International Economic Law Clinic

Inspections and Non-Tariff Barriers on "Perishable Imports" at the Mexico-US Border: Legal Limits and Best Practices

January 14, 2021

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I. EXECUTIVE SUMMARY

The international tomato market constitutes a multi-billion dollar industry comprised of high-value production and import markets worldwide. Annual tomato production (both fresh and processed) in the United States is valued at roughly $1.22 billion per annum; almost $2.4 billion dollars' worth of tomatoes were imported in 2019 alone.[1] [2] The United States ranks second in global tomato production, producing almost over 2 billion tons of fresh tomatoes annually.[3] Tomatoes are among the most popular vegetables purchased by the American consumer, and rank consistently as one of the country's top vegetable imports.[4] [5]

Despite high domestic production levels, the United States is a "net-importer" of tomatoes.[6] Approximately 40% of domestic demand is supplied nationally; the rest derive from imports.[7] While tomatoes are harvested throughout the fifty states, California and Florida produce nearly 2/3 of the country's fresh supply.[8] Although Florida remains the country's top tomato producer, annual production rates have declined significantly, contracting by nearly 40% between 2002 and 2015.[9]

The volume of tomato imports, particularly from Mexico, has steadily increased in recent years. The United States comprises Mexico's primary export

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[1] Zhengfei Guan, Trina Biswas, and Feng Wu, "The US Tomato Industry: An Overview of Production and Trade," University of Florida EDIS, September 2017https://edis.ifas.ufl.edu/.

[2] Sarah Hubbart, "Imported Tomatoes from Mexico have Some U.S. Growers Seeing Red," Global Trade Magazine, August 25th, 2020, https://www.globaltrademag.com/imported-tomatoes-from-mexico-have-some-u-s-growers-seeing-red/.

[3] Guan, Biswas, and Wu, "The US Tomato Industry: An Overview of Production and Trade."

[4] "Potatoes and tomatoes are the most commonly consumed vegetables," USDA Economic Research Service, December 16, 2020, https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58340.

[5] Renee Johnson, "The U.S. Trade Situation for Fruit and Vegetable Products," Congressional Research Service, December 1, 2016, https://fas.org/sgp/crs/misc/RL34468.pdf.

[6] John Vansickle, James Lawrence Seale, "Demand Analysis of the U.S. Fresh tomato Market," International Agricultural Trade & Policy Center, University of Florida, January 2005, https://www.researchgate.net/publication/23515367_Demand_Analysis_of_the_US_Fresh_Tomato_Market.

[7] Guan, Biswas, and Wu, "The US Tomato Industry: An Overview of Production and Trade."

[8] Vansickle and Seale, "Demand Analysis of the U.S. Fresh tomato Market."

[9] Guan, Biswas, and Wu, "The US Tomato Industry: An Overview of Production and Trade."

market; in 2019 Mexican tomatoes accounted for nearly 87.5% of US tomato imports.[10]

The reasons for these trends have been attributed to disparate labor, technology, and regulatory conditions in the two countries, subsidization of the Mexican tomato industry, and increased reliance on greenhouse production methods.[11] [12] [13] [14] In Florida, the banning of methyl bromide has also been cited as an important factor. [15] Because fresh tomatoes are largely handpicked, cost of labor may be determinative in production cost.[16]

The issue of cross-border trade has become a primary source of contention between stakeholders. The Florida Tomato Exchange, an organization representing Florida tomato producers, has repeatedly petitioned the federal government to restrict the importation of Mexican tomatoes. The US federal government has at times been receptive to these demands, periodically imposing tariffs or launching anti-dumping investigations on Mexican tomatoes. In tandem with a 2019 suspension agreement, the Department of Commerce has recently mandated increased grade and quality inspections for up to 66% of tomatoes crossing the border.[17] This figure has been

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[10] Sarah Hubbart, "Imported Tomatoes from Mexico have Some U.S. Growers Seeing Red."

[11] Carol Miller, "Consumption is Up; Production is Down: Understand How Fresh Tomato Trends Affect You," April 1, 2019, https://www.growingproduce.com/vegetables/consumption-is-up-production-is-down-understand-how-fresh-tomato-trends-affect-you/.

[12] Guan, Biswas, and Wu, "The US Tomato Industry: An Overview of Production and Trade."

[13] "U.S. losing market share for tomatoes due to lack of innovation," Fresh Production Association of the Americas,, October 29, 2019, https://www.freshplaza.com/article/9158042/us-losing-market-share-for-tomatoes-due-to-lack-of-innovation/.

[14] Zhengfei Guan, "Competition in the fruit and vegetable market: Why is Florida losing to Mexico?" Food & Resource Economics,Gulf Coast Research and Education Center, University of Florida, February 21, 2018, https://fred.ifas.ufl.edu/destudio/ppt/FlAgPolicy2018/Mexico-US%20competition%20(Guan).pdf.

[15] Zhengfei Guan, "The Economic Impact of Methyl Bromide Transition on Florida Tomato and Bell Pepper Production," The University of Florida, August 31, 3018, https://portal.nifa.usda.gov/web/crisprojectpages/1003687-the-economic-impact-of-methyl-bromide-transition-on-florida-tomato-and-bell-pepper-production.html.

[16] Sarah Hubbart, "Imported Tomatoes from Mexico have Some U.S. Growers Seeing Red."

[17] Taylor Telford, "U.S. and Mexico Settle Tomato Squabble to Stave Off Tariffs, Shortage," The Washington Post, August 21, 2019, https://www.washingtonpost.com/business/2019/08/21/us-mexico-settle-tomato-squabble-stave-off-tariffs-shortage/.

publicly disputed by both Mexican growers and the FPAA, who estimate that up to 93% of tomatoes will be inspected.

These new inspections come in addition to recent inspections enacted in response to the discovery of Tomato Brown Rugose fruit virus ("ToBRFV"). Federal Statute also requires that round, "open-field" tomatoes be subject to size, quality, and grade inspections during the Florida growing season ("8e requirements"). The Fresh Produce Association of the Americas ("FPAA") has repeatedly questioned the collective impact of these inspections on cross-border trade and commerce. The FPAA's concerns are well-founded; border inspections may protract tomato shipment delivery, and even slight delays may incur significant financial loss. Because tomatoes imported from Mexico are predominantly vine-ripened, the vegetables are harvested late in the ripening process and must be expeditiously shipped to US markets. Time is thus a critical factor in ensuring the viability and consistency of the supply chain.

The following report assesses the legitimacy of these inspections under international law. Part I will provide a regulatory and policy overview for each of the three measures at issue, followed by a description of their implementation on the ground. The legal framework of the World Trade Organization ("WTO") and US-Mexico-Canada Agreement ("USMCA") will be discussed, with a specific focus on the Sanitary and Phytosanitary ("SPS") and Technical Barriers to Trade ("TBT") Agreements of both treaties. The report will subsequently evaluate the decisions of the WTO Appellate Body in the context of the inspections, assessing whether they may constitute barriers to trade under international law.

A. INTRODUCTION

Non-tariff measures that prevent or restrict the importation of goods and services may have significant economic effects on international trade. In international trade parlance, these measures are termed "non-tariff barriers to trade" ("NTBs"). Countries enter into international and bilateral trade agreements to facilitate cross-border commerce and eliminate barriers to trade, while maintaining national standards that ensure the health, safety, and quality of imported products.

Non-tariff trade barriers may be permitted if they are not more trade-restrictive than necessary. The World Trade Organization mandates that measures enacted to safeguard "human, animal, or plant life or health" ("Sanitary or Phytosanitary, or SPS measures") "shall not be applied in a manner that would constitute a "disguised restriction on international trade".[18] The newly-formed United States Mexico Canada Agreement places similar obligations on member states, requiring that national measures intended to promote health and welfare be assessed in conjunction with the availability of "alternative, less trade-restrictive approaches".[19]

Both the WTO and the USMCA permit member states to determine their own health and safety standards, so long as they do not "arbitrarily or unjustifiably" discriminate between member states or restrict international trade.[20] The SPS Agreements of both treaties elaborate an evidentiary standard for SPS measures, requiring that the latter be justified by "sufficient scientific evidence".[21] [22]Provisional, or "interim" measures must be substantiated by periodic risk assessments pursuant to both agreements.[23] While countries are encouraged to protect domestic health and welfare through domestic legislation, they are discouraged from implementing arbitrary regulations that may distort international trade.

Equally relevant to agricultural import regulations are the "Technical Barriers to Trade" Agreements concluded under both the WTO and USMCA. Technical barriers to trade comprise the majority of non-tariff barriers to trade. The WTO and USMCA TBT Agreements assert provisions governing technical regulations, standards, and conformity assessment procedures implemented by member countries. Under both treaties, member states pledge to refrain from "arbitrar[ily] or

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[18] "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)," the World Trade Organization, https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

[19] "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," Office of the United States Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[20] "The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)," the World Trade Organization.

[21] Ibid.

[22] "Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text," Office of the United States Trade Representative.

[23] Ibid.

unjustifiabl[y] discriminating between [member] countries" and "creating unnecessary obstacles to international trade".[24] [25]When implemented correctly, technical regulations and standards help promote uniform industry practice, national production mechanisms, and trade efficiency. When implemented incorrectly, TBTs, like SPS measures, may distort international commerce.

The provisions of the TBT and SPS Agreements are highly significant in assessing recent regulatory developments affecting Mexican tomato imports. For purposes of this report, the equity of inspection requirements mandated by the 2019 Tomato Suspension Agreement will be assessed in accordance international law. Recent United States Department of Agriculture ("USDA") inspections relevant to the ToBRFV will be evaluated under US treaty obligations. Lastly, federal marketing orders establishing size, quality, and grade requirements for imported tomatoes ("8e requirements") will be examined as a potentially protectionist measure warranting further review.

B. THE 2019 TOMATO SUSPENSION AGREEMENT - INSPECTIONS

In April 1996, after nearly 40 years of trade contentions, the Department of Commerce ("Commerce") launched an anti-dumping investigation into Mexican tomato imports.[26] Since the 1970s, American tomato producers had petitioned Commerce to sanction the alleged "dumping" (or sale below market value) of Mexican tomato imports in the United States.[27] Mexican stakeholders quickly entered into negotiations to suspend the anti-dumping investigation, concluding a "Tomato

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[24] Ibid.

[25] "Agreement on Technical Barriers to Trade," the World Trade Organization,https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

[26] "Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico," United States Department of Commerce, International Trade Administration, November 1, 1996, https://enforcement.trade.gov/tomato/1996-agreement/96b01.htm.

[27] Sarah Hubbart, "Imported Tomatoes from Mexico have Some U.S. Growers Seeing Red."

Suspension Agreement" with the US federal government in return for a pledge to respect price floors and market restrictions.[28]

Since 1996, the Tomato Suspension Agreement has been discontinued, modified, and reinstated a total of four times. [29] Following the termination of a 2008 suspension agreement, Commerce "signed a new…agreement" in March 2013.[30] In February 2018, the Department initiated a "five-year sunset review" of the 2013 Agreement to evaluate its efficacy, concluding that its revocation would engender "the continuation or recurrence" of dumping.[31]

In November 2018, the FTE petitioned Commerce to abandon the 2013 Agreement and reinstate the anti-dumping investigation, claiming that Mexican stakeholders had unfairly "exploited" the Agreement in order to continue uncompetitive practices.[32] [33] The FPAA, CAADES, *et al.,* and Nature Sweet collectively submitted briefs opposing the FTE's request.[34] Despite its conclusions to the contrary, Commerce decided to formally terminate the 2013 Tomato Suspension Agreement in May 2019.[35]

Government withdrawal from the measure was accompanied by the imposition of a 17.5% tariff on Mexican tomato imports.[36] Secretary of Commerce Wilbur Ross expressed that the FTE was instrumental in Commerce's final decision, articulating

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[28]"Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico," United States Department of Commerce, International Trade Administration.

[29] Sarah Hubbart, "Imported Tomatoes from Mexico have Some U.S. Growers Seeing Red."

[30] "Fresh Tomatoes From Mexico: Intent To Terminate Suspension Agreement, Rescind the Sunset and Administrative Reviews, and Resume the Antidumping Duty Investigation," International Trade Administration, March 5, 2019, https://www.federalregister.gov/documents/2019/03/05/2019-03928/fresh-tomatoes-from-mexico-intent-to-terminate-suspension-agreement-rescind-the-sunset-and.

[31] Ibid.

[32] Ibid.

[33] Taylor Telford, "U.S. and Mexico Settle Tomato Squabble to Stave Off Tariffs, Shortage."

[34] "Fresh Tomatoes From Mexico: Intent To Terminate Suspension Agreement, Rescind the Sunset and Administrative Reviews, and Resume the Antidumping Duty Investigation," International Trade Administration.

[35] Ibid.

[36] Taylor Telford, "U.S. and Mexico Settle Tomato Squabble to Stave Off Tariffs, Shortage."

that, "*We have heard the concerns of the American tomato producing industry and are taking action today to ensure they are protected from unfair trading practices*".[37]

In 2019, Commerce decided to negate its revocation of the 2013 Agreement and suspend the antidumping investigation.[38] On September 19, 2019, the most recent Tomato Suspension Agreement ("Suspension Agreement", "TSA") was reinstated into law.[39] Unlike previous suspension agreements, the legislation imposes significant inspection requirements for Mexican tomato imports. The inspections, which took effect in April 2020, are summarized below:

Shipping Border Inspections:

Requires: Unrestricted USDA inspection of round, roma tomatoes, grape tomatoes in bulk (packaging exceeding two pounds) for quality and condition defects. Importers will be required to request inspection and pay USDA fees.

- The tomatoes will be examined pursuant to U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes, which require: Similar varietal characteristics; Mature; Not overripe or soft; Clean, Well-developed; Reasonably well formed; and, Not more than slightly rough.
- Free from: Decay; Freezing injury; and, Sunscald Not seriously damaged

Mandatory shipping point tolerances:

(1) For defects at shipping point:

1) Not more than 10% of the load should fail to meet these requirements. Not more 5% of the load shall be allowed for defects causing very serious damage, including therein not more than 1% for tomatoes which are soft or affected by decay.

(2) For defects en route or at destination:

(i.) Lots in which 15% of tomatoes fail to make the grade shall be discarded, of which not more than 5% of the load should be soft or affected by decay; **not more than** Ten percent for tomatoes which are seriously damaged by shoulder bruises or by discolored or sunken scars on any parts of the tomatoes

(iii) Ten percent for tomatoes which are otherwise defective: *And provided further,* That not more than 5 percent shall be allowed for tomatoes which are very seriously damaged by any cause, exclusive of soft or decayed tomatoes.

Source: "2019 Mexican Tomato Suspension Agreement Inspection," United States Department of Agriculture,https://www.ams.usda.gov/sites/default/files/media/MexicanTomatoSuspensionAgreement.pdf

[37] "Arizona Delegation Speaks Up on Tomato Import Dispute," Nogales International, March 11, 2019, https://www.perishablenews.com/produce/arizona-delegation-speaks-up-on-tomato-import-dispute/

[38] "Complete Text of the 2019 Suspension Agreement, Enforcement and Compliance," U.S. Department of Commerce, International Trade Administration, April 17, 2020, https://enforcement.trade.gov/tomato/2019-agreement/2019-agreement.html.

[39] Ibid.

Inspections of Greenhouse tomatoes, Requirements:

-Tomatoes of similar varietal characteristics which are mature but not overripe or soft, clean, reasonably well formed; which are free from decay, sunscald, and freezing injury, and free from serious damage caused by cuts, shriveling, puffiness, catfaces, growth cracks, scars, disease, insects, moldy stems, skin checks, or other means. (See §51.3348.)

-In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by count, are provided as specified:

1) Ten percent of the tomatoes in any lot may fail to meet the requirements of the grade, but not more than one-tenth of this amount (1 percent) shall be allowed for tomatoes which are soft or affected by decay.

2) If the product fails to meet the TSA requirement, the importer may opt either to recondition and have the lot reinspected or return the lot to Mexico. The receiver may reject a lot or may accept a portion of the lot after reconditioning and reject the quantity of tomatoes lost during the salvage process. After reconditioning, the lot must be reinspected.

Source: "2019 Mexican Tomato Suspension Agreement Inspection," United States Department of Agriculture, https://www.ams.usda.gov/sites/default/files/media/MexicanTomatoSuspensionAgreement.pdf

Pursuant to the legislation excerpted above, the United States Department of Agriculture ("USDA") will conduct "unrestricted" inspections of "round, roma tomatoes and [grape tomatoes in packaging exceeding two pounds] for quality and condition defects. The quality and condition mandate derives from guidelines elaborated in U.S. No. 2 of the U.S. Standards for Grades of Fresh Tomatoes. USDA inspectors must inspect fresh tomatoes for size, quality, and ripeness; not more than 10% of the inspected lot may fail grade requirements.

Jungmeyer has labelled the inspections as "punitive", suggesting that they may be retaliatory or protectionist towards Mexican Imports. In a recent statement, Jungmeyer stated*, "U.S. importers and marketers of Mexican tomatoes will bear what amounts to punitive costs associated with such levels of inspection. Because of the sheer volume of tomatoes shipped north from Mexico to the U.S., we can expect the inspections to create substantial delays that compromise the quality, affordability and availability of tomatoes to American consumers…The inspection provision is essentially a non-tariff trade barrier whose ripple effects will not only damage the U.S. tomato market but many other industries that trade with Mexico."* [40]

[40] Ibid.

The timing of the measures has additionally met with scrutiny. Critics have highlighted that the inspections were announced subsequent to Commerce's rejection of the FTE's request to suspend the TSA. In October 2019, the FPAA, CAADES et al. and Mexican growers criticized the inspections, citing future harm to producers and stakeholders.[41] [42] Shortly thereafter, Florida Agricultural Commissioner Nikki Fried called for the USDA to "step up" and inspect tomatoes for Tomato Brown Rugose Fruit Virus (ToBRFV).[43] Contemporaneous with Fried's request, the FTE petitioned Commerce for the reinstatement of an anti-dumping investigation on Mexican tomato imports.[44]

Pursuant to U.S. trade legislation, an anti-dumping investigation may be initiated upon the request of a "domestic party" regardless of the validity of a current suspension agreement.[45] The seeming contemporaneity of the FTE's call for a renewed anti-dumping investigation and Fried's request for ToBRFV inspections has provoked inquiry. The FPAA has highlighted that a negative injury finding by Commerce (as a result of the Anti-Dumping Investigation) would have suspended the TSA, tomato inspections, and import duties. Fried's request suggests an attempt by Florida growers to invoke additional trade restrictions in anticipation of the TSA's potential rescission.

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[41] "FPAA Calls Tomato Suspension Agreement a 'Step Backward'", FPAA, September 19, 2019, https://www.freshfrommexico.com/fpaa-calls-tomato-suspension-agreement-a-step-backward/

[42] "FTE Requests Continued Investigation of Mexican Tomatoes", VSC News, October 14, 2019, https://vscnews.com/fte-requests-continued-investigation-mexican-tomatoes/

[43] "Virus in Imported Tomatoes Worries Florida Agriculture Officials", WPTV, October 10, 2019, https://www.wptv.com/news/protecting-paradise/virus-in-imported-tomatoes-worries-florida-agriculture-officials

[44] "FTE Requests Continued Investigation of Mexican Tomatoes", VSC News.

[45] Ibid.

C. TOMATO BROWN RUGOSE FRUIT VIRUS – INSPECTIONS

Discovered in 2014, Tomato Brown Rugose Fruit Virus ("ToBRFV") is a highly infectious plant pathogen infecting tomatoes and peppers.[46] The virus spreads through contact with infected plants, human contact, tools, and machinery.[47] Seeds, roots, and plant leaves/stalks may transmit the pathogen, which can survive sometimes "up to 20 years" within the soil or on "debris".[48]

Evidence suggests that greenhouse farming may exacerbate ToBRFV spread, increasing the likelihood that a plant comes in close proximity to an infected machine, tool, or plant.[49] ToBRFV is associated with the spread of related pathogens such as "Tobacco mosaic virus (TMV), Tomato mosaic virus (ToMV), and Cucumber green mottle mosaic virus (CGMMV)".[50]

Infected plants may show visible signs of infection. Leaves may become "wrinkled and bubbled" and display a "mosaic pattern".[51] The calyx may turn brown and become "rough" in consistency.[52] Infected fruit lose their color, adopt brown spots, and fall.[53] The virus stunts the growth of young infected plants; in older plants,

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[46] Kai-Shu Ling, Tongyan Tian, Suraj Gurung, Raquel Salati, Andrea Gilliard, "First Report of Tomato Brown Rugose Fruit Virus Infecting Greenhouse Tomato in the U.S," *Plant Disease* (2019): 103:1439. https://doi.org/10.1094/PDIS-11-18-1959-PDN.

[47] François-Xavier Branthôme, "ToBRFV: Quarantine status in effect from 1 November," Tomato News, September 24, 2019, http://www.tomatonews.com/en/tobrfv-quarantine-status-in-effect-from-1-november_2_819.html

[48] Ronald Goldy, "Tomato Brown Rugose Fruit Virus (ToBRFV): A New Concern for Tomato and Pepper Producers, Michigan State University Extension, November 25, 2019, https://www.canr.msu.edu/news/tobrfv-a-new-concern-for-tomato-and-pepper-producers.

[49] Robert Gilbertson, UC Davis Department of Plant Pathology, California Tomato Research Institute, July 24, 2019. http://tomatonet.org/img/uploadedFiles/2019%20Uploads/ToBRFV%20CA%20info%20pamphlet_07.24.2019_print.pdf.

[50] "Federal Order for U.S. Imports of Tomato (Solanum lycopersicum) and Pepper (Capsicum spp.) Hosts of Tomato brown rugose fruit virus (ToBRFV)," United States Department of Agriculture, November 15, 2019, https://www.aphis.usda.gov/import_export/plants/plant_imports/federal_order/downloads/2019/DA-2019-28.pdf.

[51] Ronald Goldy, "Tomato brown rugose fruit virus (ToBRFV): A new concern for tomato and pepper producers."

[52] Ibid.

[53] Ibid.

signs of infection may not become apparent until the fruit has ripened.[54] Once infected with the virus, tomatoes are no longer sellable.[55]

ToBRFV has been labeled as a "very aggressive" pathogen, and may destroy between 30%-70% of crop yield.[56] [57]In 2018, the virus was discovered and subsequently eradicated in the United States.[58] In 2019, the virus was been detected in the Mexican province of Michoacan.[59]

The United States and European Union have both enacted import inspections to fight transmission of the virus. In August 2020, the European Union called for the "sampling and testing" of at least 20% of tomato and pepper plant imports.[60] Pursuant to the decision, all imported pepper seeds were to be tested at national borders "regardless of origin".[61] The mandate remains in force.

In 2019, the USDA Animal and Plant Health Inspection Service ("APHIS") passed an interim federal order restricting tomato and pepper imports into the United States. The order declares ToBRFV a "serious threat to U.S. agriculture", and states that import restrictions are "necessary to safeguard U.S. tomato and pepper production while APHIS fully evaluates emerging scientific evidence on ToBRFV".[62] The Federal Order calls for increased border inspections on tomatoes originating from Mexico, Canada, and the Netherlands.[63] All tomato imports must be accompanied by

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[54] Ibid.

[55] "EPPO Alert List –Tomato brown rugose fruit virus (Tobamovirus -ToBRFV)," the World Trade Organization, 2020, https://members.wto.org/crnattachments/2020/SPS/SYC/20_3139_00_e.pdf.

[56] Ronald Goldy, "Tomato brown rugose fruit virus (ToBRFV): A new concern for tomato and pepper producers."

[57] Andy Wyenandt, "Understanding and Controlling Tomato Brown Rugose Fruit Virus," Plant & Pest Advisory, Rutgers University Extension, January 7, 2020, https://plant-pest-advisory.rutgers.edu/understanding-tomato-brown-rugose-fruit-virus/.

[58] Ronald Goldy, "Tomato brown rugose fruit virus (ToBRFV): A new concern for tomato and pepper producers."

[59] "Tomato brown rugose fruit virus (TOBRFV), Distribution details in Mexico," EPPO Global Database, https://gd.eppo.int/taxon/TOBRFV/distribution/MX/

[60] "Commission Implementing Regulation (EU) 2020/1191 of 11 August 2020" European Commission, Eur-Lex, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32020R1191.

[61] Ibid.

[62] "Federal Order for U.S. Imports of Tomato (Solanum lycopersicum) and Pepper (Capsicum spp.) Hosts of Tomato brown rugose fruit virus (ToBRFV)."

[63] Ibid.

both a Phytosanitary certificate and declaration certifying that the lot "has been inspected and been found free of [ToBRFV]". Imports lacking this attestation will be denied entry.[64]

The USDA has recently amended the 2019 Federal Order in light of new global outbreaks. In June 2020, APHIS issued a revised federal order elaborating import requirements for tomatoes from affected countries. Mexican exporters would be required to provide an "industry inspection certification document" certifying that the lots have "been inspected and been found free of symptoms of Tomato brown rugose fruit virus".[65] The new Federal Order reiterated that the requirements were "interim measures until the risk [from ToBRFV] has been more thoroughly analyzed and a long-term solution can be established".[66]

D. "8E" INSPECTION REQUIREMENTS

Section 8e of the 1937 Agricultural Marketing Agreement Act (termed "8e requirements") prescribes minimum grade, quality, and size requirements for specific import commodities."8e requirements" mandate the inspection of select fruits and vegetables pursuant to guidelines established in Federal Marketing Orders. Federal Marketing Orders are federal regulations that standardize production, inspection, and shipment practices for specific items produced in the United States.

The objectives of 8e inspections are three-fold, 1) "to develop dependable markets for products by ensuring consumer satisfaction and encouraging repeat purchases", 2) to "promote buyer satisfaction and increased sales for…commodities by ensuring that only acceptable quality products [are imported]" and, 3) to minimize

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[64] Ibid.

[65] "APHIS Amends Federal Order for U.S. Imports of Tomato (Solanum lycopersicum) and Pepper (Capsicum spp.) Hosts of Tomato brown rugose fruit virus (ToBRFV), United States Department of Agriculture,, June 3, 2020, https://www.aphis.usda.gov/import_export/plants/plant_imports/federal_order/downloads/2020/DA-2020-12.pdf.

[66] Ibid.

market distortion by avoiding price-cutting on lower-value commodities.[67] Implicit in these requirements is an effort to ensure homogeneity in the quality and marketability of domestic produce and foreign imports.

Federal Marketing Order 966, titled "Tomatoes Grown in Florida", applies to tomato imports.[68] The provisions of Federal Marketing Order No. 966 establish the Florida Tomato Committee and articulate inspection and grade requirements for locally-produced tomatoes.

The standards elaborated in Federal Marketing Order No. 966 are incorporated in 8e inspection requirements at the border. It is important to note that 8e inspections are only required during the Florida tomato growing season, which runs from October 10 to June 15 each year.[69]

"8e" Grade, size, quality and maturity requirements:

(1) From October 10 through June 15 of each season, imported tomatoes shall be at least 29⁄32 inches in diameter. Not more than 10 percent in any lot may be smaller. All lots of tomatoes shall be at least U.S. No. 2 grade:

- Similar varietal characteristics;
- Mature;
- Not overripe or soft;
- Clean;
- Well developed;
- Reasonably well formed; and,
- Not more than slightly rough.

[67] "Section 8e & Imports," Agricultural Marketing Service, United States Department of Agriculture, https://www.ams.usda.gov/rules-regulations/section8e.

[68] "966 Florida Tomatoes," Agricultural Marketing Service, United States Department of Agriculture, https://www.ams.usda.gov/rules-regulations/moa/966-florida-tomatoes

[69] Ibid.

"8e" Grade, size, quality and maturity requirements (Continued)

- Tomatoes must be free from:
- Decay;
- Freezing injury; and,
- Sunscald
- Not seriously damaged by any other cause
- Required:
- -An official inspection certificate certifying that tomatoes meet the U.S. import requirements for tomatoes under Section 8e, issued by a designated governmental inspection service and applicable to a specified lot is required on all imports.
- -Inspection and certification…will be available and performed in accordance with the rules and regulations governing certification of fresh fruits, vegetables and other products…Cost of inspection and certification shall be borne by the applicant. *Definitions: "Greenhouse tomatoes means tomatoes grown indoors."

Source: § 980.212 7 CFR Ch. IX (1–1–11 Edition) - Import regulations; tomatoes, Agricultural Marketing Service, https://www.govinfo.gov/content/pkg/CFR-2011-title7-vol8/pdf/CFR-2011-title7-vol8-sec980-212.pdf

Similar to the inspections required by both the Federal Order and TSA, "8e" requirements mandate inspection certificates attesting compliance with U.S. import requirements. It is worthy of note that "8e requirements" do not apply to cherry, grape, roma, and greenhouse tomatoes; the Federal Marketing Order defines "greenhouse" tomatoes as "tomatoes grown indoors".[70] The definition of this term has become increasingly significant as greenhouses have become more prominent in tomato production.

[70] "§ 980.212 7 CFR Ch. IX (1–1–11 Edition), Import Regulations; Tomatoes," Agricultural Marketing Service, https://www.govinfo.gov/content/pkg/CFR-2011-title7-vol8/pdf/CFR-2011-title7-vol8-sec980-212.pdf.

E. INSPECTION PRACTICES ON THE GROUND

The following examples highlight how federal inspection are implemented in practice. A recent visit to a fruit and vegetable warehouse on the US-Mexican border (Del Campo Supreme), permitted our team to document the steps involved.

TSA Inspection process:

Once the tomatoes cross the border, they are taken to the distribution warehouse. Upon arrival, the USDA is notified, and an inspection is scheduled for the next 24-48 hours. The tomatoes, packed in stacks of boxes on pallets, are unloaded from the truck and prepared for the inspector.

The inspection will then select boxes to be inspected. Pallet packaging broken down by warehouse staff and the marked boxes are taken to an inspection room. The inspector then prepares the inspection paperwork, which can take up to an hour to complete. Once the paperwork is complete, the actual inspection may finally begin.

The inspector will visually inspect each tomato, looking for discoloration, splotches, scaring, damage, and other visible imperfections. Inspectors will then feel and touch the tomatoes to check for firmness, bruising and other structural issues. A thermometer may be inserted into one or two tomatoes to check interior temperatures. Last, a few tomatoes are sliced open and the inspector checks the interior of the vegetable. This process is repeated for every type of tomato selected for inspection.

If the batch passes the inspection, the tomatoes are re-boxed, and the shipping pallets are repackaged and loaded into the truck for shipment. The entire inspection process can take between 2-3 hours depending on the size of the load. In a normal 8-hour workday, an inspector can thus conduct between 3 and 4 inspections. For extra inspections, the inspector will charge overtime rates

The FPAA has expressed concerns that the TSA inspections may delay imports. For one, inspection fees are exorbitant and may increase if an inspector works “overtime”. Current fees hover approximately $400-$500 per truck load.

Secondly, delays could impact produce marketability due to “ripeness” level and consumer specifications. Many customers require a specific stage of ripeness for produce purchases, and may reject non-conforming shipments. Because tomatoes

continue to ripen after harvest; small delays in the shipment process risk provoking rejection by the customer.

Inspections required under Tomato Suspension Agreement may also impact other produce inspections. Citrus, avocados, and onions are among the numerous items that must also be inspected at the border; increasing tomato inspections may inhibit the swift deployment of staff and resources needed to complete timely inspections. As a result, TSA inspections may place FPAA members at a competitive disadvantage by increasing operating costs and impacting the saleability of fresh produce

ToBRFV Inspections:

Immediately after harvest in Mexico, tomatoes undergo preliminary ToBRFV inspections to ensure that the lots are disease-free. Once the tomatoes pass preliminary inspection, they are packaged and prepared for transport (by truck) to the US-Mexico border. At the border, a Customs and Border Protection ("CBP") officer may perform a random inspection to detect the presence of Tomato Brown Rugose Fruit Virus ("ToBRFV"). If a load is chosen for inspection, a visual inspection is conducted to detect indications of infection such as discoloration. Recent scientific evidence suggests that discoloration may be confused with certain stages of ripeness, and thus may be ineffective as a ToBRFV assessment mechanism.

Loads suspected of infection are then subject to a rapid test. Plants testing "positive" will be sent back to Mexico; those unaffected may continue across the border to the distributor's warehouse. The truck will be again unloaded, and an inspection request made to the the United States Department of Agriculture ("USDA"). The inspector has 24-48 hours to respond to the request. When a response is received and a load finally chosen for inspection, boxes will be marked at random and removed for further testing. Tomatoes will then be removed from selected boxes and placed on tables for additional inspection. Typically a delay of an hour or more will ensue before the tomatoes are inspected; administrative paperwork and protocol is extensive and must be completed before the process begins.

When the inspection finally begins, the inspector will examine the tomatoes for external disfigurements, firmness, discoloration, and internal temperature. Select tomatoes will be cut open; in totality, the entire process may take up to three hours. If the selected tomatoes pass the inspection, they will be placed back into the box, repackaged, and reloaded onto the truck for entry into commerce. The batches will then be transported to a retailer for unloading and shelving.

PART II. THE USMCA AND WTO LEGISLATIVE FRAMEWORK

A. The USMCA

Enacted by the Trump Administration in 2018, the United States-Mexico-Canada Trade Agreement ("USMCA") represents the leading multilateral trade agreement concluded between the United States, Mexico, and Canada. The USMCA entered into force on July 1, 2020, replacing the North American Free Trade Agreement ("NAFTA") as the primary treaty body governing trade relations between the three nations.[71] Established with the stated objective of "creating more balanced, reciprocal trade supporting high-paying jobs for Americans and [the growth of] the North American economy", the USMCA purports to expand market access for US exports abroad, strengthen labour protections in Mexico, and expand intellectual property rights for biotechnology.[72] Although the USMCA largely retains the trade liberalization measures established under NAFTA (such as a "zero-tariff" policy for agricultural commodities), it presents important new changes to the regulation of agricultural trade.

i. The USMCA Sanitary and Phytosanitary Guidelines

The USMCA SPS regulations aim to protect *"human… or plant life or health in the territories of the parties[,] while facilitating trade between them"*. All regulations must be justified on the basis of scientific evidence, and should derive from accepted international rules, standards, or guidelines. Measures should be discontinued in the absence of "a scientific basis". Provisional SPS measures are to be evaluated through continued risk assessments in the event that "scientific evidence is insufficient" in their justification.

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[71] "USMCA To Enter Into Force July 1 After United States Takes Final Procedural Steps For Implementation," Office of the United States Trade Representative, April 24, 2020, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation

[72] "Creating More Balanced and Reciprocal North American Trade," Office of the United States Trade Representative, https://ustr.gov/usmca#:~:text=mutually%20beneficial%20trade.-,The%20new%20United%20States%2DMexico%2DCanada%20Agreement%20(USMCA),grows%20the%20North%20American%20economies.

The USMCA incorporates the provisions of GATT Article XX and presents a "balancing test", requiring that regulations "*not be more trade restrictive than required to achieve the level of protection that the party has determined to be appropriate*". *"A measure is not more trade restrictive than required unless there is another option that is reasonably available, taking into account technical and economic feasibility, that achieves the Party's appropriate level of protection and is significantly less restrictive to trade*".

Article 9.1 further prevents parties from imposing "undue [delays]" during the inspection process, requiring that inspection facilities be located in an area that does not cause "unnecessary inconvenience to an applicant or its agent". The inspection must be conducted such that the "integrity of the good is preserved".

ii. The USMCA Chapter on Technical Barriers to Trade

The USMCA chapter on technical barriers to trade incorporates the WTO TBT Agreement into its provisions, applying to standards, technical regulations [and] conformity assessment procedures".[73] The Agreement asserts that the "WTO TBT Committee Decision on International Standards" will be determinative in elaborating "international [trade] standards.[74] Where no official standard exists, the USMCA permits assessing alternative standards which may apply in its stead.[75]

The Agreement also specifies that only standards conforming to the WTO TBT Committee Decision will be "accorded preference" in bilateral negotiations.[76] Countries are forbidden from entering into agreements that may circumscribe the applicability of the WTO TBT Agreement.[77] "Technical assistance" must also be consistent with the WTO TBT Committee Decision on International Standards.[78]

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[73] "United States-Mexico-Canada Agreement (USMCA),: Office of the United States Trade Representative, October 2018.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Ibid.

The USMCA TBT chapter reiterates countries' commitment to core principles of the WTO TBT Agreement, notably transparency, national treatment, mutual recognition, and risk assessment.[79] The Chapter furthermore authorizes state parties to employ subcontractors to undertake "conformity assessment" procedures for "testing or inspections", and "to extend national treatment.to subcontracting bodies".[80] The Chapter establishes a "TBT Committee" to facilitate multilateral agreement and cooperation, in addition to providing monitoring and technical functions.[81]

B. The WTO

The World Trade Organization, or "WTO", constitutes the world's leading multilateral trade institution. The WTO was established in 1994 pursuant to the Marrakesh Agreement, subsequent to the termination of the Uruguay Round of Multilateral Trade Negotiations.[82] The WTO aims to promote the efficient operation of international trade by "lowering trade barriers through negotiations with member governments". The WTO currently possesses 159 nations among its members, including Mexico and the United States. While the Organization generally opposes barriers to international trade, certain measures are permitted if they are deemed "*necessary to protect human, animal, or plant life or health"* or "*relate to the conservation of exhaustible natural resources".* [83] These exceptions, elaborated in GATT Article XX, must comply with the provision's "Chapeau" (or introductory) clause; "[measures may not be] *applied in a manner which would constitute 'a means of arbitrary or unjustifiable discrimination between countries where the same*

[79] "Technical Barriers to Trade – USMCA Chapter 11," United-States-Mexico-Canada Agreement, https://usmca.com/technical-barriers-to-trade-usmca/.

[80] Ibid.

[81] Ibid.

[82] "Marrakesh Agreement Establishing the World Trade Organization," The World Trade Organization, https://www.wto.org/english/res_e/booksp_e/sli_e/5MarrakeshAgreementEstablishingtheWTO.pdf.

[83] "Disputes, Clarifying the Rules," The World Trade Organization, https://www.wto.org/english/tratop_e/envir_e/disputes_e.htm#:~:text=Two%20exceptions%20are%20of%20particular,the%20conservation%20of%20exhaustible%20natural.

conditions prevail', and should not constitute *"a disguised restriction on international trade*".[84] All measures must be consistent and justified by scientific evidence.[85]

i. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement")

SPS measures consist of "*relevant [national] laws, decrees, regulations, requirements and procedures, including, inter alia…inspection, certification, and approval procedures…[and] sampling procedures and methods of risk assessment*", enacted to realize the following:

- The protection of "human or animal life from risks arising from additives, contaminants, toxins or disease-causing organisms in their food;"
- The protection of "human life from plant- or animal-carried diseases;"
- The protection of "animal or plant life from pests, diseases, or disease-causing organisms;"
- "[the prevention] or [limiting of] other damage to a country from the entry, establishment or spread of pests."

Source: Understanding the WTO Agreement on Sanitary and Phytosanitary Measures," The World Trade Organization, May 1998.

The SPS Agreement permits member states to enact legislation protecting health and welfare while respecting the rules of free trade. The SPS strives to protect against the imposition of arbitrary, non-justifiable health or welfare measures which constitute "disguised protectionism".[86]Due to their "technical complexity", sanitary or phytosanitary measures may be easily misused as protectionist devices in an effort to

[84] Ibid.

[85] "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures," The World Trade Organization, May 1998, https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm.

[86] Ibid.

restrict foreign imports.[87] The following principles illustrate how the SPS Agreement obliges member states to refrain from engaging in protectionism.

- **Harmonization**: SPS measures must correspond to "international standards, guidelines, and recommendations".[88] Measures that are more stringent than international rules must be justified on the basis of scientific evidence.[89] The World Organization for Animal Health (OIE), the Codex Alimentarius Commission (Codex), and the International Plant Protection Convention (IPPC) comprise "international standard-setting bodies".[90]

- **Equivalence**: Importing states must recognize SPS measures from exporting states as "equivalent", provided the exporting country proves "that its measures achieve…[an] appropriate level of protection".[91]

- **Risk Assessment:** Member States must conduct risk assessments to ensure that measures "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection". Regulations may be instituted on an interim basis when "scientific information is insufficient". Risk assessments should "take into account scientific evidence…inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest — or disease — free areas…ecological and environmental conditions".[92]

- **"Adaptation to Regional Conditions, Including Pest or Disease-Free Areas**"[93]
  Importing states shall tailor all SPS measures to the specific part of the country from which a product originates, taking into account the "prevalence

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[87] Ibid.

[88] Ibid.

[89] Ibid.

[90] "The WTO Sanitary and Phytosanitary (SPS) Agreement", Australian Government, Department of Agriculture, Fisheries and Forestry, https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/animal-plant/plant-health/publications/taxanomy/wto_sps_agreement_booklet.pdf.

[91] Ibid.

[92] "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures," The World Trade Organization.

[93] "Technical Barriers to Trade," the World Trade Organization.

of…diseases or pests, the existence of eradication or control programs, and appropriate criteria or guidelines which may be developed by the relevant international organization"[94]

- **Transparency**: Member states must disclose information regarding SPS measures at the request of other members. A "national enquiry point" must be established for this purpose.

ii. WTO Agreement on Technical Barriers to Trade ("TBT Agreement")

Similar to the WTO SPS Agreement, the TBT Agreement establishes standards for non-tariff measures (NTMs) in the aim of enhancing trade efficiency and prevent "disguised protectionism".[95] Unlike the SPS, the TBT deals specifically with "technical regulations, standards, and conformity assessment procedures" for "agricultural and industrial" goods.[96] Services are not covered by the Agreement.[97] The TBT Agreement differs from the SPS predominantly with respect to the types of measures it covers.[98]

The TBT expands the scope of non-tariff measures that may be potentially justified provided they "are non-discriminatory and do not create unnecessary obstacles to trade".[99] In addition to excepting regulations that protect "human, plan, or animal health", the Agreement identifies national security, "prevention of deceptive practices", and the "protection of human safety" as categories warranting protection.[100] It is important to retain that it "is the purpose of a particular measure...that determines whether…it is subject to the disciplines of the SPS or the

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[94] Ibid.

[95] "The WTO Agreements Series, Technical Barriers to Trade," the World Trade Organization, https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf#:~:text=The%20WTO%20Agreement%20on%20Technical%20Barriers%20to%20Trade,procedures%20do%20not%20create%20unnecessary%20obstacles%20to%20trade.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] "Technical Barriers to Trade," the World Trade Organization, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

[100] "The WTO Agreements Series, Technical Barriers to Trade," the World Trade Organization.

TBT Agreement, and not the product or category of product in question".[101] The table below illustrates the types of measures covered by the TBT Agreement:

Technical Regulations:	**Standards:**	**Conformity Assessment Procedures:**
"Technical regulations lay down product characteristics or their related processes and production methods. Compliance is mandatory. They may also deal with terminology, symbols, packaging, marking and labelling requirements."[102]	"Standards are approved by a recognized body which is responsible for establishing rules, guidelines or characteristics for products or related processes and production methods. Compliance is not mandatory. They may also deal with terminology, symbols, packaging, marking and labelling requirements."[103]	"Conformity assessment procedures are used to determine that relevant requirements in technical regulations or standards are fulfilled. They include procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; and registration, accreditation and approval."[104]

Like the SPS, the TBT Agreement mandates core standards for member states to ensure compliance. These are as follows:

- **Non-discrimination**: Pursuant to the non-discrimination principle, technical regulations, standards, and conformity assessment procedures must comply with national treatment requirements.[105] In other words, states must give "'treatment no less favorable' than that accorded to 'like products' of national origin and to like products originating in any other country".[106] WTO Body appellate decisions interpreting national treatment include US-Tuna II, US-Clove Cigarettes, and US-Certain Country of Origin Labelling.[107]

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid.

- **"Avoidance of unnecessary obstacles to trade"**[108] While the WTO permits some divergence with respect to member states' technical regulations, standards, and conformity assessment procedures, it requires that these measures "not be more trade-restrictive to fulfil the legitimate objective".[109] When possible, countries should take measures to standardize and simplify regulations and procedures to ensure that trade may take place as smoothly as possible.

- **Harmonization**: Similar to the SPS Agreement, member states should strive to standardize and harmonize procedures in accordance with international standard-setting bodies, such as the International Telecommunication Union, the International Standardization Organization, and the International Electrotechnical Commission.[110]

- **Equivalence**: Member states should accept disparate national measures that achieve the same objective as "equivalent" for purposes of trade efficiency.[111]

- **Mutual Recognition**: With respect to conformity assessment procedures, members should strive to accept "product testing or certification" standards issued in relevant markets.[112] The principle of "mutual recognition" encourages countries to mutually accept the validity of diverse testing or certification mechanisms in member states.[113]

- **Transparency:** The TBT places a notification requirement on member countries, requiring them to inform the WTO Secretariat, 1) in the absence of a relevant "international standard, guide, or recommendation" for the measure in question, or, when a proposed measure does not conform to international standards, guides, or recommendations, and, 2) "if the technical regulation or conformity assessment procedure may have a significant effect on the trade of other Members".[114]

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[108] "Technical Barriers to Trade," The World Trade Organization.

[109] Ibid.

[110] "The WTO Agreements Series, Technical Barriers to Trade," the World Trade Organization.

[111] "Technical Barriers to Trade," The World Trade Organization.

[112] Ibid.

[113] Ibid.

[114] Ibid.

PART III: THE WTO SPS AGREEMENT

The current ToBRFV measures imposed by the USDA, particularly the border inspections, fall within the definition of an SPS measure because they were ostensibly intended to protect the health of US tomatoes.[115] In order to be permissible, these measures must comply with a number of requirements outlined in the WTO SPS Agreement[116] addressed below:

- not be maintained without sufficient scientific evidence *(1)*[117]; or
- alternatively, comply with the requirements of permissible provisional measures *(2)*[118]; and
- be based on an assessment of the risk to plant health *(3)*[119]; and
- be adapted to SPS characteristics of the area where the products originate from and destined for *(4)*[120]*;*
- be conducted without undue delay *(5)*[121].

This paper will address the substance of these requirements as elaborated in the WTO jurisprudence and associated compliance of US ToBRFV measures.

A. Scientific Evidence

i. Description of the requirement

According to the WTO SPS Agreement, a measure that potentially affects trade must be based on "sufficient scientific evidence."[122]

The requirement of scientific evidence is essential to maintain the balance between promoting international trade and protecting human, animal and plant life or health.[123] If the measure is not supported by sufficient scientific evidence, an important requirement of the SPS Agreement, then there is a greater likelihood that it constitutes disguised protectionism. In this section we will evaluate whether the US's ToBRFV measure is supported by sufficient scientific evidence.

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[115] Federal Order, Import Restrictions for Tomato (Solanum Lycopersicum) and Pepper (Capsicum spp.) Hosts of Tomato Brown Rugose Fruit Virus (ToBRFV), USDA, DA-2019-28 (effective Nov. 22, 2019) https://www.aphis.usda.gov/import_export/plants/plant_imports/federal_order/downloads/2019/DA-2019-28.pdf;
https://www.aphis.usda.gov/import_export/plants/plant_imports/federal_order/downloads/2020/DA-2020-12.pdf. [Hereinafter ToBRFV Order].
[116] See generally, Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493 (1995). [Hereinafter SPS Agreement].
[117] *Id*. at art. 2.2.
[118] *Id*. at art. 5.7.
[119] *Id*. at art. 5.1.
[120] *Id.* at art. 6.
[121] *Id.* at Annex C(1)(a).
[122] *Id*. at art. 2.2.
[123] Appellate Body Report, EC – Hormones, ¶ 177, WTO Doc. WT/DS48/AB/R (1998).

The WTO Appellate Body in *Japan – Apples* found that the term *"*scientific evidence*"* generally excludes unsubstantiated information and related hypotheses.[124] What constitutes *"*sufficient*"* is determined on a case-by-case basis and must include a rational relationship between the scientific evidence and the measure.[125]

In *Japan – Agricultural Products II*, the Appellate Body was faced with the question of sufficient scientific evidence.[126] The measures at issue were the inspection and testing of each variety of fruits, as well quarantine requirements to prevent entry and spread of the codling moth. The US, as claimant, asserted that Japan had failed to provide an explanation regarding disparate testing for each variety. There was no scientific reason why the differences between an apple, nectarine, or cherry would be relevant to the effectiveness of the quarantine treatment. Empirical evidence had established that produce variety was immaterial to the type of quarantine treatment needed.[127] The Panel and the Appellate Body found that there was no rational relationship between the measure and scientific evidence, ruling that the scientific evidence was insufficient.[128]

Another way that states may satisfy the sufficiency and rational relationship requirement is to assess the "seriousness of risk to life or health".[129] In cases where human health may be at risk, the required "sufficiency threshold" is significantly lower.[130] The threshold is higher in cases where the risk implicates plant health or pests, and implicates a higher standard of proof. The following case shows the importance of determining the seriousness of risk.

In J*apan – Apples*, Japan enacted SPS measures to prevent the transmission of fire blight bacterium through apples.[131] The measure prohibited the importing of apples from orchards where the bacteria had been detected, particularly from orchards in the US.[132] The Appellate Body found that there was no rational or objective relationship because the measure was disproportionate to risk.[133]

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[124] Appellate Bodies Report, Japan – Apples, ¶ 8.93, WTO Doc. WT/DS245 (2003).
[125] Panel Report, Japan – Agricultural Products II, WT/DS76/R (1998); ¶ 8.29 & 8.42; See also, Appellate Body Report, Japan – Agricultural Products II, ¶ 84, WTP Doc. WT/DS76 (1999).
[126] Appellate Body Report, Japan – Agricultural Products II, supra at ¶¶ 73, 84.
[127] Panel Report, Japan – Agricultural Products II, supra, ¶ 4.59.
[128] Japan – Agricultural Products II, supra, at ¶ 85.
[129] EC-Hormones, at ¶ 124.
[130] Id.
[131] See generally, Japan-Apple.
[132] *Id*.
[133] *Id.*

Case study: Japan – Apples

The position of the USA as a complaining party*:*

"The United States claimed that each of Japan's fire blight restrictions is maintained without sufficient scientific evidence because there was no scientific evidence that harvested, mature US apples, could serve as a pathway for introduction of fire blight to Japan. There was no scientific evidence that each and every step in any hypothetical pathway would be completed, and therefore no scientific evidence that the pathway would be completed and that exported apple fruit could introduce the disease to Japan."

Important findings regarding the sufficiency of scientific evidence*:*

The Appellate body found that based on existing evidence the risk of transmission of fire blight bacterium through the importation of apple fruits was negligible in contrast to the rigorous requirements of the measure.[134]

ii. Analyses of the US measures

The purpose of the inspection of commercial tomato fruits imported from Mexico is to prevent the entrance and spread of the Tomato Brown Rugose Fruit Virus (ToBRFV).[135] Commercial tomato fruits are imported for immediate consumption by the consumer and are destined for a grocery store or food production factory, not a local tomato field. The ToBRFV is a contagious virus that infects tomato and pepper plants and is transmitted through contact with other infected plants.[136]

However, the US has yet to show that a rational relationship exists between an infected tomato (for consumer use) from Mexico, spreading the virus to US tomato plants through direct or indirect contact, and tomato border inspections. While considering the rational relationship between the measure and the scientific evidence in this case, it is important to note that the inspection requirement at issue is imposed in addition to the requirement of on-field certification of tomato shipments in Mexico.[137]

APHIS admits that the phytosanitary risk associated with infected fruit is historically considered to be low in comparison to transmission from plants and seeds. However, they argue that interim measures are necessary to safeguard the US tomato and pepper production while APHIS fully evaluates emerging scientific evidence on ToBRFV.[138]

In analogy to the *Japan – Apples case,* the US measures are overly restrictive and disproportionate to the low level of ToBRFV transmission risk through commercial tomato fruit. This risk is low not only because the likelihood of viral spread through infected fruit is insignificant, but also because imported tomatoes "certified on-field" are unlikely to be infected.

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[134] *Id*. at ¶ 168.
[135] ToBRFV Order, supra.
[136] *Id.*
[137] *Id.*
[138] *Id.*

The US authorities have invoked the exception provided by Article 5.7 of the SPS Agreement, which allows the state to apply the measure provisionally if scientific evidence is insufficient.[139] However, this exception is not absolute; as the US contended in *Japan – Apples,* Article 5.7 may not be interpreted in such way so that to "swallow the whole of the SPS Agreement".[140] Article 5.7 still requires the state to comply with a number of requirements considered below:

B. Use of Provisional Measures

i. Description of the requirement

In cases where relevant scientific evidence is insufficient, a state may provisionally adopt sanitary or phytosanitary measures on the basis of available information, including data obtained from relevant international organizations and SPS measures applied by other member states.[141] Enacting SPS measures without sufficient scientific evidence constitutes a deviation from state obligations pursuant to the WTO Agreement. One issue is whether the US measure may qualify as a permissible provisional measure.

Four cumulative requirements must be satisfied to adopt and maintain a provisional phytosanitary measure:

1. the measure is imposed in respect of a situation where relevant scientific evidence is insufficient;

2. the measure is adopted on the basis of available pertinent information;

3. the state shall seek to obtain the additional information necessary for a more objective assessment of risk; and

4. the state shall review the measure accordingly within a reasonable period of time.[142]

Whenever one of these four requirements is not met, the measure at issue is inconsistent with Article 5.7. [143]

Quite often this exception is misused by the states. Some states may be in possession of sufficient scientific information; however, they fail to analyse it and review the measure accordingly. In *Japan – Agricultural Products II*, for example, Japan claimed that the restriction on fruit from the US was a provisional measure and was therefore exempt from meeting the sufficient scientific evidence requirement.[144] However, the Appellate Body held that these measures did not properly fall under the category of "provisional" because Japan did not seek to obtain any further information or study the data it already possessed. It had abused the right to use provisional

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[139] SPS Agreement, *supra*, at art. 5.7.
[140] Japan-Apples, *supra* at ¶ 65.
[141] SPS Agreement, *supra*, at art. 5.7.
[142] SPS Agreement, *supra*, at art. 5.7.
[143] Japan – Agricultural Products II, *supra*, at ¶ 89.
[144] *Id*.

measures, not because of the lack of available information, but due to its own failure to obtain or analyse the pertinent data.[145]

The Appellate Body also explained that the notion of "reasonable period of time" for review of the measure must be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining information necessary for the review. In *Japan – Agricultural Products II* the "necessary additional" evidence being relatively easy to obtain, the Panel and Appellate Body concluded that Japan failed to review its measure in a reasonable period of time.[146] The period of time with respect to the Panel assessment constituted 3 years; not since the adoption of the measure, but since 1995 when the SPS Agreement established the review obligation.

ii. Analysis of US measures

The U.S. authorities contend that ToBRFV inspection measures are provisional and will be imposed contemporaneously with the evaluation of emerging scientific evidence.[147] This signifies that the US is legally justified in relying on Article 5.7 given the insufficiency of scientific evidence. Pursuant to the SPS Agreement, the US is required to either update the measure or to justify the inspections on the basis of scientific evidence. Currently, we have not detected evidence of on-going reviews evaluating the efficacy of the measure; the requirement furthermore has also not been amended on the basis of newly acquired information. While the inspections have been in force for about a year, the question of its review and amendment is likely to be a matter for future consultation.

C. Risk Assessment

i. Description of the measure

Any SPS measure shall be based on an assessment of the risk to plant health.[148] States are responsible for conducting risk assessments; a general and unsubstantiated discussion of the disease is not enough to satisfy this requirement.[149]

The WTO Appellate Body has determined that a proper risk assessment must include the following: (1) the identification of specific disease or pests; (2) the analysis of the likelihood of entry and spread of the disease without the application of any measures; and (3) the analysis of this likelihood if such measures are applied.[150]

In *Japan – Apples*, Japan prohibited the importation of fruits from certain orchards to prevent the transmission of fire blight bacterium.[151] In its submission, the US claimed that none of the bacterial spread pathways identified by Japan could prove that a mature apple fruit could host and transmit the fire blight to Japan. The Panel and

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[145] *Id.*
[146] Id., at ¶ 93.
[147] ToBRFV Order, *supra*.
[148] SPS Agreement, *supra,* at arts. 5.1, & 5.2
[149] See generally, Japan – Agricultural products II, *supra*.
[150] Japan – Agricultural products II *supra*.
[151] *Id.*

the Appellate Body agreed with the US's line of argumentation, determining that the measure was impermissible under the SPS Agreement because it was not based on an adequate risk assessment. Japan's pest risk-analysis failed to evaluate the likelihood of entry and spread of fire blight specifically through the apple fruit, as well as the likelihood of entry when the regulation was applied. [152]

ii. Analyses of the US measure

APHIS's 2020 Federal Order identified ToBRFV as a plant disease posing a threat to plant health.[153] This satisfies the first criteria of the risk assessment.

Issues may arise in tandem with the second and third criteria. First, the Regulation's risk identification solely covers the risk of entry of infected produce to US territory, but not the risk of spread to locally-produced tomatoes and peppers. There is no clear pathway describing how the virus may be transmitted from commercial tomato fruit to locally-grown tomato plants in the US. As APHIS has identified, the risk of spread of virus through commercial fruit is historically low. Since sufficient scientific evidence does not yet exist, the government will not be able to provide the necessary risk assessment until sufficient scientific data emerges.

Secondly, the Order does not evaluate the likelihood of ToBRFV transmission as a result of the new inspection measures. It is not clear to what extent the regulation protects against viral spread. To comply with the SPS Agreement, the US authorities need to provide a more complete risk assessment; key information is currently lacking.

D. Recognition of Pest-Free Areas

i. Description of the requirement

> **Article 6.1 of the SPS Agreement obliges the members to ensure that**: their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area (country, part of the country, or parts of several countries.) from which the product originated and to which the product was destined; taking into account the level of prevalence of specified diseases or pests, the existence of eradication or control programs, and appropriate criteria or guidelines of international organizations.

Pursuant to this rule, a state may not unconditionally apply measures restricting imports without taking regional conditions of the exporting state into account. Instead, the state shall develop a process for recognition of pest-free areas and relax the import restrictions for such areas, if applicable.

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[152] *Id.*
[153] ToBRFV Order, *supra*.

WTO SPS Committee Guidelines suggest that:

- Importing Members should publish the basis for recognition of pest or disease-free areas and areas of low pest or disease prevalence, and a description of the general process used.
- Members should proceed with a recognition process without undue delay.
- The process should be applied without discrimination between Members.
- Members should endeavour to maintain transparency in all aspects of the recognition process.[154]

If a particular area within the territory of an importing Member has a similar SPS status as the area of origin of a product (e.g. has the same level of prevalence of a given disease), that Member may be required to tailor its measure by relaxing the restrictions on imports into that area.[155] For example, if the cases of spread of ToBRFV are reported in particular area in the US, the import of tomatoes from Mexico to this area shall be subject to less trade-restrictive measures than prescribed in the current Order.

In *India – Agricultural products*, the Indian government introduced a prohibition on the import of certain agricultural products (mostly poultry) from countries where avian influenza had been reported. It was questioned whether the prohibition was compatible with the WTO member obligations to take regional conditions into account when applying import restrictions.

[154] Committee on Sanitary and Phytosanitary Measures, *Guidelines to Further The Practical Implementation of Article 6 of The Agreement On the Application of Sanitary and Phytosanitary Measures*, WTO, G/SPS/48, ¶¶ 5-7 (2008).
[155] Panel Report, *United States- Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina,* WTO Doc. DS447, ¶ 7.649 (2015).

Case study: India – Agricultural products

<u>Position of the USA as complaining party</u>:

The United States claimed that India's measures explicitly ban poultry from all parts of a country whenever AI is detected anywhere in that country, noting that the wording of the measures "leaves no room for deviation". According to the United States, this precluded the application of AI restrictions on a regionalized basis as required under Article 6 of the SPS Agreement.

The United States further argued that India's AI measures preclude India from taking regional conditions into account, as these measures explicitly require a ban on covered imports from all parts of a country whenever there is a detection of AI anywhere in the country.

<u>Important findings regarding the regionalization obligations:</u>

Appellate Body upheld the Panel's findings that India's AI measures were inconsistent with Arts. 6.2 and 6.1 because they did not recognize the concept of disease-free areas and areas of low disease prevalence and they were not adapted to the SPS characteristics of these areas.

Similar restrictions were also imposed by China for poultry products deriving from countries where avian influenza cases had been reported. These measures restricted US and EU imports; both parties raised relevant trade concerns between 2016 and 2019. The United States and EU requested China to recognize pest-free areas within their territories, apply a regionalization approach, and lift bans on heat-treated poultry products which could not transmit the virus. Both states highlighted their rigorous and effective monitoring system for avian influenza, asserting its compliance with transparency obligations. Though China has since modified the measure and limited the areas impacted by it, concerns have not been resolved regarding the recognition of pest-free areas.[156]

ii. Analysis of the US measures

Similar to the initial measures imposed by India and China, US ToBRFV inspections constitute "blanket" requirements that fail to delineate between different regional conditions in Mexico. The nature of this regulation is distinct from US restrictions on avocado imports, which apply a regionalized approach and adapted different rules for separate Mexican states.[157]

In addition to border inspections, Mexican exporters must also comply with the requirements of phytosanitary "on-field" certification. Mexican fields that have been certified as "virus-free" must provide extensive evidence demonstrating that the yield is not infected.

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[156]SPS Committee Meeting, *China's Import Restrictions Due to Highly Pathogenic Avian Influenza*, Sanitary and Phytosanitary Information Management System, STC- 406, (2016-2020) http://spsims.wto.org/en/SpecificTradeConcerns/View?ImsId=406.

[157] Movement of Hass Avocado From Areas Where Mexican Fruit Fly or Sapote Fly Exists, 74 FR 31154 (2009) https://www.federalregister.gov/documents/2009/06/30/E9-15416/movement-of-hass-avocados-from-areas-where-mexican-fruit-fly-or-sapote-fruit-fly-exist.

The ToBRFV Order does not provide for any procedure facilitating the recognition of pest-free areas in the exporter state. However, Mexican authorities are entitled to request information regarding the US inspections in accordance with the SPS Agreement. If requested, the US authorities must provide all necessary information and proceed with a recognition process without undue delay. The US's failure to adopt a regionalized approach would potentially violate the SPS Agreement.

E. Control, Inspection and Approval Procedures

i. Description of the requirement

Even if a SPS measure complies with the above requirements, its implementation may still give rise to a potential violation of the SPS Agreement. Annex C(1)(a) of the Agreement requires states to commence and to complete specific control, inspection, and approval procedures without undue delay.[158]

The obligation to ensure that relevant procedures are undertaken and completed without undue delay may be infringed through measures other than control, inspection, and approval mechanisms. Actions that prohibit, prevent, or impede implementation may violate the provision; such actions or omissions could equally give rise to a violation of Annex C(1)(a) and Article 8.[159]

Lack of national of capacity to conduct timely inspections or simultaneously implement procedures may constitute a violation of the Agreement. In a recent case decided by the Appellate Body, Brazil challenged Indonesia's approval process to import chicken meat into Indonesia.[160]

[158] SPS Agreement, *supra*, at Annex C(1); *See also*, Appellate Body Report, *Australia – Apples*, WTO Doc. WT/DS367/21 ¶ 438 (2011).
[159] Appellate Body Report, *Australia - Apples*, ¶ 438.
[160] Panel Report, *Indonesia – Chicken*, WTO Doc. WT/DS484/26, ¶ 3.1.a. (2020).

Case study: Brazil-Indonesia Chicken

Measure at issue: *Whether Indonesia's certification process constituted an undue delay*

Product at issue: *Chicken meat from Brazil*

Purpose: *Certify that Brazil's chicken meat met Indonesia's various standards*

Important findings regarding undue delay:

Brazil was challenging Indonesia's approval process to import chicken meat into Indonesia. The process required Brazil to first submit requested documentation and questionnaires. Next, the requested information would then undergo a "desk review" which included review and approval by a panel of experts and an onsite inspection of production facilities. However, the panel of experts only met a few times a year and reviewed the cases in the order they were submitted. Indonesia was unable to review Brazil's documents until the second time the panel met.

The Panel found that Indonesia lacked the resources to adequately process the applications in a timely manner and not cause a delay. This was considered an undue delay because members have a responsibility to make sure that the capacity is such that the process can be undertaken and completed in a timely manner. Therefore, the actual measure (requirement to submit specific information, review by expert panel and onsite inspection of production facility) was not a violation. The violation was Indonesia's inability to complete the process without undue delay violated Annex C(1)(a) and Article 8.

ii. Analyses of the US measures

The timeline of the inspection process is relevant in evaluating US ToBRFV inspections. Three inspection stages may be deduced from the ToBRFV Order:[161]

> i. Obtaining a phytosanitary certificate from the place of origin that the tomato fruits on particular field are virus free;
> ii. Inspection of tomato fruits at the point of origin to ensure it is free of disease symptoms;
> iii. Inspection at the US ports of entry checking whether tomato fruits show any signs of disease;
> Note: If any visual signs are detected, a rapid laboratory test is conducted.

As reported by the FPAA, inspection and laboratory procedures may be delayed due to a general lack of inspectors, limited quantity of staff during peak seasons, or COVID-related restrictions. Because the tomatoes have a limited shelf life, inefficient inspection measures may render the product unsellable. The simultaneous application of multiple inspection procedures, coupled with lack of skilled personnel, may cause undue delays affecting imported produce.

F. Conclusion

Although Tomato Brown Rugose Fruit Virus poses a threat to agricultural produce, it also creates a serious regulatory challenge. While permitting states to enact non-tariff measures protecting plant life and health, the SPS Agreement also holds members accountable for protectionism and disguised restrictions on international trade. This accountability helps ensure that restrictive trade-barriers are implemented fairly and proportionally.

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[161] ToBRFV Order, *supra*.

One of the ways that member states may ensure compliance with the SPS is to ensure that all regulations are justified on the basis of sufficient scientific evidence. Risk assessments may also play an important role in ensuring that measures are necessary and justifiable. Current US regulations pertaining to ToBRFV are bolstered by pertinent information regarding the pathogen and the threat it poses. US authorities do not currently possess sufficient evidence to indefinitely justify the inspections; regular risk assessments must be conducted in tandem with emerging scientific evidence. The US government has repeatedly stressed that the 2020 Federal Order constitutes an interim, or provisional, measure. Given current ToBRFV infection patterns and eradication efforts in Mexico, it is possible that the current US inspections may not be proportionate to actual transmission risk.

The risk assessment elaborated in the 2020 Federal Order is problematic, as it covers risk of crop transmission at the exclusion of viral spread to locally-produced tomatoes and peppers. In order to ensure compliance with the SPS Agreement, the US needs to establish how the pathogen may be transmitted from commercial tomatoes to locally-grown plants in the United States.

In the instance that adequate scientific evidence does not exist to justify a non-tariff measure, a state may apply interim measures to protect national health or welfare. To be entitled to apply this exception, the US is required to update the measure within "a reasonable period of time", and must present scientific evidence justifying its implementation. Because current inspections have been in force for roughly a year, their review and eventual amendment is likely to be a matter for future consultation.

SPS measures deemed permissible under the WTO Agreement must be implemented without "undue delay". The Agreement may be violated when staffing or logistical issues prevent an inspection from being expeditiously implemented. Evidence suggests that ToBRFV inspections at the border are ineffective. The requirement of certifications issued "on the ground", visual inspections and laboratory tests, and the simultaneity of diverse control quality-measures may hamper the inspection process.

One potential solution would be to request the application of a "regionalized approach", or the relaxing of restrictive import measures for tomatoes originating from Mexican zones identified as pest-free. Similar regional approaches have been employed by WTO members to mitigate the distortionary effects of non-tariff measures.

Based on the above considerations, US ToBRFV inspection requirements arguably have a negative and disproportionate impact on tomato imports from Mexico. Unfortunately, unilateral non-tariff barriers may engender reciprocal "ripple effects" in tandem with the Uruguay Trade Agreement. The US-Mexico potato and avocado dispute is one example; law makers anticipate the dispute to evolve into one of the first causes of action brought before the USMCA Dispute Settlement Body.[162]

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[162] Zeke Jennings, *Fresh-potatoes-to-Mexico Push Has Been a Long One for US Potato Industry,* spudman.com, (July 2020) https://spudman.com/news/fresh-potatoes-to-mexico-push-has-been-a-long-one-for-us-potato-industry/.

PART IV: THE WTO TBT AGREEMENT

A. Current situation

i. Tomato Marketing Orders and Potential TBT Violations

The FPAA faces challenges from various NTBs that relate to the TBT Agreement, including federal marketing orders. In the analysis that follows, Federal marketing orders will briefly be explained, and several potential violations of the TBT Agreement will be discussed.

ii. Marketing Orders: Background Information

Federal marketing orders are sets of rules and regulations issued under the direction of the United States Department of Agriculture (USDA). These marketing orders are designed to protect domestic markets of milk, fruits, and vegetables by influencing supply, demand, price, and various regulations.[163] The federal government gained the power to issue marketing orders under the Agricultural Marketing Agreement Act (AMAA) of 1937, a piece of New Deal legislation.[164] The legislation was originally designed in part to protect US farmers by allowing them to have a say in the legal requirements and industry mandates of their produce.[165] Little has changed in the AMAA since it was passed,[166] and producers of pertinent industries are still permitted to create industry mandates that set the rules for the production and sale of milk, fruits, or vegetables.[167] The marketing orders govern many of the standards that produce must meet, regardless of whether the produce is grown in the United States or imported from abroad.[168] Practically speaking, "local administrative committees and boards manage the day-today operations of their marketing orders or agreements under the oversight of the USDA Agricultural Marketing Service. Committees and boards are

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[163] Suzanne Thornsbury & Scott Reynolds, *An introduction to federal marketing orders*, MICHIGAN STATE UNIVERSITY, (June 1, 2011), https://www.canr.msu.edu/news/an_introduction_to_federal_marketing_orders#%3A~%3Atext%3DFederal%20marketing%20orders%20are%20regulations%2Cto%20collectively%20address%20marketing%20challenges.

[164] Agricultural Marketing Agreement Act of 1937, (Approved June 3, 1937), https://www.ams.usda.gov/sites/default/files/media/AgriculturalMarketingActof1937.pdf; *see also* Bradley John Kalebjian, *The Effect of Terminated Marketing Orders on Small Farms, and a Reflection on the Jeffersonian Spirit*, 22 San Joaquin Agric. L. Rev. 115, 115-16 (2013), http://www.sjcl.edu/images/stories/sjalr/volumes/V22N1C4.pdf.

[165] Bradley John Kalebjian, *The Effect of Terminated Marketing Orders on Small Farms, and a Reflection on the Jeffersonian Spirit*, 22 San Joaquin Agric. L. Rev. 115, 116 (2013).

[166] *Id.* at 116.

[167] *Id.* at 116, *see also* see also Suzanne Thornsbury & Scott Reynolds, *An introduction to federal marketing orders*, MICHIGAN STATE UNIVERSITY, (June 1, 2011), https://www.canr.msu.edu/news/an_introduction_to_federal_marketing_orders#%3A~%3Atext%3DFederal%20marketing%20orders%20are%20regulations%2Cto%20collectively%20address%20marketing%20challenges.

[168] Agricultural Marketing Agreement Act of 1937, at 162 (Approved June 3, 1937), https://www.ams.usda.gov/sites/default/files/media/AgriculturalMarketingActof1937.pdf.

comprised of producers, handlers, and public members selected by USDA from industry nominations."[169]

B. Florida Tomato Marketing Order

The current marketing order on tomatoes governs production in Florida, covering various areas of regulation: "the marketing order authorizes quality regulations, research and promotion programs, and container and pack regulations for Florida fresh market tomatoes."[170] The order was originally issued in 1955 and was most recently amended in 1986.[171] Under the Tomato Suspension Agreement (an agreement regarding tomatoes imported from Mexico), section 8e requires that tomatoes "meet minimum grade and size requirements in accordance with § 980.212 (7 CFR 980)."[172] Exempt from these requirements however, are tomatoes "with minimum quantities not exceeding 60 lbs per day, or to pear shaped, cherry, hydroponic, and *greenhouse tomatoes*."[173]

Applicable to imports of all other Mexican tomatoes are specific requirements that attempt to ensure quality produce. Among these are requirements that tomatoes must be the correct grade and size. Specific exemptions are detailed, and processes for tomatoes that fail inspections are explained.[174] If tomatoes fail to meet the requirements specified by the tomato marketing order, they will be rejected.[175]

i. Proposed Changes to the Florida Tomato Marketing Order

In June of 2019, the Florida Tomato Committee (a member of the producers who implement the regulations of the marketing order) proposed changes to the tomato marketing order.[176] This included changing the definition of what constitutes a "controlled environment" to be more expansive. Ultimately, the changes that would have expanded the definition of a controlled environment were rejected in November of 2020.[177] However, the possibility still remains that these same measures (or similar ones) will be suggested in the future.

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[169] United States Department of Agriculture, *Marketing Orders Fact Sheet*, (May 2017), https://www.ams.usda.gov/sites/default/files/media/SCMarketingOrdersFactSheet.pdf.

[170] U.S. Dept. of Agric., Agricultural Marketing Service Marketing Orders and Agreements: 966 Florida Tomatoes, (1955), https://www.ams.usda.gov/rules-regulations/moa/966-florida-tomatoes.

[171] *Id.*

[172] USDA, *Section 8e Regulations and the Tomato Suspension Agreement – FAQs*, (last visited 13 Jan 2021), https://www.ams.usda.gov/sites/default/files/media/Tomato_Suspension_FAQs%5B1%5D_0.pdf.

[173] U.S. Dept. of Agric., Agricultural Marketing Service Marketing Orders and Agreements: Importing Tomatoes, https://www.ams.usda.gov/rules-regulations/section8e/tomatoes.

[174] *Id.*

[175] *Id.*

[176] *USDA proposes changes in handling requirements for Florida Tomatoes*, VEGETABLE GROWERS NEWS, June 10, 2020, https://vegetablegrowersnews.com/news/usda-proposes-changes-in-handling-requirements-for-florida-tomatoes/.

[177] Tomatoes Grown in Florida; Amendments to the Marketing Order No. 966, 85 Fed. Reg. 72914 (Dec. 12, 2020) (to be codified at 7 CFR 966),

Acknowledging that alternative production methods have greatly expanded in the last decade, the Florida Tomato Committee recommended updating the tomato marketing order to include regulations on the use of shade structures, although the majority of Florida tomatoes are still produced in open-field environments.[178] This development is significant because, as was stated above, one of the few exemptions to tomato marketing order requirements are "greenhouse tomatoes."[179] The marketing order defines "greenhouse tomatoes" simply as "tomatoes grown indoors."[180] This definition has been a source of contention and debate, as it is unclear whether relatively recent technologies fall under the marketing order definition of greenhouses.[181] Recent technologies to provide controlled environments for tomatoes include shade cloths, shade tunnels, shade houses, as well as hothouses and greenhouses that utilize more high-tech methods.[182] The Florida Tomato Committee agrees that these shade house methods, although very seldom practiced in Florida, should not be covered by the greenhouse exemption in the Florida tomato marketing order.[183]

C. FPAA Response

In response to the proposed changes to the tomato marketing order, the FPAA has stated that "the Members of the Florida Tomato Committee do not grow any tomatoes in either 'controlled environment' or under 'protected agriculture' methods as that term is commonly understood in the industry."[184] The FPAA believes that the proposed changes to the tomato marketing order are merely an attempt to implement protectionist measures for Florida-grown tomatoes under the guise of a TBT intended to maintain quality produce.[185]

D. Relevant Articles and Cases under the TBT Agreement

Article 2 of the TBT Agreement mandates that technical regulations should not "have the effect of creating unnecessary obstacles to international trade," and shall "not be more trade-restrictive than necessary to fulfill a legitimate objective."[186] Legitimate objectives include the "protection of human health or safety, animal or plant life or

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https://www.federalregister.gov/documents/2020/11/16/2020-23590/tomatoes-grown-in-florida-amendments-to-the-marketing-order-no-966 .

[178] Tomatoes Grown in Florida; Modification of Handling Requirements, 85 Fed. Reg. 35222 (July 09, 2020) (to be codified at 7 CFR 966).

[179] Electronic Code of Federal Regulations, Title 7, Subtitle B, Ch. IX, Part 980, §980.212 (current Jan 12, 2021) https://www.ecfr.gov/cgi-bin/text-idx?SID=1b535375748632deef9b7dfc983b4684&node=se7.8.980_1212&rgn=div8.

[180] *Id.*

[181] Prop. Rule by Agricultural Marketing Service, USDA Fed. Reg., at 35223, (Jun 9, 2020), https://www.federalregister.gov/documents/2020/06/09/2020-12183/tomatoes-grown-in-florida-modification-of-handling-requirements.

[182] *Id.* at 35223.

[183] *Id.* at 35224.

[184] Comments in response to the proposed changes to the Marketing Order, Fresh Produce Association of the Americas, 2 (July 8, 2020), file:///Users/brienbrockbank/Downloads/Tomato%20Comments%20FPAA.pdf.

[185] *Id.*

[186] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.

health, or the environment" in accordance with Article 2.5. Thus, a technical requirement or conformity assessment procedure intended to protect human or plant "life or health" is presumably not trade-restrictive in violation of the TBT Agreement.

i. Non-discrimination

a. Description of the requirement

> **Art. 2.1 TBT Agreement: Most-Favoured Nation Clause**
>
> 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.

Article 2.1 of the TBT Agreement incorporates the "national treatment" and "most-favoured nation" requirements found in Articles III and I of the GATT. The Most-Favoured Nation Clause requires states to treat imported products no less favorably than like domestic products or like products originating from any other country. GATT Art. XX formerly allowed for limited exceptions to the most-favoured nation clause, permitting discrimination against foreign products under specific circumstances. Notably and importantly, the TBT Agreement does not include any provision similar or equivalent to Art. XX of the GATT.

US – Tuna II addresses Art. 2.1 of the TBT Agreement. The United States had imposed certain labelling requirements on tuna imported from Mexico, refusing to allow Mexico to mark their tuna "dolphin-safe" because of fishing techniques used by Mexican fishermen. In the Eastern Tropical Pacific Ocean, fisherman use a technique with 'purse-seine nets' called 'setting on' where dolphins are chased by nets in order to catch the tuna swimming below. The technique is not widely used in other areas or oceans. The Appellate Body held that a Member using its domestic market to exert pressure on producers of other Members, with respect to production methods, was not in and of itself a violation of national treatment under Art. 2.1. However, because the US was unable to demonstrate that the "dolphin-safe" labelling requirements were implemented solely on the basis of "legitimate regulatory distinctions," the Appellate Body found that the United States had violated Art. 2.1 of the TBT Agreement. Additionally, the Appellate Body found that the United States had not evenly implemented "dolphin-safe" restrictions across other fishing methods that posed risks to dolphins in different oceans. In other words, the Appellate Body held that the TBT Agreement was violated because US "dolphin-safe" labelling requirements disproportionately discriminated against Mexican tuna without a legitimate basis for doing so.[187]

In *US – Clove Cigarettes*, Indonesia alleged that the United States had violated Art. 2.1 of the TBT Agreement by prohibiting the production of clove-cigarettes in Indonesia but allowing US-manufactured menthol cigarettes. The United States argued that the prohibition was implemented in an effort to reduce tobacco consumption among American youth The Appellate Body held that clove and menthol cigarettes are "like products" under the meaning of Art. 2.1, holding that banning clove cigarettes (which

[187] The WTO Agreement Series: Technical Barriers to Trade at 16-17, (May 2014), wto.org/english/res_e/publications_e/tbttotrade_e.pdf.

primarily originate from Indonesia) but not menthol cigarettes, (which are primarily domestic to the United States) constitutes a discriminatory measure under Art. 2.1.

These cases demonstrate the importance of applying measures evenly and uniformly across domestic and foreign products that are "like." In past cases, the Appellate Body has looked to various factors that are largely consumer-driven in determining whether products are like: end-use, consumer tastes and habits, tariff classifications, and the competitive relationship between products.[188] When a product from a foreign country is treated less favorably than a like domestic product, there must be a "legitimate regulatory distinction" to justify the disparate treatment.[189] Even when a measure is found to have a legitimate purpose, the Appellate Body has consistently found Art. 2.1 violations when the legitimate purpose is applied selectively such that it disproportionately affects a foreign state.

b. Analysis of the US measure

The stated purpose of the tomato marketing orders is to ensure high-quality produce. Seeking high-quality produce easily meets the broad "legitimate objective" requirement for trade measures. A more difficult determination is whether the legitimate purposes of marketing orders are applied in a discriminatory manner against Mexican produce. If it can be demonstrated that tomato marketing orders have disproportionately negative effects on Mexican tomatoes or other 8e inspected produce items such as grapes, avocadoes or onions, Mexico may have a valid claim against the United States under TBT Agreement 2.1.

The proposed amendments to the tomato marketing order that would regulate the use of shade structures and greenhouses are particularly concerning. The Florida Tomato Committee acknowledges that the vast majority of Florida's locally-grown tomatoes are produced in open fields, and are therefore subject to the strict requirements of the marketing order. Shade structures and greenhouses are severely limited in Florida because of hurricanes and other weather patterns that could easily destroy the structures. In Mexico however, various shade structures and greenhouses are commonly used for tomato production. If the proposed amendments regarding shade structures and greenhouses are passed and implemented however, Mexico will likely have a strong case that TBT Art. 2.1 has been violated. Because Florida does not use shade-structures, Mexico would likely be able to demonstrate that the marketing orders discriminate specifically against the importation of Mexican tomatoes. The discriminatory effect of the proposed amendments to the tomato marketing order correlates to US – Tuna II, where certain fishing practices were targeted to a specific region. Similarly, marketing orders specifically targeting shade structures and greenhouses would likely be targeting the few markets that use those technologies to produce tomatoes, including Mexico.

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[188] *Id*. at 18.

[189] *Id.*

ii. Necessity

a. Description of the requirement

> **Art. 2.2 TBT Agreement**
>
> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than *necessary* to *fulfil* a *legitimate* objective, taking account of the risks non-fulfilment would create. […]

Necessity is an important principle for domestic regulation under WTO agreements. Article 2.2 of the TBT Agreement lays out the necessity test. Versions of this test also appear in Art. XX of the GATT. While Art. XX of the GATT lists certain exceptions that must be met in order the necessity test to apply, Art. 2.2 of the TBT Agreement applies a requirement of necessity directly without exception. The complaining party carries the burden of proof. In order to succeed under Art. 2.2, they must prove that a measure is not the least trade-restrictive available, as indicated below:

The AB noted that Art. 2.2 TBT Agreement requires four steps:

(1) First, a panel must "*independently and objectively assess*" the objective pursued by examining the *"texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure."*[190] The panel is not bound by the parties' characterizations of the objective.

(2) Second, the panel must assess whether the objective is *'legitimate'* within the meaning of Art. 2.2. If it is found among those listed in Art. 2.2, it is automatically considered legitimate[191]; if not, then a panel must assess the legitimacy of the objective within the context of the TBT and other covered agreements.[192]

(3) Third, the challenged measure must '*fulfill'* the legitimate objective pursued. As long as the measure makes a contribution, this test is sufficiently satisfied to move on to the final step.

(4) The fourth step, determining whether the measure is *'necessary'* to fulfill the legitimate objectives pursued, involves a *'relational analysis'* of the challenged measure and comparison to reasonably available alternative measures, as proposed by the complainant.

The '*relational analysis*' involves a weighing and balancing of three factors: the measure's degree of contribution to the legitimate objective, the trade-restrictiveness of the measure, and the risks that non-fulfillment of the legitimate objective would create. According to the sixth preambular recital of the TBT Agreement, a Member is free to

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[190] Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, ¶ 314, WTO Doc. WT/DS381/AB/RW/USA (adopted Dec. 14, 2018) [hereinafter US-Tuna II].

[191] Appellate Body Report, United States – Certain Country of Origin Labelling (COOL) Requirements, ¶ 372, WTO Doc. WT/DS384/AB/RW (adopted May 18, 2015) [hereinafter *US-Cool*].

[192] US-Tuna II at ¶ 313.

enact technical regulations '*at the levels it considers appropriate*'. Trade-restrictiveness refers to the degree to which a measure limits trade[193]. The panel must objectively assess the desired degree of contribution and is not bound by Members' characterizations during the dispute.[194] There is no exact indication of how panels should examine this requirement. Finally, the panel must consider the risks of non-fulfillment of the legitimate objective, taking account of, '*inter alia: available scientific and technical information, related processing technology or intended end-uses of products*'.[195]

Case Study 2: US – Tuna II

Measure at issue: (1) "Dolphin Protection Consumer Information Act" (DPCUA); (2) Dolphin-safe labelling standards"; (3) ruling by a US federal appeals court in *Earth Island Institute v. Hogarth.* Together the measures set out the conditions under which tuna products sold in the US may be labelled as "dolphin-safe"

Product at issue: Tuna and tuna products

Important findings regarding

- **TBT Art. 2.2:** The AB disagreed with the Panel's ruling that the measure at issue was more trade-restrictive than necessary to fulfil US legitimate objectives, and found instead that "the alternative measure proposed by Mexico [AIDCP 'dolphin safe' labelling combined with the existing US standard] would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue". The AB thus reversed the Panel's finding that the measure was inconsistent with Art. 2.2.
- **TBT Art. 2.4:** The Appellate Body modified the Panel's conclusion and ruled that the AIDCP "dolphin-safe" definition and certification did not constitute a "relevant international standard" within the meaning of Art. 2.4, since "the AIDCP is not open to the relevant bodies of at least all Members and thus not an 'international standardizing body' for purposes of the TBT Agreement". It nonetheless upheld the Panel's ultimate finding that the measure did not violate Art. 2.4.

One of the key elements of the Article 2.2 necessity clause is the comparison of the challenged measure to proposed alternative measures. In US – Tuna II[196] for example, the AB found that a comparison to alternative measures is required in "most cases." Here the comparison was decisive as the AB overturned the Panel's finding of violation under Article 2.2 because Mexico's proposed alternative measure did not contribute to legitimate US objectives in the same degree.[197]

Regarding the fulfil test under Art. 2.2, it is determined that, unlike the "material contribution" required under the necessity test of Article XX (b) and (d) GATT, the TBT Agreement requires no minimum contribution to the legitimate objective

[193] Id. at ¶ 319.

[194] Id. at ¶ 316–17.

[195] Id. at ¶ 321.

[196] US – Tuna II at ¶ 322.

[197] *Id.* at ¶ 330

pursued.[198] Rather the degree of contribution is weighed against other factors and, in particular, whether or not a proposed alternative makes an equivalent contribution.[199]

Art. 2.2 offers, unlike the limited list of Art. XX GATT an open list of policy objectives that may justify measures under the TBT Agreement. These could include providing consumer product information, as in US-Tuna II and US – COOL. In both TBT cases, the panels and the AB misjudged the regulatory authority in determining the legitimate objectives pursued, while at the same time preventing the parties from tailoring the objectives to a more favorable analysis.

As the Panel found in US-Tuna II, this is consistent with the previous GATT case law that grants regulators discretionary powers in determining their own objectives. Thus, both cases, the objectives pursued by the contested measures were considered "legitimate" within the meaning of Art. 2.2, even though this was not explicitly provided for the GATT 1994.

It can thus be stated that the TBT Agreement encompasses a broad range of legitimate objectives that members can pursue under the TBT Agreement.

b. Analysis of the US measure

In order to meet the necessity requirement under Art. 2.2 of the TBT Agreement a measure must be advancing a legitimate objective, the measure must fulfill that legitimate objective, and the measure must be *necessary* to achieve the legitimate objective. A WTO panel is likely to find that the tomato marketing order has a legitimate purpose (i.e. quality tomatoes). There is also a strong case that the exemptions for shade-houses and greenhouses fulfil the objective of quality produce, as greenhouses and shade-houses are separate technologies that achieve separate results. Shade-houses that are enclosed by a door or barrier use resources efficiently, as they reduce the need for pesticides and enable longer growing seasons.

Therefore, it may be fairly argued that shade-houses should be granted equivalent exemptions to greenhouses, as the quality of shade-house produce is comparable, if not superior, to that produced in a greenhouse. However, regarding the degree of contribution made by the measure to the legitimate objective at issue it will be difficult for the United States to demonstrate that stricter shade-house and greenhouse requirements are necessary to ensure quality produce. According to the FPAA the parties who have proposed modifications to the Marketing Order do not use the methods of agricultural production they seek to regulate. If Mexico is able to demonstrate that alternative measures could successfully achieve high-quality produce, they are likely to succeed in showing that the proposed shade-house and greenhouse requirements of the tomato marketing order are more trade restrictive than necessary to fulfill the legitimate objective pursued by the US. If so, Mexico has a valid claim against the United States for violating the 'necessary' provision of TBT Agreement, Art. 2.2.

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[198] US – COOL at ¶ 469

[199] *Id.* at ¶ 468

iii. Compliance with International Standards

a. Description of the requirement

Art. 2.4 TBT Agreement

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, *as a basis for their technical regulations* *except* when such international standards or relevant parts would be *an ineffective or inappropriate means* for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Art. 2.5 TBT Agreement

[…] Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be *rebuttably presumed not to create an unnecessary obstacle to international trade.*

Art. 2.4 aims to strengthen the role of the TBT Agreement as an instrument that harmonizes international standards. As members increasingly apply technical regulations, this provision helps to encourage Members to coordinate their standards to avoid unnecessarily complicating or overburdening international trade (*see* Case Study US-Tuna II). As such, Art. 2.5 ensures that technical regulations which conform to international standards are "*rebuttably presumed [to] not create an unnecessary barrier to international trade*" in accordance with Art. 2.2 of the TBT Agreement.

In EC-Sardines the AB found that a standard used "as a basis for" a technical regulation must be "*used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation*".[200] Moreover, one thing cannot be the "basis for" another if the two are contradictory to each other.[201]

With regard to the burden of proof, the AB found that it is for the complainant, not the defendant, to prove that a measure is not an "inappropriate or ineffective means" of achieving the legitimate objective pursued. If members are not in position to use a "relevant international standard" as a basis for their technical regulations, they are obliged under Article 2.9 to notify the WTO Secretary and other members of the objective and the reasons for their action within a reasonable time for comment. Members may adopt urgent technical regulations without fulfilling these notification obligations, but under Art. 2.10 the urgency of the matter thus dealt with must be justified retrospectively.

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[200] Appellate Body Report, European Communities – Trade Descriptions of Sardines, ¶ 243, WTO Doc. WT/DS231/AB/R (adopted Sep. 26, 2002) [hereinafter EC – Sardines].

[201] Id. at ¶ 248.

Case Study 3: EC - Sardines

Measure at issue: EC Regulation establishing common marketing standards for preserved sardines, including a specification that only products prepared from *Sardina pichardus* could be marketed/labelled as preserved sardines.

Product at issue: Two species of sardines found in different waters - *Sardina pilchardus Walbaum* (mainly in Eastern North Atlantic, in the Mediterranean Sea and the Black Sea) and *Sardinops sagax sagax* (mainly in the Eastern Pacific along coasts of Peru and Chile).

Important findings regarding

- **TBT Art. 2.4:** The AB upheld the Panel's finding that the definition of "standard" does not require that a standard adopted by a "recognized body" be approved by consensus. Therefore, the standard in question, Codex Stan 94, fell within the scope of Art. 2.4 as well.
- **TBT Art. 2.4:** The AB reversed the Panel's finding that the European Communities had **the burden of proving** that the relevant international standard was ineffective and inappropriate under Art. 2.4 and found, instead, that the burden rested on Peru to prove that the standard was effective and appropriate to fulfil the legitimate objectives pursued by the European Communities through the EC Regulation. The AB upheld the Panel's alternative finding that Peru had adduced sufficient evidence and legal arguments to demonstrate that the international standard was not ineffective or inappropriate to fulfil the legitimate objectives pursued by the European Communities (of market transparency, consumer protection and fair competition), since it had not been established that most consumers in most member states of the European Communities have always associated the common name "sardines" only with *Sardina pilchardus Walbaum.*

b. Analysis of the US measure

As already indicated in the previous sections, the AB is likely to find that the tomato marketing order has a legitimate purpose. Similar to EC-Sardines, there is a strong case that the burden of proving that the relevant international standard was ineffective and inappropriate under Art. 2.4 TBT, rests on Mexico. As already stated above, products from shade-houses are at least comparable to those from greenhouses in terms of quality. So, if Mexico can show that the proposed changes to the tomato marketing order are not necessary but a merely an attempt to implement protectionist measures for US-grown tomatoes, it would have a strong case.

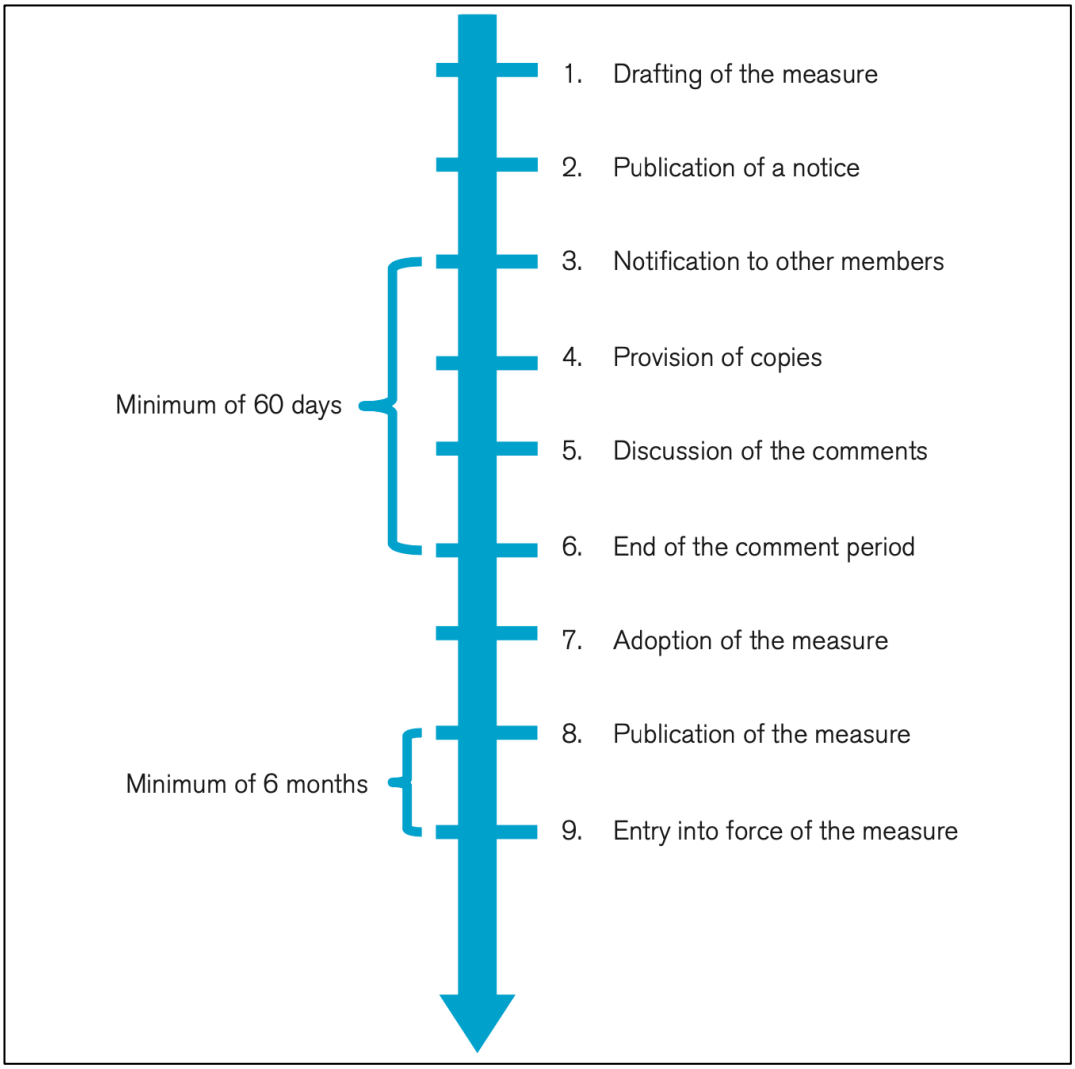
E. Notification and Transparency

Transparency is a cornerstone of the TBT Agreement. Transparency in the context of the TBT Agreement consists of three core elements:

a. provisions on the **notification** of draft technical regulations (Articles 2.9, 2.10, and 3.2) and conformity assessment procedures (Articles 5.6, 5.7 and 7.2), as well as the "one-time" notification of each member's organizational "set-up" for the implementation of the Agreement (Article 15.2)

b. the establishment of **enquiry points** (Article 10.1) and a notification authority (Article 10.10)

c. **publication requirements** for technical regulations (Articles 2.9.1 and 2.11), conformity assessment procedures (Articles 5.6.1 and 5.8) and standards (Annex 3, paragraphs J and O).



TBT Transparency requirements

Art. 2.11 and 2.12 of the TBT Agreement stipulate that all technical regulations must be published promptly so as to provide a "reasonable interval" of time for other Members to adapt. For instance, in *US – Clove Cigarettes* the US violated 2.12 because it did not provide a "reasonable interval" of time between the publication of the measure and its entry into force. As a result, the AB found that the Doha Ministerial Decision of 14 November 2001 was a "subsequent agreement of the parties" for the interpretation of "reasonable interval", indicating a period of 6 months, whereas the US measure only allowed 3-months interval.

F. Order of Application

The TBT Agreements provides no explicit guidelines on how its provisions should interact, including provisions of Art. 2. The AB's interpretation of Art. 2.1 has raised the issue of timing, specifically concerning the order in which panels should address the provisions. The traditional order has chronologically followed the sequence of the provisions (i.e., moving from Art. 2.1 to 2.2, etc). However, some parts in the literature have suggested that the necessity test (see Art. 2.2) and comparison to alternatives are at the heart of the TBT Agreement. According to these conclusions, Art. 2.1, including its new-found "even-hardness" requirement, should serve as a

consideration secondary to the "necessity" requirements. In doing so, it would function in similar fashion to the chapeau of Article XX of the GATT, following the "necessity" test under Art. 2.2. Regarding a potential violation, the effect on the present case is not yet foreseeable, but the question could be addressed in future Appellate Body jurisprudence.

G. Dispute Resolution Mechanisms

Article 13 of the TBT Agreement authorizes the creation of a Committee on Technical Barriers to Trade, to meet once per year to "consult on any matters relating to the operation of [the] Agreement or the furtherance of its objectives."[58] As part of its mandate, the Committee may create technical bodies or working groups to resolve member state concerns and "[carry] out…responsibilities as assigned to it under this Agreement."[59] Similarly, Article 14 calls for the establishment of a dispute resolution body in the event a member state has exhausted attempts to standardize national procedures or resolve concerns bilaterally.[60] Technical expert groups may be appointed to assist in the evaluation of a claim by the panel, and are responsible for the compilation and submission of a final report to both member states and the dispute resolution panel.[61]

H. Conclusion

Because Florida does not use shade-structures, it can be argued that Mexico has a potentially strong case that the United States has violated TBT Article 2.1 pursuant to the WTO Agreement. Marketing orders specifically targeting shade structures and greenhouses would likely implicate the few markets that use these technologies to produce tomatoes, as seen in US – Tuna II.

With respect to the necessity requirement of TBT Art. 2.2, Mexico would have a valid claim against the US if it could establish that the proposed shade-house and greenhouse requirements of the tomato marketing order are more trade restrictive than necessary to fulfill the legitimate national objectives.

Finally, as demonstrated with imports on poultry products, the US TBT measures could potentially harm US export markets in the future, as countries could impose reciprocal barriers to trade.

Case Study 4: United States - Measures Affecting Imports of Poultry Products

Agreements cited: Art. 2, 3, 4, 5, 8 (SPS); Art. 2, 5 (TBT)

Product at issue: poultry and poultry products

EC – US 1997
On 18 August 1997, the EC requested consultations with the US in respect of a ban on imports of poultry and poultry products from the EC by the US Department of Agriculture's Food Safety Inspection Service, and any related measures. The EC contended that although the ban is allegedly on grounds of product safety, the ban does not indicate the grounds upon which EC poultry products have suddenly become ineligible for entry into the US market.

Case Study 4 (Continued)

US – EC 2009
On 16 January 2009, the US, in turn, requested consultations with the EC regarding certain measures of the EC affecting poultry from the US.
The US notes that the EC prohibits the import of poultry treated with any substance other than water unless that substance has been approved by the EC. Consequently, the EC prohibits the import of poultry that has been processed with chemical treatments ("pathogen reduction treatments" or "PRTs") designed to reduce the amount of microbes on the meat, effectively prohibiting the shipment of virtually all US poultry to the EC. The EC has not published or otherwise made available the process for approving a substance. The EC also maintains a measure regarding the marketing standards for poultry meat, which defines "poultry meat" as only "poultry meat suitable for human consumption, which has not undergone any treatment other than cold treatment."
According to the United States, in 2002, the United States requested the European Commission ("Commission") to approve the use of four PRTs in the production of poultry intended for export to the EC: chlorine dioxide, acidified sodium chlorite, trisodium phosphate, and peroxyacids. However, after more than six years, including unexplained delays, the EC has not approved any of these four PRTs and instead has rejected the approval of the use of these four PRTs.

PART V: REMEDIES

Each of the agreements elaborated above provide mechanisms for redress. In this section, we discuss potential remedies that the FPAA may consider in its current dispute, noting that the Association lacks standing to invoke treaty violations as a private entity.[202] Pursuant to treaty, only state parties may formally invoke violations of the WTO or USMCA or their dispute settlement mechanisms.[203] The invocation of the dispute settlement procedures below are thus contingent on the FPAA's concerns being raised by a member state. Because the FPAA represents importers of Mexican produce, the Association possesses a common policy interest with Mexican authorities to tackle and eliminate barriers to trade.

A. USMCA – Dispute Settlement Mechanisms

The USMCA contains detailed enforcement and conflict resolution mechanisms to be employed by member parties.[204] Chapter 9 permits both importing and exporting parties to duly request information concerning trade restrictions, import controls, as

[202] WTO, *Introduction to the WTO Dispute Settlement System*, Dispute Settlement System Training Module: Chapter 1, wto.org, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm.

[203] *Ibid.*

[204] *See generally,* USMCA.

well as pest and disease conditions in implicated zones.[205] The USMCA furthermore calls for the establishment of technical working groups, meeting on a permanent or ad-hoc basis, to be called upon in the event of trade disputes surrounding SPS measures implemented by either party. [206] The technical working groups, comprised of representatives nominated by both parties, are authorized to consider "[SPS] measures…that are likely to affect, directly or indirectly, trade…" in the objective of "providing advice with a view to facilitating the resolution of specific trade concerns relating to those measures."[207]

Chapter 31 of the USMCA permits recourse to dispute settlement, provided that both parties have exhausted potential remedies through technical consultations or working groups under Articles 9.18 and 9.19.[23] The Agreement asserts that dispute settlement is a measure of last resort, aimed at the resolution of "scientific or technical issues" in consultation with experts recommended by the parties.[24] An "advisory technical expert group" may be also established in conjunction with the proceedings, which may in turn request advisory opinions from "international standard setting organizations."[208]

A state party may first seek redress through a USMCA technical working group pertaining to SPS measures. If unsuccessful, the state may then apply for redress through the USMCA dispute settlement body.

B. WTO – Remedies

i. The SPS Agreement

The WTO SPS Agreement provides member states with several mechanisms that may be used to address concerns pertaining to SPS measures.[209]

The following might be relevant to the ToBRFV inspections at issue:

a. Request information on the measure from the WTO SPS Enquiry Point of contact point of International Plant Protection Convention (IPPC).[210]

According to Art. 7 and Annex B.3 of the SPS Agreement, WTO Members must establish an Enquiry Point responsible for providing answers and documentation to all questions from interested Members.

b. Request recognition of pest- or disease-free areas and areas of low pest or disease prevalence with regard ToBRFV-free fields in Mexico.

Pursuant to Article 6 of the SPS Agreement, a state may not unconditionally apply import restrictions on a country-wide basis. The US is therefore obliged to

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[205] *See USMCA, ch. 9.*

[206] *Ibid. at. 9.18*

[207] *Ibid.* At 9.18

[208] *Ibid. Ch. 31.*

[209] Committee on Sanitary and Phytosanitary Measures, *Catalogue of Instruments Available to WTO Members to Manage SPS Issues*, WTO, G/SPS/63 (2018). [Hereafter Catalogue].

[210] SPS Agreement, *supra*, at Annex B.3.

develop a procedure recognizing pest-free areas and to relax import restrictions for such areas if applicable (please see section *Recognition of pest-free areas*).[211]

The SPS Committee has additionally developed guidelines to facilitate the application of Article 6 of the SPS Agreement, which includes the following steps:

Step 1: the exporting Member requests information about the importing Member's requirements and procedures for the evaluation of recognition requests;

Step 2: the importing Member explains its requirements and procedures;

Step 3: the exporting Member sends the documentation demonstrating compliance with the requirements laid down by the importing Member;

Step 4: the importing Member evaluates the documentation and, if necessary, requests additional information;

Step 5: the exporting Member provides any clarification, additions, or modifications requested by the importing Member;

Step 6: the importing Member evaluates the additional information and, where necessary, steps 4 and 5 are repeated;

Step 7: if applicable, the importing Member carries out on-site verification of the information provided in support of the recognition request and sends a report on the on-site verification to the exporting Member;

Step 8: the exporting Member responds to the inspection report;

Step 9: the importing Member decides whether to recognize a pest- or disease-free area. When the decision is negative, the importing Member should provide the exporting Member with the technical grounds for its determination, with a view towards allowing the exporting Member to modify and adapt its procedures. When the decision is positive, the importing Member then takes steps to facilitate trade from the exporting Member.[212]

a. Request facilitated ad hoc consultations or negotiations (i.e. "Good Offices of the Chair") on specific sanitary or phytosanitary issues.[213]

"Good Offices" constitutes a process by which a state directly concerned about a specific SPS measure may request mediated discussions with another member. The Chairman will assist them in resolving the matter in question.

b. Raise an issue as a specific trade concern at the WTO SPS Committee meeting.[214]

Members may request, in writing to the Secretariat, the inclusion of a particular issue in a meeting of the WTO SPS Committee. Requests may be made until the date of notice convening the meeting.

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[211] *See* SPS Agreement section 4 of this paper.
[212] WTO, *WTO Analytical Index: SPS Agreement- Article 6 (practice)* https://www.wto.org/english/res_e/publications_e/ai17_e/sps_art6_oth.pdf.
[213] Catalogue, *supra*.
[214] SPS Agreement, art. 17.2.

This request should be made consistent with the timelines established by the Secretariat. Members proposing to raise any matter relevant to the implementation of the Agreement, including any matter relating to a particular notification, should give notice to other concerned Member(s) as far as possible in advance of the SPS Committee meeting.[215]

ii. The TBT Agreement

The TBT notification procedure assists states in preventing the imposition of technical barriers to trade. The notification procedure provides participants with advanced notice of new technical regulations or conformity assessment procedures implemented by other countries.

a. Aim of the TBT notification procedure

To prevent the enactment of technical barriers to trade, WTO Members submit draft legislation to other members of the TBT Agreement. The legislation is then mutually assessed with respect to its potential impact on commerce consistency with the Agreement.

The TBT Agreement also assists private enterprise in the preparation of products and services for emerging technical requirements. Furthermore, a dialogue between WTO Members can result in the amendment of a notified measure, which can be withdrawn by the proposing country.

Given the current competition between US tomato producers and Mexican growers and exporters, it is probable that national agricultural committees will continue to press for new restrictions on Mexican tomato imports. The following procedures could be useful in preventing the imposition of trade-distorting measures.

b. How does the TBT notification procedure work*?*

Upon circulation of the notified measure, there is a minimum 60-day period for comments during which the adoption process is frozen. Economic operators may provide their contributions on the drafts to the EU Member State Enquiry Points or to the EU Enquiry Point. Comments are sent directly by the EU TBT Enquiry Point to the notifying WTO Member.

Comments may result in bilateral or multilateral discussions within the TBT Committee itself. The notifying Member may then decide to:

- change the content of the proposed regulation;
- postpone its entry into force;
- or withdraw the measure altogether.

Once the notified measures are adopted, WTO Members are encouraged to ensure their prompt publication. The notifications remain available in the TBT database, which also provides detailed information regarding the TBT Agreement.

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[215] Catalogue, *supra*.

C. General remedies within WTO System

The WTO additionally provides general dispute resolution methods that apply to all breaches or violations. Generally, within the WTO system, it is also possible to:

a. Ask questions as part of the Trade Policy Review process with regard to the US trade policies.[216]

Members are subject to trade policy reviews contingent on their economic share of world trade. WTO Members are given the opportunity to review and make inquiries to other members regarding their trade policies.

b. Request formal Dispute Settlement Consultations
c. Request formal "Good Offices, Conciliation and Mediation"
d. Request the establishment of a dispute settlement panel

The report of a panel may be adopted by the Dispute Settlement Body only if the report is not appealed by any party to the dispute.[217] In case of appeal, the case is considered a final decision rendered by the Appellate Body.[218]

The Dispute Settlement Understanding of the WTO prescribes that an appeal shall be heard by three members of the Appellate Body. On December 10, 2019, this rule was modified to require only one member of the Appellate Body to hear the dispute. The appointment of candidates to the Appellate Body requires consensus among all WTO members. To date, the United States has been the sole party to continually object judge recruitment. The incoming US administration may discontinue this practice.

When the Appellate Body is not in session, a panel report appeal may never be finalized. The WTO Dispute Settlement Understanding[219] does not establish any mechanisms that overcome this problem.

In March 2020 the EU and 15 other WTO member states established an agreement permitting internal appeals and resolution of trade disputes. This Multiparty Interim Appeal Arbitration Arrangement (MPIA), mirrors WTO appellate rules and may be used between members willing to participate in the event the Appellate Body is inoperational.[220]

On July 31, the participants in the Multi-Party Interim Appeal Arrangement (MPIA) notified the WTO of ten arbitrators who will hear appeals of WTO panel reports under the MPIA.[221] This marked the final step in rendering the MPIA dispute settlement mechanism a functional alternative to WTO dispute settlement.

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[216] Catalogue, *supra.*
[217] Annex 2 of the WTO Agreement, *Understanding on Rules and Procedures Governing The Settlement of Disputes*, art. 16.
[218] *Ibid. at* art. 17.
[219] *Ibid.*
[220] European Commission, *EU and 15 World Trade Organizatiion Members Establish Contingency Appeal Arrangement for Trade Disputes*, European Union, erupa.eu (2020) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2127.
[221] European Commission, STATEMENT ON A MECHANISM FOR DEVELOPING, DOCUMENTING AND SHARING PRACTICES AND PROCEDURES IN THE CONDUCT OF WTO DISPUTES, JOB/DSB/1/Add.12 (2020) https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf.

While Mexico is a current member of the MPIA, the United States is not. This dispute settlement mechanism may therefore not be used in disputes with the US.

The WTO provides several dispute settlement procedures intended to address and resolve the trade concerns of member states. Some of these remedies may be invoked through specialized committees established in conjunction with the SPS and TBT Agreements. Other may implicate the involvement of the WTO General Council or Dispute Settlement Body, the latter providing a remedy of last resort through the intervention of an adjudicative panel or the WTO Appellate Body. Collectively, these instruments aim to promote dialogue between members, facilitate trade through consultations and negotiation, and enhance international commerce. Given current concerns surrounding the vitality of the WTO dispute settlement mechanism, USMCA dispute settlement procedures may provide a viable alternative for future disputes between Mexico and the United States.

APPENDICES: 1. Time Table for WTO Dispute Settlement Procedure

Time Table for WTO Dispute Procedure

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year	**(without appeal)**
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1y 3m	**(with appeal)**

https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

Appendix 2. Time-schedules of WTO cases involving USA as a complaining party

EC – Hormones

EC prohibition on the placing on the market and the importation of meat and meat products from USA and Canada treated with certain hormones.

Consultations requested	26 January 1996
Panel requested:	25 April 1996
Panel established:	20 May 1996
Panel composed:	2 July 1996
Panel report circulated:	18 August 1997
Appellate Body report circulated:	16 January 1998
Art 21.3(c) DSU Arbitration award circulated	29 May 1998
Art 22.6 DSU Arbitration decision circulated :	12 July 1999

Japan – Agricultural products II

Varietal testing and quarantine requirements aimed to prevent entry and spread of codling moth, under which the import of certain plants originating from the United States was prohibited.

Consultations requested:	7 April 1997

Panel requested:	3 October 1997
Panel established:	18 November 1997
Panel composed:	18 December 1997
Panel report circulated:	27 October 1998
Appellate Body report circulated:	22 February 1999
Mutually Agreed Solution notified:	23 August 2001

Japan – Apples

Certain Japanese measures restricting imports of apples from USA aimed to prevent transmission of fire blight bacterium.

Consultations requested:	1 March 2002
Panel requested:	7 May 2002
Panel established:	3 June 2002
Panel composed:	16 July 2002
Panel report circulated:	15 July 2003
Appellate Body report circulated:	26 November 2003
Art 21.5 DSU Panel report circulated:	23 June 2005
Mutually Agreed Solution notified:	30 August 2005

India – Agricultural products

Import prohibitions imposed on imports of certain agricultural products from some countries (including USA) due to concerns relating to avian influenza.

Consultations requested:	6 March 2012
Panel requested:	11 May 2012
Panel established:	25 June 2012
Panel composed:	18 February 2013
Panel report circulated:	14 October 2014
Appellate Body report circulated:	4 June 2015

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