

APPENDIX 2

APEC Ministerial Meeting Vladivostok, September 5-6

Joint Statement

ANNEX A

APEC MODEL CHAPTER ON TRANSPARENCY FOR RTAS/FTAS

This APEC Model Chapter is intended to build best practices for RTA/FTAs in the area of transparency standards. This Model Chapter is an APEC contribution to the promotion of high-quality and comprehensive free-trade agreements in the Asia-Pacific region and the realisation of the Bogor Goals. They are intended to encourage a coherent and consistent approach to the design and content of such agreements.

The text of this Model Chapter is based on the combination APEC members economies' existing FTA Chapters, Article X of GATT and Article III of GATS. It establishes WTO rules as the minimum standard for transparency provisions and adds to that certain standard elements that reflect the practices of APEC Members.

The provisions provided for in this model Chapter reflect the general APEC principle of non-binding agreements. They are neither mandatory nor exhaustive, nor do they indicate that economies will include all of the elements here in all of their RTAs/FTAs. They are not written in legal language that is mandatory to be used in an agreement. These provisions are indicative examples to provide members with useful references in negotiating RTA/FTA chapters. They are a guide to the kind of provisions that might be included in a free trade agreement. They will not prejudice the positions of APEC Members in any of their current or future trade negotiations.

General considerations relevant to this Chapter

- *The purpose of a transparency chapter in a free trade agreement is to promote transparency and due process in policy-making, as well as to facilitate the administration and exchange of information between the Parties, in particular, through designating contact points in each of the parties to the agreement to facilitate communication on matters arising under the FTA;*
- *These elements may be supplemented by or may be stipulated in other more specific provisions in individual chapters;*
- *The provisions contained in this Chapter are not intended to preclude or prejudice the establishment of sector-specific obligations that may be set forth elsewhere in the agreement and to the extent of any inconsistency would prevail over these more general provisions. This Chapter, similar to other chapters of a general or institutional nature, must be read in light of the whole agreement, given that other provisions (e.g., general or chapter-specific exceptions) may take precedence over the specific provisions of this chapter.*

Article 1: Definitions

This Article is designed to provide the scope of application of this Chapter by defining the term of "measure of general application" that would be used throughout the text of the Chapter, unless

provided otherwise. For the deeper clarification of the particular definition of the term “measure of general application” it appears necessary to include such a definition particularly in Model transparency chapter in order to underline such a meaning of this particular term used throughout the chapter.

The term “measure of general application” includes, as it is provided for in the relevant Articles of WTO Agreements (in particular Article X of GATT, Articles III and XXVIII of GATS), judicial decisions of general application. There is no intention to include judicial decisions that are not of general application and that regulate relations between specific parties in a dispute, i.e. those decisions that have no direct impact on non-parties to the proceedings.

For the purposes of this Chapter:

“Measures of general application” means laws, regulations, decision, judicial decisions and administrative rulings of general application pertaining to or affecting the matters covered by this Agreement. Judicial decisions if they do not have a direct impact on persons that were not involved in the respective judicial proceedings are not of general application and are not covered by this definition.

“Interested persons” means persons of the other Party that are directly affected by a measure of general application or administrative rule or proceeding covered by this Chapter.

Article 2: Publication of Measures of General Application

This Article is intended to reflect the WTO standard for the publication of measures of general application of the Parties to the FTA. Due to the specificity of the judicial systems and the procedures for the judicial decisions to be taken it is not feasible for paragraph 2 to cover judicial decisions. In many legal systems such decisions are taken without any prior publication and they enter into force on the date of their announcement.

In the case of international agreements, such practice is already required to a certain extent by the WTO Agreements (in particular Article X of GATT, Articles III and XXVIII of GATS).

This Article is not intended to detract from any WTO obligations regarding the notification and publication of domestic measures.

1. Each Party shall promptly publish, at the latest when the measure becomes effective, or otherwise make publicly available its measures of general application in such a manner as to enable the other Party and its interested persons to become acquainted with them. Agreements pertaining to or affecting matters covered by this Agreement in which the Party participates shall also be published, subject to the mutual agreement of the Parties to the first mentioned Agreement.
2. To the extent practicable, a Party shall provide a reasonable period of time between the date of publication of a measure of general application and its entry into force. Except in emergency situations, a Party shall not enforce a measure of general application before such measure has been officially published. This paragraph does not require a Party to ensure the prior publication of judicial decisions of general application if that is contrary to the domestic laws and procedures of that Party.
3. To the extent practicable, a Party shall include in the publication an explanation of the purpose of and rationale for the adopted measure.

Article 3: Public Consultations

This Article is intended to establish rules related to the prior publication of the draft measures of general application and to provide interested persons with opportunities to comment on such measures. Though there is no requirement to conform a measure according to the submitted comments, this Article still establishes a certain level of predictability for interested parties with respect to the process for promulgating measures. Nevertheless the commitments of this Article are not unlimited and they are balanced by the fourth paragraph that enables a Party to introduce measures without any prior publication under certain emergency circumstances.

For the reasons described above, judicial decisions are exempted from the rules of this Article.

1. Each Party shall endeavor to make publicly available proposed measures of general application prior to their adoption and provide a reasonable period of normally not less than 30 days for the other Party and its interested persons to comment to the authority responsible for the development of the proposed measure.
2. The comments received during the period for consultations under paragraph 1 of this Article shall be considered by the authority responsible for development of the proposed measure.
3. This Article does not require a Party to ensure the prior publication for commenting or taking into account any views of the other Party or its interested persons on judicial decisions of general application of the Party if that is contrary to the domestic laws of that Party.
4. Each Party shall ensure the timely publication as referred to in paragraph 1 of this Article, except in emergency situations involving economy's (internal) security, specific measures regarding monetary and fiscal policy or measures the publication of which would impede law enforcement, or otherwise be contrary to the public interest, public health, or prejudice the legitimate commercial interest of particular enterprises, public or private.
5. To the extent practicable, a Party shall include in the publication an explanation of the purpose of and rationale for the proposed measure.

Article 4: Publication Resources

This Article provides for an indication as to where the covered measures might be published.

The obligations to publish proposed and final measures contained Articles 2 and 3 of this Chapter may be satisfied by publication in an official journal for public circulation, be it physical or online and the Party should encourage their distribution through additional outlets, including an official website.

Article 5: Disclosure of Confidential Information

This Article reiterates the relevant provisions in the WTO Agreements (in particular Article X of GATT, Article III bis of GATS) and is intended to provide for special treatment of confidential information.

Nothing in this Chapter shall require any Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 6: Contact Points

This Article provides for basic rules on contact points.

1. Each Party shall provide to the other Party the details of the contact points established or maintained in accordance with this Agreement, including those that provide assistance to the other Party and its interested persons.
2. The relevant contact point, upon the request of a Party or its interested persons shall assist in finding and obtaining copies, on a timely basis, of published measures of general application. Such measures shall be made available to the interested persons, while they are in effect and for a reasonable period after they are no longer in effect and for a reasonable period after they are no longer in effect.
3. The Parties shall notify each other promptly of any changes regarding how to contact their respective contact points.
4. Each Party shall ensure that its contact points are able to coordinate and facilitate a response on the matters covered by this Agreement, including any enquiries referred to in Article Notification and Provision of Information.

Article 7: Notification and Provision of Information

This Article is intended to establish additional commitments related to responses by the Parties, and includes guidance stating that a reasonable amount of time to respond is 30 days. That does not preclude a Party from responding within a shorter period of time, or extending it in case the situation or matter in question so requires.

1. The Party shall respond to the written enquiries of the other Party on matters pertaining to implementation of this Agreement within a reasonable period of time. Enquiries may be addressed through enquiry or contact points established under this Agreement or any other mechanism as appropriate.
2. The reasonable period of time provided for in paragraph 1 of this Article shall not normally exceed 30 days from the date of the receipt of the written request.
3. Any notification, information or response provided under this Agreement shall be without prejudice as to whether the measure is consistent with this Agreement.

Article 8: Administrative Proceedings

This Article defines the conditions required for prompt review and correction of final administrative actions.

1. With a view to administering in a consistent, impartial and reasonable manner its measures of general application, each Party shall ensure, in its administrative proceedings, that:
 - a. wherever possible, persons of the other Party that are directly affected by a proceeding are given reasonable notice, in accordance with the procedures provided for in its domestic laws and procedures, when a proceeding is initiated, including a description of the nature of the proceeding, the legal basis in accordance with which the proceeding is initiated, and a general description of any relevant issues;
 - b. persons of the other Party that are directly affected by a proceeding are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit;
 - c. its procedures are in accordance with the domestic law.

Article 9: Review and Appeal

This Article is based on the relevant WTO standards (in particular Article X of GATT, Article VI of GATS). It should be noted that the second and third sentences of paragraph 1 of this Article are intended to cover two different situations – independence of the tribunals and independence of procedures. Due to the complexity and specificity of services regulation it seems to be relevant to reiterate the respective provision of Article VI of GATS.

1. Each Party shall establish or maintain judicial, arbitral or administrative tribunals or procedures, for the purpose of the prompt review and, where warranted, correction of administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter. Where such procedures are not independent from the agency entrusted with the administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.
2. Each Party shall ensure that in any such tribunals or procedures the parties to the proceedings are provided with:
 - a. a reasonable opportunity to advocate for their respective positions; and
 - b. a decision based on the evidence.
3. Subject to appeal or further review procedures as provided for in its domestic law, each Party shall ensure such decisions shall be implemented by, and shall govern the practice, of the offices or authorities with respect to the administrative action at issue.

Article 10. Specific Provisions

This Article intends to prevent conflicts between this Chapter and provisions of other Chapters that might contain transparency standards in specific areas of cooperation, such as SPS or TBT.

In case of conflict between this Chapter and the specific provisions of other Chapters in respect of issues covered by this Chapter, such specific provisions shall prevail.