeated in: Decision by Arbitrator, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU, WT/DS285/ARB, 21 December 2007, at paras 4.15-18.

<sup>54</sup> WT/DS207/RW

<sup>55</sup> WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9

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