MONASH University

TradeLab

MEMORANDUM

Re: Proposed Amendments to [redacted]

9 June 2019, Melbourne

Submitted by:

Mariia Artemenko
Aashritha Kumar
Joel Nixon
Xhanti Wong

TradeLab
International rules on cross-border trade and investment are increasingly complex. There is the WTO, World Bank and UNCTAD, but also hundreds of bilateral investment treaties (BITs) and free trade arrangements ranging from GSP, EU EPAs and COMESA to ASEAN, CAFTA and TPP. Each has its own negotiation, implementation and dispute settlement system. Everyone is affected but few have the time and resources to fully engage. TradeLab aims to empower countries and smaller stakeholders to reap the full development benefits of global trade and investment rules. Through pro bono legal clinics and practica, TradeLab connects students and experienced legal professionals to public officials especially in developing countries, small and medium-sized enterprises and civil society to build lasting legal capacity. Through 'learning by doing' we want to train and promote the next generation of trade and investment lawyers. By providing information and support on negotiations, compliance and litigation, we strive to make WTO, preferential trade and bilateral investment treaties work for everyone.
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EXECUTIVE SUMMARY

This memorandum assesses the international and domestic legal implications arising from [redacted] policy currently under contemplation by the government of [redacted].

Expanding the [redacted]

[redacted]. We conclude that the proposed measure does not contravene any of [redacted]'s international or domestic obligations. We also consider that the proposed [redacted] has no legal implications provided that it adheres to the requirements of [redacted]'s constitution.

Altering the Definition of [redacted]

[redacted]. [redacted] is aiming to close this loophole by [redacted]. It is proposed that the current legislative regime relating to the definition of [redacted] in [redacted] be amended to include such situations. We conclude that to the extent that this measure raises issues of inconsistency with the *General Agreement on Tariffs and Trade* ('*GATT*') regarding restrictions on trade are infringed, it is necessary for the protection of public health in limiting [redacted], and thus does not violate [redacted]'s international obligations.

Prohibiting [redacted]

[redacted] is proposing to ban [redacted], with the intention to [redacted]. The proposed measure would also cover [redacted]. We conclude that [redacted]would contravene [redacted]'s obligations under WTO law, whereas a [redacted] would not.

Prohibiting [redacted]

[redacted] proposes to [redacted], with the intention of [redacted]. This ban could be a prima facie infringement of the constitutionally entrenched [redacted]. However, the [redacted] Constitution allows for such infringements where [redacted]. On this basis, we conclude that the proposed [redacted]will be constitutional.

Prohibiting [redacted]

[redacted] is not inconsistent with the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*, on the basis that [redacted].

Imposition of [redacted]

[redacted] is proposing to [redacted]s. We concluded that the introduction of [redacted] would be consistent with [redacted]'s domestic law and relevant international law obligations, and [redacted] is not restricted by [redacted]'s legal obligations. We also note that the current proposal would not cover [redacted], and thus would not fall within the proposed amendment. We also examined the possibility of including an [redacted],

and concluded that although it may be inconsistent with Article VIII of *GATT*, the measure may be justifiable under Article XX.

[redacted]

[redacted] proposes to introduce a requirement that [redacted] must [redacted]. We concluded that this proposal did not give rise to any issues of inconsistency with the *Technical Barriers to Trade Agreement* ('*TBT Agreement*').

1. EXTENDING THE [redacted]

1.1. BACKGROUND

1. You have requested that we investigate the viability of [redacted]. Currently [redacted]. As such, this memorandum addresses the potential legal challenges which may arise in extending the [redacted] regime to include [redacted]. The differences between [redacted] are outlined below in our summary of [redacted]'s current [redacted] legislative framework.

2. You have also requested for us to assess the viability of establishing a [redacted]and any potential legal issues. Currently, the [redacted] is responsible for [redacted]. In making the decision to [redacted], the [redacted] must consider [redacted].

3. The [redacted]is intended to [redacted]. Moreover, the ability to [redacted] will afford the [redacted] government greater control over [redacted].

1.1.1. Current Legislative Regime

1. [redacted]

4. [redacted]'s [redacted]regime was implemented in [redacted]. Currently, [redacted].

2. [redacted]

5. [redacted]

6. [redacted]

1.2. POTENTIAL LEGAL RAMIFICATIONS

1.2.1. [redacted]

7. We rely on the following information provided by you, namely that: [redacted]

We do not believe any provisions of *General Agreement of Trade and Tariffs* ('*GATT')*[1] are contravened as the proposed measure appears to be applied uniformly.

[redacted].

8. Under the *General Agreement of Trade in Services* ('*GATS')*, 'service' is defined broadly to include services in all sectors.[2] This is further clarified by the

[1] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) art I, III, VIII, XI ('*GATT*')

[2] Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (*'GATS'*).

Services Sectoral Classification List (W/120) and *Central Product Classification System*, which includes services incidental to manufacturing.[3] The [redacted]

9. *GATS* defines trade in services as the supply of services in four modes, of which two are relevant: cross-border supply (e.g. services flowing from the territory of other WTO members to [redacted]) and commercial presence of service suppliers of a WTO member in [redacted] (e.g. foreign entities operating in [redacted]).[4]

10. Given the assumptions made in paragraph 7, particularly the fact that the regime would not distinguish between domestic and foreign service providers, we consider that the proposed extension of the licensing regime to include wholesalers and retailers does not conflict with any provisions of the *GATS.*

1.2.2. [redacted]

1. [redacted]

11. [redacted]

2. Abiding by [redacted]'s Constitution

12. [redacted]

[3] *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991).

[4] Ibid.

2. EXPANDING THE DEFINITION OF [redacted]

2.1. BACKGROUND

13. [redacted]

14. [redacted]

15. [redacted]

16. [redacted]

2.1.1. Current Legislative Regime

17. [redacted]

2.1.2. Proposed Amendment

18. [redacted]

2.2. POTENTIAL LEGAL RAMIFICATIONS

2.2.1. Is the Measure Discriminatory?

19. There is an argument that this measure affords [redacted] less favourable treatment than that afforded to domestic [redacted]

20. Article III.4 of the *GATT* (national treatment) requires contracting parties to accord imported products no less favourable treatment than that accorded to like products of national origin. This is in respect of all laws, regulations and requirements affecting a product's sale.[5]

21. It may be argued that [redacted] is treating such imported [redacted] less favourably than domestically manufactured and sold [redacted],[6] because [redacted]. However, as [redacted], the amendment would merely close a loophole in the existing law that allows [redacted].

22. To the extent that the measure is discriminatory, it is justifiable as it stems from a legitimate purpose in protecting public health (defined below).

2.2.2. Quantitative Restrictions

23. Article XI of the *GATT* [7] prohibits contracting parties from implementing 'quantitative restrictions' on the import of products from another contracting party. A quantitative restriction includes any prohibition or restriction which either by law or fact limits or otherwise reduces the number of products that can be imported into a WTO member's territory.[8] [redacted]

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[5] *GATT* (n 25) art 3.4.

[6] Ibid.

[7] *GATT* (n 25) art 11.

[8] Ibid.

24. With respect to Article XI, the term 'prohibitions or restrictions' has a broad meaning and is understood to mean a 'legal ban on the trade or importation of a specified commodity'.[9] In *Colombia – Ports of Entry*, the panel concluded that 'restrictions' refer to 'measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly'.[10] Whilst the proposed measure may have the effect of limiting the amount of [redacted] imported into [redacted], the measure does not restrict market access to imported [redacted]. [redacted] may still be [redacted]

2.2.3. Does the Human Health Exception Apply?

25. Article XX of the *GATT* sets out a number of exceptions which render measures prima facie inconsistent with *GATT* permissible. In particular, Article XX provides that WTO members may adopt policy measures that are inconsistent with *GATT* articles, but necessary to protect human health.[11]

26. Establishing that a measure falls within paragraph (b) of Article XX requires the fulfillment of a three-step test:[12]

(1) Whether the proposed measure is indeed designed to protect human health;
(2) Whether it is necessary to fulfil the public health policy objective; and
(3) Whether it is applied in conformity with the introductory proviso ('chapeau') of Article XX.[13]

1. Designed to Protect Human Health

27. [redacted]

28. [redacted]

29. [redacted]

30. It therefore appears likely that the nexus between the measure and protection of human health is established.

2. Necessity of the Measure

31. In order for a measure that restricts trade to be eligible for an exception under Article XX(b), a member has to establish that it is necessary to protect public health. This requires the balancing of relevant factors including the contribution made by the measure to the policy objective [redacted] and the impact of the measure on international trade. Additionally, necessity can be further established through an

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[9] Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WTO Doc WT/DS366/R (27 April 2009) [7.244].

[10] Ibid [7.240].

[11] *GATT* (n 25) art 20(b).

[12] Panel Report, *United States - Standard for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) [6.20].

[13] *GATT* (n 25) art 20.

examination of whether a less trade-restrictive measure is 'reasonably available' that can achieve the same level of protection of public health.[14]

32. The importance of public health has been consistently affirmed by WTO panels and the Appellate Body as 'vital and important to the highest degree'.[15] [redacted] As the proposed measure is directed at the protection of public health, this is a factor which should weigh heavily in favour of supporting its necessity.

33. The next consideration is the extent to which the measure contributes to achieving this objective – [redacted]. This threshold will be met if the measure contributes in a manner that is not marginal or insignificant, but rather one that is 'apt to achieve a material contribution to the objective'.[16] Hence, it would be preferable to be able to demonstrate through evidence or data that the measure does or will make a material contribution to the protection of human health.

34. Where there exists a 'genuine relationship if ends and means' between the objective and the measure, it is likely that the measure will be considered to be making a necessary contribution to the achievement of the objective. By implementing a more onerous regime [redacted], [redacted] is clearly aiming to [redacted]. This is beneficial in [redacted]

35. The WTO has acknowledged that complex public health problems can only be dealt with through comprehensive policy comprising a multiplicity of policy tools that have a complementary effect.[17] Here, this measure forms part of a comprehensive policy aiming to [redacted] in [redacted].

36. Most importantly, the WTO Appellate Body has given WTO members broad discretion to select their preferred 'level of protection' regarding public health policy.

37. Once a justifiable level of protection is set by a Member, a WTO panel may only determine issues relating to whether there are reasonably available alternative measures that achieve the same level of protection of public health.

38. 'Reasonably available alternatives' must be consistent with a Member's [redacted] and must not unduly burden a Member in its implementation.[18] Importantly, alternatives must be capable of achieving the same level of protection (of public health) that the Member intends to achieve.[19]

39. As the measure would close the loophole [redacted], there are arguably no other alternative measures available to achieve the same level of protection.

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[14] Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres*, WTO Doc WT/DS332/AB/R (3 December 2007) ('*Brazil-Retreaded Tyres'*) [156].

[15] Ibid [179].

[16] *Brazil-Retreaded Tyres* (n 58) [151].

[17] Ibid.

[18] Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) ('*US-Gambling'*) [308].

[19] Appellate Body Report, *EC – Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001) [174]–[175].

40. Thus, it is likely that the measure would be provisionally justified under Article XX (b).

3. The 'Chapeau' Requirement

41. Article XX's chapeau (introductory paragraph) imposes conditions on the application of the measure itself. The measure must not constitute an 'arbitrary or unjustifiable discrimination' between members or a 'disguised restriction on international trade'.[20]

42. Though, it may be argued that the measure does restrict international trade, and hence may constitute a 'disguised restriction on international trade', this is unlikely to be the case. As [redacted], it can be argued that the level of protection achieved by the [redacted] measure is warranted. Moreover, [redacted].

43. The measure does not discriminate between WTO members. If implemented, it is targeted [redacted], regardless of origin. Nor does the measure unjustifiably restrict international trade. The chapeau is unlikely to pose a problem to legal compatibility.

2.2.4. Conclusion

44. In our view, neither Article III:4 nor Article XI of the *GATT* are infringed by [redacted]'s proposed measure. But in the event that the measure is inconsistent with either or both provisions, we consider that it would be justifiable under Article XX(b) of the *GATT*.[21]

[20] *GATT* (n 25) art 20.

[21] Ibid.

3. PROHIBITING [redacted]

3.1. BACKGROUND

45. [redacted] is proposing to ban [redacted], with the intention to [redacted]

46. The proposed measure would also cover the [redacted]that are already marketed in [redacted].

47. We note that [redacted] of the Proposed Amendments introduces a [redacted].

48. You requested us to assess two possibilities for the amendment of the [redacted]. Firstly, you asked us to identify the possible legal implications of the [redacted]. Secondly, you asked us to explore the legal implications of the implementation of the [redacted].

3.1.1. Current Legislative Regime

49. The current definition of [redacted] is [redacted].

3.1.2. Proposed Amendment

50. [redacted] is seeking to [redacted].

51. The new definition of [redacted] is intended to expand the meaning of the '[redacted]' and is proposed to include [redacted].

3.2. POTENTIAL LEGAL RAMIFICATIONS

3.2.1. [redacted]

52. For the sake of completeness, [redacted] and [redacted] will be addressed separately in this part of the memorandum.

1. [redacted]

53. You have stated that the rationale for [redacted] is that [redacted].

54. There is a question whether the implementation for the measure would be consistent with [redacted]'s substantive and procedural obligations under the *TBT Agreement* and the *GATT*.

55. Article 2.1 of the *TBT Agreement* provides:
Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.[22]

56. For a violation of the national treatment obligation in Article 2.1 of the *TBT Agreement* to be established, three elements must be satisfied:
(i) the measure at issue must be a technical regulation;
(ii) the imported and domestic products at issue must be like products; and

[22] *Agreement on Technical Barriers to Trade*, opened for signature 12 April 1979, 1186 UNTS 276 (entered into force 1 January 1980) art 2.1 ('*TBT Agreement*').

(iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.[23]

57. We are of the opinion that the implementation of [redacted] would be inconsistent with [redacted]'s obligations under Article 2.1 of the *TBT Agreement* as on the facts provided all three elements referred to in paragraph 57 would most likely be satisfied (see paragraphs 60–75).

58. This conclusion is a result of the careful consideration of the Appellate Body decision in [redacted].

(i) The Measure at Issue Must be a Technical Regulation

59. We are of the opinion that the proposed measure [redacted] is a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement,* because [redacted]

(ii) *The Imported and Domestic Products at Issue Must be Like Products*

60. The likeness of the products is a difficult factual issue and we do not possess enough information concerning market composition and consumer preferences to provide a conclusive opinion on this question. For example, we do not possess the information whether [redacted]. We base our analysis on this information.

61. [redacted]

62. [redacted]

63. [redacted]

64. [redacted]

(iii) *The Treatment Accorded to Imported Products Must be Less Favourable Than That Accorded to Like Domestic Products*

65. Assuming that the imported and domestic products at issue are like products, in order for the violation of the Article 2.1 of the *TBT Agreement* to be established, the third and last element must be satisfied which is that the treatment accorded to imported products must be less favourable than that accorded to like domestic products.[24]

66. [redacted]

67. [redacted]

68. If the measure in question is prima facie inconsistent with Article 2.1 of the *TBT Agreement,* the case law suggests that the issue would be whether this *prima facie* discriminatory measure is saved by the measure being a 'legitimate regulatory

[23] Appellate Body Report, *US – Tuna II (Mexico)*, WTO Doc WT/DS487/AB/R (22 January 2012) [202] ('*US–Tuna II (Mexico)*'). See also Appellate Body Report, *US – COOL*, WTO Doc WT/DS384/AB/RW (29 June 2012) [267].

[24] Appellate Body Report, *US – Tuna II (Mexico)*, WTO Doc WT/DS487/AB/R (22 January 2012) [202]. See also Appellate Body Report, *US – COOL*, WTO Doc WT/DS384/AB/RW (29 June 2012) ('*US – Tuna II (Mexico)'*) [267].

distinction' within the meaning of the Article 2.1. of the *TBT Agreement*. The factors taken into consideration in this regard are similar to those considered in relation to Article XX *GATT*.[25]

69. [redacted]

70. [redacted]

71. In order to make a 'legitimate regulatory distinction' argument, [redacted] would need evidence which would suggest that [redacted]

72. Therefore, we are of the opinion that the [redacted] would be inconsistent with Article 2.1. of the *TBT Agreement* and in [redacted] to be consistent with the *TBT Agreement*, [redacted] should take a broader approach and legislate to ban [redacted].

3. [redacted]

73. [redacted].

74. [redacted]

75. [redacted]

76. [redacted]

3.2.2. Total ban on[redacted]

77. You also asked us to consider whether the total ban on [redacted].

78. We are of the opinion that if [redacted] takes a broader approach and legislates to ban [redacted], the 'treatment no less favourable' requirement entrenched in the Article 2.1 of the *TBT Agreement* would not be infringed. This is because the technical regulation will not modify the conditions of competition to the detriment of imported products as opposed to 'like products' of domestic origin.[26]

79. Similarly, the ban of all [redacted] would not infringe Article 2.1. of the *TBT Agreement.*

3.2.3. Conclusion

80. We are of the opinion that [redacted] should consider abandoning the [redacted] as it may be inconsistent with Article 2.1. of the *TBT Agreement*. Rather, in our view, [redacted] should extend the [redacted]

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[25] Appellate Body Reports, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products,* WTO Doc WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) [5.122]–[5.124], where the absence of a general exceptions clause, such as in art XX, in the TBT Agreement has been taken into account by WTO panels and WTO Appellate Body in reading art 2.1 in the *TBT Agreement* (*'US–Seal Products'*).
[26] Ibid [215].

4. PROHIBITING [redacted]

4.1. BACKGROUND

81. [redacted]

82. [redacted]

4.1.1 Definition of [redacted] and [redacted]

83. [redacted]

84. [redacted]

85. [redacted]

4.1.2 Current Domestic Law

86. [redacted]

4.1.3 Enforceability

87. [redacted]

88. [redacted]

4.2 POTENTIAL LEGAL RAMIFICATIONS

89. We understand that the implementation of [redacted] would be by way of enacting domestic legislation. As such, there are a number of considerations that need to be taken into account. In analysing the legal risks and challenges associated with implementing legislation in [redacted], this section will explore:

– Considerations under [redacted]'s domestic law – [redacted]; and
– Considerations under the *GATS.*

4.2.1 Considerations under [redacted]'s domestic law – [redacted]

90. The right to [redacted] is part of [redacted]. The [redacted] could be challenged for its inconsistence with the right to [redacted].

91. [redacted]

92. [redacted]

93. [redacted]

94. [redacted]

95. [redacted]

96. [redacted]

97. [redacted]

[redacted]

1. Strict exceptions to the [redacted]

98. In order to ensure that the [redacted] does not seem overly restrictive on the right to [redacted], the [redacted] should [redacted].

99. [redacted]

4.2.2 GATS considerations

100. The *GATS* was adopted to ensure that international trade law obligations extended to the service sector of the global economy. [redacted] is a WTO member and therefore the GATS applies to any obligations/restrictions on the service sector that [redacted] may enact through its legislation.

101. Under the *GATS,* 'service' is defined broadly to include services in all sectors.[27] This is further clarified by the Services Sectoral Classification List (W/120) and Central Product Classification System (CPC), which includes services incidental to manufacturing.[28] It is unclear whether [redacted]

102. [redacted]

103. Most provisions in GATS apply where the WTO member has made specific commitments in respect of the relevant type and mode of service. [redacted] has not made any such commitments in relation to [redacted]. Therefore, the only relevant obligation for [redacted] is the requirement not to discriminate between foreign service suppliers (most-favoured nation treatment, or 'MFN').

104. The proposed measure does not differentiate between service suppliers on the basis of nationality, therefore the GATS is not engaged.

[27] *GATS* (n 29).

[28] *Services Sectoral Classification List*, WTO Doc MTN.GNS/W/120 (10 July 1991).

5. PROHIBITING [redacted]

5.1. BACKGROUND

105. [redacted]

106. [redacted]

107. [redacted]

108. [redacted]

5.2. POTENTIAL LEGAL RAMIFICATIONS

5.2.1. Perceptions Around [redacted]

109. [redacted]

110. [redacted]

111. [redacted]

5.2.2. [redacted]

1. [redacted]

112. [redacted]

2. [redacted]

113. [redacted]

114. [redacted]

115. [redacted]

5.2.3. International Trade Law Considerations

1. TRIPS

116. [redacted]

(i) [redacted]

117. [redacted]

118. [redacted]

(ii) [redacted]

119. [redacted]

(iii) [redacted]

120. [redacted]

121. [redacted]

122. [redacted]

2. TBT Agreement

123. The TBT Agreement aims to ensure that 'technical regulations' are non-discriminatory and do not create unnecessary obstacles to trade. Of importance to this proposed measure is Article 2.2.[29]

124. Article 2.2 requires members to refrain from implementing technical regulations that are more trade-restrictive than necessary to fulfill a legitimate objective. In analysing whether the proposed measure is in breach of Article 2.2, the following must be considered:

(i) *Is the* [redacted] *Measure a 'Technical Regulation'?*

125. The TBT Agreement defines a 'technical regulation' as 'a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method'.[30]

126. Under the proposed measure it is mandatory for manufacturers to follow specific rules applying to [redacted]. We therefore consider that this measure would be a technical regulation.

(ii) *Is the Measure More Trade Restrictive than Necessary to Fulfil a Legitimate Objective?*

127. The proposed measure's objectives are to (1) improve public health by [redacted]; and (2) [redacted].

128. [redacted]

129. [redacted]

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[29] *TBT Agreement* (n 70) art 2.2.

[30] Ibid.

130. Secondly, the trade-restrictiveness of the measure must be discussed. 'Trade-restrictiveness' is defined as the extent of the limiting effect the measure had upon international trade. [redacted]

131. However, the specificity of this proposed measure [redacted] would indicate that their does not exist alternative measures that would be less trade restrictive and still fulfill [redacted]'s objectives. Moreover, [redacted]

132. As such, we consider that the measure would not be more trade-restrictive than necessary to fulfil a legitimate objective and therefore is not in contravention of Article 2.2 of the *TBT Agreement.*

5.2.4. Impact of Domestic Legislation

1. Misleading or Deceptive Conduct

133. [redacted]

134. [redacted]

135. [redacted]

136. [redacted]

2. [redacted]

137. [redacted]

138. [redacted]

(i) [redacted]

139. [redacted]

140. [redacted]

141. [redacted]

142. [redacted]

143. [redacted]

144. [redacted]

145. [redacted]

(ii) [redacted]

146. [redacted]

147. [redacted]

148. [redacted]

149. [redacted]

5.2.5. Conclusion

150. [redacted]

151. Irrespective of the commencement of legal action in [redacted] courts, in our view, the proposed measure is nonetheless compliant under international and domestic law.

6. IMPOSITION OF [redacted]

6.1. BACKGROUND

152. [redacted] is proposing to apply [redacted]. You advised us that [redacted]

153. [redacted]

154. [redacted]

155. [redacted]

156. [redacted]

157. [redacted]

6.2. POTENTIAL LEGAL RAMIFICATIONS

6.2.1. [redacted]

158. [redacted]

159. [redacted]

160. [redacted]

161. We are of the opinion that [redacted] would be consistent with relevant international law obligations and [redacted]'s domestic law such as [redacted].

162. [redacted]

163. We also suggest consideration of expanding the scope of the application of the [redacted]

164. In relation to the [redacted]

165. In relation to the [redacted], international law does not restrict the [redacted] if it is [redacted] in a non-discriminatory manner [redacted]

166. [redacted]

167. Moreover, if [redacted] would be different, this could potentially result in the violation of [redacted]'s international law obligations such as national treatment obligation under the Article III:4 of the *GATT*, if the effect of the measure was to treat imported products less favourably. If so, the measure would need to be defended under the Article XX (g) or (b) exceptions in the *GATT*. The possible international law implications would largely depend on the factual circumstances within which the implemented measure would be operating.

168. [redacted]

169. [redacted]

170. [redacted]

171. [redacted]

6.2.2. [redacted]

6.2.2.1. Article VIII – Fees and Formalities

172. Article VIII: 1(a) *GATT* reads as follows:

All fees and charges of whatever character…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.

173. And Article VIII: 4 *GATT* provides:

The provision of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those related to: …

(c) licensing

174. [redacted]

6.2.2.2. Cost of services rendered

175. To determine whether a charge is limited to the 'cost of services rendered', Article VIII *GATT* sets out a twofold test. Firstly, the charge in question must involve the rendering of a service, and secondly, the charge must not exceed the approximate cost of that service.[31]'Services rendered' means 'services rendered to the individual importer in question'.[32] 'Cost of services rendered' is to mean 'the cost of the customs processing for the individual entry in question'.[33]

176. Our interpretation of this provision is that the [redacted] should be limited to the cost of obtaining an import licence.

177. In *Argentina – Textiles and Apparel*[34], a 3% *ad valorem* tax imposed on imports was intended to raise 'revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and

[31] Panel Report, *United States Customs User Fee*, WTO Doc L/6264-35S/245 (2 February 1988) [69].

[32] Ibid [80].

[33] Ibid [86].

[34] Appellate Body Report, *Argentina – Measures Affecting Imports, Footwear, Textiles, Apparel and other Items,* WTO Doc WT/DS56/AB/R (27 March 1998).

exports'[35]. This measure was found to be inconsistent with Article VIII *GATT*, as the charge on importers had a secondary purpose of benefiting exports, as such, was not limited to the cost of services rendered. In applying *Argentina – Textiles and Apparel* to [redacted], allowing for a portion of [redacted]'s import licensing fee to finance [redacted]may be seen as a secondary purpose. Therefore, such a measure may be inconsistent with Article VIII *GATT*.

178. [redacted] This fee structure is known as an *ad valorem* charge. Analogous to *Argentina – Textiles and Apparel,* this *ad valorem* charge has 'no fixed maximum fee'[36] and thus, 'by design, not limited to the amount of the approximate cost of services rendered'[37]. As such the proposed measure is likely to be inconsistent with the obligations under Article VIII: 1(a) *GATT*.

6.2.2.3. Article XX GATT

179. In the event of a challenge to a measure that includes [redacted] in the cost of an importer's licence ('the measure'), [redacted] may argue that the measure is justified under the General Exceptions listed in Article XX *GATT*. The burden of proof resides with [redacted] in proving the measure is within the purview of Article XX(b)[38] and Article XX(g) *GATT*.

1. Article XX(b) GATT

180. Establishing a successful defence under Article XX(b) requires consideration of three factors.[39] It requires the examination of:

1. Whether the policy in respect of the measure falls within the range of policies designed to protect human, animal or plant life or health;
2. Whether the inconsistent measure is necessary to fulfil the policy objective; and
3. Whether it is applied in conformity with the proviso ('chapeau') of Art XX.[40]

(i) *Policy objective of the measure in issue?*

181. You have told us that the policy objective of [redacted] is to [redacted]

(ii) *Is the measure 'necessary' to fulfil the objective of* [redacted]

182. Determining if the measure is 'necessary' to [redacted] requires balancing the trade-restrictiveness of the measure in light of [redacted]. If the measure appears to be

[35] Guidlines to Article VIII (n 167) 269.

[36] Ibid 268.

[37] Ibid.

[38] *US – Gambling* (n 63) [309]–[311]. The Appellate Body additionally noted that a responding party need not identify the universe of less trade-restrictive alternative measures then show that none achieve the desired outcome. See also *EC – Seal Products* (n 77) [5.169].

[39] Panel Report, *United States-Standard for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) [6.20].

[40] *GATT* (n 25) art XX.

necessary, the panel will consider if there exist any alternative measures that are less trade restrictive but equally achieve the objective.[41].

183. While WTO panels and the Appellate Body have repeatedly affirmed the that the protection of human health is vital and of the highest degree of importance[42], the weight given to [redacted] remains unclear under Article XX(b) *GATT*.

(iii) *Is the EL in contravention of the chapeau of Art XX?*

184. The Chapeau of Art XX *GATT* imposes a condition on measures that they cannot be applied in a manner that constitutes 'arbitrary or unjustifiable discrimination' between countries where the same conditions prevail, or a 'disguised restriction on international trade'. [43]

185. However, as [redacted] applies to all [redacted] (both domestically manufactured and imported), it operates in a non-discriminatory manner as all products are subject to the [redacted] regardless of country of origin. Moreover, as the measure is applied 'even-handedly' and non-arbitrarily, there seems to be no substantial issue with compliance with the chapeau of Art XX *GATT*. Likewise, there is no suggestion that the measure is a disguised restriction on international trade.

2. Article XX(g) GATT

(i) *Relating to the conservation of exhaustible natural resources*

186. The measure could, alternatively, be justified under Article XX(g) *GATT* as it is 'relating to the conservation of exhaustible natural resources… in conjunction with restriction on domestic production or consumption'[44]. The term 'exhaustible natural resources' has been interpreted broadly. The measure proposed by [redacted] need not be 'necessary' or 'essential' to achieve the policy purpose of protecting the environment, rather, the measure needs to be 'primarily aimed at the conservation of exhaustible natural resources'[45]. From what you have told us, the [redacted], thereby 'relating to' conservation within the meaning of Article XX(g) *GATT*.

(iii) *Made in conjunction with restrictions on domestic production on consumption*

187. The [redacted] may restrict trade if the [redacted]. This restriction is not inconsistent with Article XX(g) *GATT* provided [redacted] applies the measure uniformly, to all [redacted], of both domestic and international origin.

(iii) *Is the* [redacted] *in contravention of the chapeau of Art XX?*

188. The [redacted] is unlikely to contravene the chapeau, as discussed above.

6.2.2.6. Conclusion

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[41] Brazil-Retreaded Tyres (n 58).

[42] Ibid.

[43] *GATT* (n 25) art XX.

[44] Ibid art XX(g).

[45] Guidlines to Article VIII (n 167) 284.

189. It is in our opinion that [redacted] may be inconsistent with Article VIII GATT, however may be justified in terms of Article XX(b) and/or Article XX(g) GATT. There is a paucity of relevant case law concerning the success of enacting trade-restrictive measures for the benefit of [redacted], thus, will be a task left to be determined if litigated.

7. REQUIRING [REDACTED] FOR SALE IN [REDACTED] TO [redacted]

7.1. BACKGROUND

190. [redacted]

191. [redacted]

192. [redacted]

193. [redacted]

7.2 POTENTIAL LEGAL RAMIFICATIONS

194. This section will explore considerations under international trade law, particularly any obligations arising under the *TBT Agreement.*

195. The *TBT Agreement* aims to ensure that 'technical regulations' are non-discriminatory and do not create unnecessary obstacles to trade. Labelling requirements fall under the definition of 'technical regulation' and 'standard' as in *Annex 1: Terms and their Definitions for the Purpose of this Agreement*.[46]

7.2.1 Article 2.1 *TBT Agreement*

196. In order to comply with Article 2.1 *TBT Agreement*, [redacted] must ensure that [redacted], rather than only imported [redacted]. If this requirement is only imposed on imported [redacted], [redacted] will be in contravention of Article 2.1 *TBT Agreement*, which states that technical regulations should not be a way of treating imported products less favourably than like products of national origin.[47]

7.2.2. Article 2.2 *TBT Agreement*

197. Technical regulations should not be applied with the effect of creating unnecessary obstacles to international trade. For this purpose, Article 2.2 *TBT Agreement* states that technical regulations should not be more *trade-restrictive than necessary*, to fulfil a *legitimate objective*, taking account of the *risks non-fulfilment would create*.[48] This section will examine whether all three parts Article 2.2 have been met.

1. Legitimate Objective

198. The protection of human health is a legitimate objective under the TBT Agreement.[49] [redacted] Therefore, this technical regulation, [redacted], is in pursuit of a legitimate objective.

2. Risk of Non-Fulfilment

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[46] *TBT Agreement* (n 70).

[47] Ibid art 2.1.

[48] Ibid art 2.2.

[49] Ibid.

199. [redacted]

3. More trade-restrictive than necessary?

200. Given that [redacted] fulfils a legitimate objective, it must not be "more trade restrictive than necessary", which requires a consideration of three factors:
– the degree of contribution made by the measure to the legitimate objective;
– the trade-restrictiveness of the measures; and
– the nature of the risk and the gravity of the consequences of not fulfilling the objectives.

201. The third element has already been addressed.

(i) *Degree of contribution made by the measure to the legitimate objective*

202. [redacted]

(ii) *Trade-restrictiveness*

203. [redacted]

204. [redacted]

205. [redacted]

206. [redacted]

207. [redacted]

208. [redacted]

209. [redacted]

210. [redacted]

211. We therefore conclude that this proposal would not raise any issues of inconsistency with WTO law.