# Tribunal Procedure Committee

Consultation on possible changes to the Upper Tribunal Rules 2008 arising from trade remedies appeals

## Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions. Further information on Tribunals can be found on the HMCTS website at: www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals

2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
(a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
(b) the tribunal system is accessible and fair;
(c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
(d) the rules are both simple and simply expressed; and
(e) the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

4. In pursuing these aims the TPC seeks, among other things, to:
   (a) make the rules as simple and streamlined as possible;
   (b) avoid unnecessarily technical language;
   (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   (d) adopt common rules across tribunals wherever possible.

5. Further information on the TPC can be found at our website:
   www.gov.uk/government/organisations/tribunal-procedure-committee

6. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills. The Upper Tribunal mainly, but not exclusively, decides appeals from the First-tier Tribunal. One of the Chambers of the Upper Tribunal is the Tax and Chancery Chamber (the "UT(TCC)"), and the Rules which apply there are the Upper Tribunal Rules 2008 (the "UT Rules"). These Rules can be found in the "Publications" section of our website:
   www.gov.uk/government/organisations/tribunal-procedure-committee

7. The vast majority of cases dealt with in the UT(TCC) are appeals from the Tax Chamber of the First-tier Tribunal, but there are also a number of other jurisdictions, including financial services cases. Those other jurisdictions give rise to a small number of cases (approximately 20 a year, regarding financial services) in the UT(TCC). Tribunal judiciary assigned to the UT(TCC) have expertise and experience across the range of all cases to be dealt with by that Chamber.

## This Consultation

8. The purpose of this consultation is to seek views as to possible changes to the UT Rules in relation to the proposed allocation of appellate jurisdiction in what are termed "trade remedies" cases to the UT(TCC). The need for provision to be made for appeals in these cases arises on the basis of the United Kingdom (the

"UK") leaving the European Union (the "EU") next year. Responses to the consultation will be considered by the TPC.

9. Trade remedies cases exist by reference to relevant World Trade Organisation ("WTO") Agreements (commonly termed the "WTO rules"), and (presently) relevant EU Regulations. The WTO is a membership organisation of governments and customs territories that set, apply and enforce the rules for trade between themselves. Both the EU and the individual EU countries (hence, the UK) are members of the WTO. The European Commission ("the Commission") is currently responsible for investigating complaints in trade remedies cases concerned with exports into the EU.

10. On the basis that the UK will leave the EU on 29 March 2019, the UK will then become responsible for its own trade policy, and a new trade remedies system will need to come into being. The Department for International Trade must plan for there to be such a system in place before then. After exit from the EU, the relevant EU Regulations will no longer apply, and the trade remedies framework being developed by the UK government is intended to meet the UK's WTO obligations.

11. This consultation is not concerned with the policies behind or concerning the proposed new trade remedies system; it is only concerned with possible changes to the UT Rules so as to cater for these trade remedies cases in the UT(TCC).

12. It is unusual for the TPC to consult on possible changes to Rules before relevant legislation has been enacted, and particularly so when the relevant statutory instruments have not yet been laid before Parliament. Further, it should be borne in mind that details described below of the proposed new trade remedies system are a reflection of the government's preparedness planning, and its final form may be subject to change. However, the TPC must proceed on the basis that there will be a new trade remedies system in operation from 29 March 2019, broadly in line with that described in this document, and the TPC must seek views now as to possible rule changes. In this way, in light of such views as are received, steps may be taken by the TPC to ensure that appropriate UT Rules are in place to enable these cases to be dealt with by the UT(TCC).

13. The TPC believes that many who will be minded to respond to this Consultation will already have an understanding of trade remedies cases. It is sometimes difficult to strike the right balance in providing information as regards new appeal rights. However, below you will find further information on the following:

- trade remedies cases;
- proposed arrangements for a new trade remedies system;
- the proposed appeals process;
- possible amendment of the UT Rules;
- the consultation questions; and
- how to respond and by when.

The consultation questions are also in a separate Word document on our website, which can be used for submitting your response.

14. Possible changes to the UT Rules are discussed in detail below by reference to the following topics and the rules which the TPC considers most relevant:

(i) Definitions (UT rule 1);
(ii) Procedural steps and time limits (UT rules 23, 24, 26 and 26A);
(iii) Costs (UT rule 10);
(iv) Confidentiality of information (UT rule 14); and
(v) Hardship applications (UT rule 23).

## Trade remedies cases

15. Trade remedies cases involve:

(i) alleged "dumping" of goods from overseas into a market;
(ii) export of goods the price of which is alleged to be affected by a government subsidy or other measure; or
(iii) safeguards.

16. The WTO rules define “dumping” as the selling of products on export markets at a price lower than the cost of production in the domestic market, in a way that causes demonstrable “injury” to competitors in the importing jurisdiction. A subsidy is defined by the WTO rules as being a “financial contribution” by a government that confers a “benefit” on the recipient company. Both dumping and subsidisation are unfair trade practices.

17. “Safeguard” measures, unlike anti-dumping and anti-subsidy measures, are not a response to unfair trade practices. Rather, they allow the WTO member to limit an unforeseen, sudden and sharp increase in imports of a product, causing or threatening to cause “serious injury” to a sector by imposing a quota or increased customs duties.

18. Members of the WTO must comply with the following agreements: (i) the WTO Anti-Dumping Agreement; (ii) the WTO Agreement on Subsidies and Countervailing Measures; and (iii) the WTO Agreement on Safeguards (collectively, the WTO rules). These Agreements may be accessed via the links below:
    www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm
    www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm
    www.wto.org/english/docs_e/legal_e/25-safeg_e.htm

19. The (then) European Community was given exclusive competence for external trade policy, in the form of a Common Commercial Policy, by the 1957 Treaty of Rome, to which the UK acceded in 1973. The EU has implemented the relevant WTO Agreements in its trade defence instruments, which may be accessed via the following links:

    eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1036 (Regulation (EU) 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification))

    eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016R1037 (Regulation (EU) 2016/1037 of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification))

eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0478
(Regulation(EU) 2015/478 of 11 March 2015 on common rules for imports (codification) - regarding exports from WTO members)

eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R0755
(Regulation (EU) 2015/755 of 29 April 2015 on common rules for imports from certain third countries (recast) - regarding exports from non-WTO members)

20. The EU anti-dumping regulation, most recently amended this year, transposes the WTO rules on dumping into EU law. It covers all goods imported from any third country, whether or not that country is a WTO member. The EU anti-subsidy regulation, also amended this year, allows the imposition of "countervailing duties" against imports in cases where foreign governments have provided subsidies, directly or indirectly, for the "manufacture, production, export or transport of products", in a way that causes injury to European producers. The recent amendments may be accessed via the following link: www.europarl.europa.eu/RegData/etudes/ATAG/2018/621880/EPRS_ATA(2018)621880_EN.pdf

21. EU entities affected by alleged dumping or subsidisation may apply to the Commission for an investigation, which may result in the imposition of anti-dumping or countervailing duties. In urgent cases, where significant injury would be caused by any delay in action, "provisional" duties may be imposed by the Commission, pending the outcome of the full investigation. The EU Council of Ministers is responsible for adopting or rescinding anti-dumping or countervailing duties, on a proposal by the Commission. Such measures normally expire after five years, but they may be suspended earlier following a "review".

22. The current EU safeguard regulations, and as amended this year, allow the Commission to investigate whether there is an import surge causing injury to a sector in the EU, and if so, to impose safeguards. "Provisional" measures may again be applied, if necessary, pending the outcome of the full investigation.

23. In all cases, the Commission initiates and handles (with the support of the Council of Ministers) complaints made by reference to the EU trade defence

instruments. Such complaints may be made by a range of persons/entities, and if measures are adopted, again a range of persons/entities may be affected. In relation to the initiation and investigation of complaints, and the imposition of measures, there are thus "interested parties" (see further, paragraph 30 below). Only "interested parties" are able to participate (as parties) in a dumping, subsidisation or safeguarding investigation.

24. As for appeals, the WTO Anti-Dumping Agreement (Article 13) and the WTO Agreement on Subsidies and Countervailing Measures (Article 23) both expressly require WTO members to have independent, judicial procedures in place to allow parties to appeal decisions taken under anti-dumping and countervailing provisions (without specifying precisely what procedures need to be in place, being a matter for WTO Members). The WTO Agreement on Safeguards does not require Members to have an appeals process.

25. Presently, in trade remedies cases arising under the EU Regulations rights of appeal exist to the EU General Court (part of the European Court of Justice), including in safeguards cases.

26. We next describe the proposed arrangements for a new trade remedies system.

## Proposed arrangements for a new trade remedies system

27. Detailed trade remedies provisions are contained in the Taxation (Cross-border Trade) Act 2018 (the "Act"), which may be accessed via the link below: www.legislation.gov.uk/ukpga/2018/22/contents/enacted

28. Schedules 4 and 5 of the Act set out a framework for regulations to be made on trade remedies investigations, the imposition of measures (anti-dumping, anti-subsidy and safeguards), and reviews of such measures after they have been imposed.

29. The Trade Remedies Authority (the "TRA"), to be created under the Trade Bill being considered by Parliament, will undertake an equivalent role to that of the

Commission, but by reference to the relevant WTO Agreements and statutory instruments to be made under the Act, rather than the EU Regulations. The Department for International Trade will be responsible for drafting these statutory instruments. These statutory instruments will cover all the various processes that will fall within the remit of the TRA.

30. Only "interested parties" will be able to participate (as parties) in a dumping, subsidisation or safeguarding investigation or review. An "interested party" will be:

(i) an overseas exporter or the importer of the goods concerned;
(ii) a trade or business association of producers, exporters or importers of the goods concerned or goods subject to review;
(iii) the government of the exporting country or territory;
(iv) a producer of the like goods in the UK; or
(v) a trade or business association of producers of the like goods.

31. In each case, an interested party must have an interest in the investigation or review in question. These "interested parties" reflect similar definitions in the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures.

32. The WTO rules require that where an application is made to an investigating authority (such as the TRA) to initiate a dumping or subsidisation investigation, the application must not be made public unless the authority decides to initiate the investigation. If the decision is made to initiate an investigation into dumping, the TRA will be required to publish a notice announcing the initiation. Otherwise, the decision not to initiate an investigation will be notified to the applicant only.

33. Where the TRA makes a "negative determination" (e.g. to terminate an investigation or not to recommend continuing measures), it will publish a notice setting out the reasons for its decision.

34. Where the TRA makes an “affirmative determination” (e.g. to recommend applying duties), it will make such recommendation to the Secretary of State, who will then take a decision whether to accept or reject that recommendation. The Secretary of State will be responsible for considering the economic interest and the public interest in determining whether to accept the recommendation. Where a recommendation is accepted, the Secretary of State will publish a notice giving it legal effect, directing HMRC to implement the recommended rate of duty on the imports of the product(s) in question. If a recommendation is rejected, the Secretary of State will lay a statement in Parliament setting out the reasons for the rejection, and will publish the TRA’s report of the investigation.

35. An important aspect of the new trade remedies system will be the scope for a determination or recommendation by the TRA to be “reconsidered” by the TRA, following an application properly made by an interested party for that purpose. Such a process of reconsideration is absent from the EU trade defence instruments (and absent from the WTO rules).

36. Where an applicant for reconsideration is not an interested party, or where the decision in question is not eligible for reconsideration (e.g., a decision to initiate an investigation) then the application for reconsideration will not be entertained by the TRA. Further, if the TRA considers that an application for reconsideration is non-compliant with certain requirements (to be stipulated), or has been submitted out of time (see paragraph 39 below) without a reasonable request for an extension, then it will reject the application and publish a notice to this effect (or notify the applicant where the decision against which reconsideration is sought is not required to be published).

37. Where the TRA decides to initiate a reconsideration process, it will publish a notice to that effect.

38. The determinations or recommendations by the TRA which may be subject to reconsideration, will be, broadly, decisions:

(i) refusing to initiate an investigation or a review;

(ii) to recommend that a measure be imposed or not be imposed, or that an existing measure be varied or revoked; and

(iii) granting (or refusing to grant) an overpayment of duties.

39. Where the TRA is required to publish a notice in connection with its decision, it is intended that such publication will trigger the time limit within which an interested party may apply for reconsideration by the TRA. Such an application will have to be received by the TRA within a period of one month beginning from the day after the day on which the notice comes into effect. Where publication of such notice is not required (for example, where the TRA refuses to initiate an investigation), the TRA's notification of such determination to the applicant will trigger that time limit.

40. An application for reconsideration by the TRA may seek to rely on alleged factual errors. However, an application for reconsideration might raise complex legal questions that require judicial determination and therefore a reconsideration by the TRA without judicial input may simply add time and unnecessary cost. The TRA will therefore have the ability to decide, in appropriate cases, to refer a case to the UT(TCC) as part of the reconsideration to be undertaken. Thus, where an application for reconsideration relates to a dispute on a point of law, the TRA may refer the matter to the UT(TCC) for a decision before concluding its reconsideration.

41. Any measures will ordinarily remain in place for the duration of the reconsideration process, with recourse for repayments following the making by the TRA of a "reconsidered decision" (i.e. a further determination or recommendation by the TRA).

42. Following its reconsideration, the TRA can decide to maintain its original decision, or vary it, and it will publish a notice to that effect. Where the TRA varies its decision, for example where it recommends a revised level of anti-dumping duties, the TRA will make a new recommendation to the Secretary of State, who will consider whether to accept or reject it. Such a recommendation,

and the Secretary of State's acceptance or rejection of the recommendation, will be published in a notice.

43. A route of appeal will exist to the UT as regards certain determinations by the TRA and the Secretary of State. The intention is that these appeals will be dealt with by the UT(TCC), and that all such appeals will be decided by applying the same principles as would be applied by a court on an application for judicial review. Further details of the appeal process are set out below.

44. Provisions as regards both reconsideration and appeal are intended to lie within the same regulations, to be called The Trade Remedies (Reconsideration and Appeals) Regulations.

45. Throughout the process of investigation or review in a trade remedies case, respecting the confidentiality of information provided to the investigating/reviewing authority is a particular requirement of the WTO rules (see further, paragraphs 98 to 100 below). Under the new trade remedies system, these principles (to be defined by statutory instrument) will be required to be adhered to by the TRA.

46. We turn now to the proposed appeal process.

## The proposed appeals process

*Who can appeal?*

47. Only "interested parties" will be able to appeal, being those persons able to participate in a dumping, subsidisation or safeguarding investigation (see paragraph 30 above).

*Which decisions will be appealable?*

48. Decisions of the TRA which will be appealable are those set out in paragraph 38 above, but importantly only after those decisions have been reconsidered by the TRA. In addition, where the TRA rejects an application for reconsideration that is considered non-conforming, i.e. not made in the correct form, or where the application is late, such a rejection will be appealable.

49. The following decisions made by the TRA will not be appealable (nor will they be subject to reconsideration):
    - to initiate a dumping, subsidisation or safeguards investigation;
    - to initiate a review; or
    - to recommend "provisional" measures.

50. Further, where the TRA terminates a reconsideration, following the applicant withdrawing its application, and there being no reason for the reconsideration to continue, its determination to terminate the reconsideration will not be an appealable determination.

51. The Secretary of State will only make decisions following a recommendation by the TRA to impose measures. Where, following a reconsideration by the TRA of its recommendation, the TRA's reconsidered decision results in a new recommendation, the decision of the Secretary of State to accept or reject that recommendation will be appealable.

52. Appeals against determinations by the Secretary of State will be able to be made immediately to the UT(TCC). There will be no process of reconsideration of the determination by the Secretary of State. Generally, where the TRA's recommendation is appealable, so will be the Secretary of State's decision to accept or reject that recommendation.

53. The following decisions by the Secretary of State to accept or reject the TRA's recommendation will not be appealable:

(i) on “provisional” measures; or

(ii) concerning acceptance by the TRA of an undertaking.

*Time limits for appealing*

54. It is intended that where the TRA or the Secretary of State is required to publish a notice, the date upon which the notice will take effect will trigger the start of the time period within which an interested party may appeal to the UT. Where such notice is not required, the TRA’s decision being sent to the applicant is what will start time running. It is for the TPC to consider what the time limits should be, after the running of time has been triggered.

*Confidentiality of information*

55. The intention is that under the new trade remedies regime, just as confidentiality of information will be respected by the TRA, the UT will also be required (by statutory instrument) to treat as confidential any information which the TRA is treating as confidential.

*Repayments*

56. Any measures imposed will ordinarily remain in place for the duration of the appeal process, with recourse for repayments being decided only after conclusion of an appeal which has as its result a consequence that the appellant has overpaid.

57. Since the lodging of an appeal will not suspend a measure imposed, and this may cause an interested party unreasonable hardship, there will be provision for the UT to resolve any dispute in this regard.

*Outcome of the appeal*

58. On appeal, the UT may either maintain the relevant determination or recommendation, or set it aside and give directions to the decision-maker to re-make the decision.

(i) If the TRA is ordered to remake its determination/recommendation, and this results in the TRA making a new recommendation, then the Secretary of State will decide whether to accept or reject this recommendation in the usual way; and

(ii) If the Secretary of State is ordered to remake their determination, then they will have to consider the TRA's recommendation again, and take into account the UT's findings.

59. Given the proposed appeals process as outlined above, the TPC must now consider what changes might be made to the UT Rules in order to accommodate the proposed allocation of this new appellate jurisdiction to the UT(TCC). Although relevant legislation is not yet in place, and its final form will obviously be important, the content of the proposed appeals process raises naturally and clearly some specific issues for the TPC's consideration.

## Possible amendment of the UT Rules

60. Specific issues for consideration concern the following topics:

(i) Definitions;
(ii) Procedural steps and time limits;
(iii) Costs;
(iv) Confidentiality of information; and
(v) Hardship applications

Each is dealt with in turn, below.

### *Definitions*

61. The TPC considers that some changes would be necessary to UT rule 1 (definitions). Indicative drafting is as follows:

(i) insertion of a definition of a "*trade remedies case*" as "*an appeal pursuant to the Trade Remedies (Reconsideration and Appeals) Regulations [ ]*

*against a decision made by the Trade Remedies Authority or the Secretary of State*"; and

(ii) addition of a further definition of "*interested party*", to mean also "(*d) in a trade remedies case, any person other than the appellant who could have appealed the case to the Upper Tribunal and who has been added or substituted as an interested party under rule 9 (addition, substitution and removal of parties)*"

62. The latter change reflects the fact that an "interested party" within the meaning set out in paragraph 30 above may well have an interest in the outcome of an appeal (they could themselves have appealed) and may wish to become a party to it. Such a person would be entitled to apply to become a party, and if such application was successful, they would become an "interested party" within the meaning of UT rule 9.

63. The TPC does not consider that any further changes need be made to the definitions, but views are sought.

    **Question 1**: Do you agree with the possible changes to the definitions? If not, why not?

    **Question 2**: Should any further changes be made to the definitions in the UT Rules? If so, what changes and why?

***Procedural steps and time limits***

64. Part 3 of the UT Rules already provides procedures for appellate cases. The relevant rules as regards initiation of an appeal, and steps following, are set out below, with emphasis added as regards existing time limits (for other types of case where the appeal is not from a decision of another tribunal). In summary, in the UT Rules:

    (i) generally, there is a time limit of one month to initiate an appeal;

(ii) there is then a time limit of one month to submit a response to the notice of appeal (if one is to be provided); and

(iii) there is an option to submit a reply to a response, but again the time limit is one month.

65. UT rule 23 provides (insofar as relevant) as follows.

***Notice of appeal***

*23.— (1) This rule applies—*

*(a) to proceedings on appeal to the Upper Tribunal for which permission to appeal is not required, except proceedings to which rule 26A … applies;*

*(b)…; or*

*(c)….*

*(1A) ….*

*(2) <u>The appellant must provide a notice of appeal to the Upper Tribunal so that it is received within 1 month after</u>—*

*(a)…; or*

*(b) <u>if permission to appeal is not required</u>, <u>the date on which notice of decision to which the appeal relates</u>—*

*(i) <u>was sent to the appellant</u>; or*

*(ii) in a quality contracts scheme case, if the notice was not sent to the appellant, the date on which the notice was published in a newspaper in accordance with the requirement of section 125 (notice and consultation requirements) of the Transport Act 2000.]*

*(3) The notice of appeal must include the information listed in rule 21(4)(a) to (e) (content of the application for permission to appeal) …..*

*(4) …*

*(5) If the appellant provides the notice of appeal to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—*

*(a) the notice of appeal must include a request for an extension of time and the reason why the notice was not provided in time; and*

*(b) unless the Upper Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the notice of appeal.*

*(6) When the Upper Tribunal receives the notice of appeal it must send a copy of the notice and any accompanying documents—*

*(a) to each respondent; …*

*(b) ….*

*(7) ….*

[emphasis added]

66. Thereafter, UT rules 24 and 25 provide (insofar as relevant) for service of a response to the notice of appeal, and a reply to such a response:

***Response to the notice of appeal***

*24.— (1) ….*

*(1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.*

*(2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received—*

*(a) …;*

*(aa) …;*

*(ab)…; or*

*(b) in any other case, no later than 1 month after the date on which the Upper Tribunal sent a copy of the notice of appeal to the respondent.*

*(3) The response must state—*

*(a) the name and address of the respondent;*

*(c) the name and address of the representative (if any) of the respondent;*

*(d) an address where documents for the respondent may be sent or delivered;*

*(e) whether the respondent opposes the appeal;*

*(f) the grounds on which the respondent relies, …; and*

*(g) whether the respondent wants the case to be dealt with at a hearing.*

*(4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.*

*(5) When the Upper Tribunal receives the response it must send a copy of the response and any accompanying documents to the appellant and each other party.*

*(6) ….*

[emphasis added]

***Appellant's reply***

*25.— (1) Subject to any direction given by the Upper Tribunal, the appellant may provide a reply to any response provided under rule 24 (response to the notice of appeal).*

*(2) …* <u>*any reply provided under paragraph (1) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received within one month after the date on which the Upper Tribunal sent a copy of the response to the appellant.*</u>

*(2A) ….*

*(2B) ….*

*(3) When the Upper Tribunal receives the reply it must send a copy of the reply and any accompanying documents to each respondent.*

*(4) ….*

[emphasis added]

67. Under the UT Rules, following provision of the above documents (or expiry of time limits to provide them), directions may then be given by the UT.

68. The TPC is not aware of any circumstances in which these rules do not currently work satisfactorily, and it considers that limited changes to these rules are necessary to accommodate the rights of appeal in trade remedies cases. The TPC considers that it would be appropriate for an appeal to be initiated by a notice of appeal as provided for in UT rule 23, subject to considering appropriate time limits, not least in cases where a decision was promulgated not by sending it to the appellant but by publication of a notice.

69. We turn now to consideration of what the time limits should be.

70. The WTO Agreements do not contain any relevant provisions as to the time within which "judicial procedures" should be initiated.

71. As regards the current arrangements under the EU Regulations and the rights of appeal to the General Court, Article 263 of the Treaty on the Functioning of the European Union provides for a time limit of 2 months of the publication of the measure, or of its notification to the plaintiff, to bring an appeal to the General Court.

72. The Rules of Procedure of the General Court (23.4.2015) ("the General Court Rules") are also relevant. They may be accessed via the link below:

eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.105.01.0001.01.ENG

73. Under the General Court Rules:

(i) Article 60 provides for an extension of time limits on account of distance: procedural time limits shall be extended on account of distance by a single period of 10 days;

(ii) Article 61 provides that any time limit prescribed pursuant to these Rules may be extended by whoever prescribed it;

(iii) Article 81 provides that within 2 months after service of the application upon a defendant, the defendant shall lodge a defence (and the time limit may, in exceptional circumstances, be extended by the President following a reasoned request); and

(iv) Article 83 provides that the application initiating proceedings and the defence may be supplemented by a reply from the applicant and by a rejoinder from the defendant (unless the General Court decides that a second exchange of pleadings is unnecessary).

74. Thus, the time limits applicable to proceedings in the General Court are more generous than those which would be based on the "one month" provisions of the UT Rules, but it is also understood that in the General Court the time limits are generally required to be strictly adhered to. However, consideration must be given to the nature of appeals under the new trade remedies system. Rights of possible appeal to the UT will fall within the following three broad types.

(i) Firstly, determinations by the TRA to reject applications for initiation of an investigation or review, with no other person other than the appellant being aware of the rejection. Such determinations will be subject to the reconsideration process, and the determination capable of appeal will be the reconsidered determination;

(ii) Secondly, final affirmative or final negative determinations by the TRA. These will have followed an investigation or review, such determinations

will be subject to the reconsideration process, and the determination capable of appeal will be the reconsidered determination; and

(iii) Thirdly, determinations by the Secretary of State. These will have followed an investigation or review by the TRA, a determination and recommendation by the TRA, and reconsideration by the TRA. The determination of the Secretary of State capable of appeal will be the determination arising from the reconsidered determination/recommendation by the TRA.

75. It will be noted that appeals will only arise following the process of reconsideration; and all types of appeal will fall to be decided by the UT on the principles of judicial review. That suggests to the TPC that the process of reconsideration might be expected to bring focus to any appeal points arising following such reconsideration, thus concentrating only on those that will properly be arguable (rather than a wide-ranging disagreement with the decision sought to be impugned). There will already have been a time limit of one month to apply for reconsideration. It appears to the TPC that a time limit based on one month to commence an appeal in all these cases would be appropriate (and would be consistent with time limits for appeals in other types of cases which come to the UT(TCC)).

76. If time limits based on a period of one month were thought appropriate, then indicative drafting of a possible change to UT rule 23 would be as follows.

*(2) The appellant must provide a notice of appeal to the Upper Tribunal so that it is received within 1 month after—*

*(a)…; or*

*(b) if permission to appeal is not required, the date on which notice of decision to which the appeal relates—*

*(i) was sent to the appellant; or*

*(ii) in a quality contracts scheme case, if the notice was not sent to the appellant, the date on which the notice was published in a newspaper in accordance with the requirement of section 125 (notice and consultation requirements) of the Transport Act 2000.*

*(iii) in a trade remedies case*

a. *the date on which the notice published in accordance with the requirements of the Trade Remedies (Reconsideration and Appeals) Regulations [ ] comes into effect; or*

b. *where the appeal is against a decision of the Trade Remedies Authority and no notice is required to be published in accordance with the requirements of the Trade Remedies (Reconsideration and Appeals) Regulations [ ], the date on which notice of the decision was sent to the appellant.*

[insertion underlined]

77. As for a statement in response, the respondent would be the TRA or the Secretary of State (as the case may be). Both will already be well acquainted with case. Given that the standard will be that of judicial review, the TPC considers that preparation of a statement in response ought not to take more than a month from the Tribunal sending the Notice of Appeal.

78. Similarly, the TPC considers that preparation of a statement of reply (if any) ought not to take more than a month from the Tribunal sending the statement of response.

79. The TPC therefore considers that UT rules 24 and 25 would work appropriately as regards the response (if any) and reply (if any).

80. In connection with all the above proposed time limits, it will be borne in mind that the UT may extend time in appropriate circumstances (under UT rule 5(3)(a)).

81. For completeness, it may be noted that it is possible that an application for reconsideration by the TRA of its determination/recommendation will be made at the same time as initiation of an appeal (in the same case) against a determination of the Secretary of State (in accepting or rejecting the recommendation by the TRA). It appears to the TPC that the Secretary of State would however be able to apply to the UT for the appeal to be stayed (under UT rule 5(3)(j)) while the TRA undertakes its reconsideration of its decision. Once that reconsideration is concluded, then any pending appeal against the Secretary of State's (original) determination could then proceed alongside any further

appeal of the TRA's reconsidered decision or a further appeal of a decision of the Secretary of State following a recommendation of the TRA arising from its reconsideration.

82. The questions raised by the analysis above are as follows.

    **Question 3**: Is it appropriate that an appeal be initiated via UT rule 23? If not, why not?

    **Question 4**: Should the time limit for initiating an appeal be (i) in the case of a decision required to be published by notice, within one month of the coming into effect of the notice; and (ii) in the case of a decision that is not required to be published, within one month of the TRA sending its decision? In either case, if not, why not?

    **Question 5**: If UT rule 23 is to govern the making of an appeal, should the time limit for a response be as provided for in UT rule 24? If not, why not?

    **Question 6**: If UT rule 23 is to govern the making of an appeal, should the time limit for a reply to a response be as provided for in UT rule 25? If not, why not?

***Referrals to the UT***

83. As for the TRA referring a question of law to the UT during the course of a reconsideration (see paragraph 40 above), it appears to the TPC that the appropriate procedure would already fall within UT rule 26A, set out below (insofar as relevant):

    ***Cases transferred or referred to the Upper Tribunal, applications made directly to the Upper Tribunal and proceedings without notice to a respondent***

    *26A.— (1) Paragraphs (2) and (3) apply to— (a)…; or (b) a case, other than an appeal …, which is started by an application made directly to the Upper Tribunal.*

    *(2) In a case to which this paragraph applies—*

    *(a) the Upper Tribunal must give directions as to the procedure to be followed in the consideration and disposal of the proceedings;*

    *(aa) …; and*

    *(b) the preceding rules in this Part will only apply to the proceedings to the extent provided for by such directions.*

*(3) If a case or matter to which this paragraph applies is to be determined without notice to or the involvement of a respondent— (a) any provision in these Rules requiring a document to be provided by or to a respondent; and (b) any other provision in these Rules permitting a respondent to participate in the proceedings does not apply to that case or matter.*

*(4) ….*

84. The TRA would make an application to the UT, and it would then be for the UT to give directions. The TPC would anticipate that the UT would at that stage deal with (for example) who the parties to the application should be and what further steps should be taken.

85. The question raised by the above is as follows.

    **Question 7**: Should a referral by the TRA to the UT(TCC) be made via UT rule 26A? If not, why not?

***Costs***

86. The WTO Agreements do not contain any relevant provisions as regards costs in judicial procedures.

87. With appeals to the General Court (under the present arrangements), although the general position is "loser pays" (by reference to Article 134 of the General Court Rules), under Article 140(b) of those Rules, recoverable costs are limited to those incurred for the purpose of the proceedings before the Court and which were necessary for that purpose. Thus, costs which may already have been incurred in relation to a trade remedies case (for example, costs incurred in relation to an investigation/review) will be irrecoverable, as they will not have been for the purpose of proceedings. Further, the General Court is not obliged to take into consideration a national scale of lawyers' fees (such as guideline hourly rates), or any agreement as to payment of a scale of costs between client and lawyer. The TPC understands that costs awards in the General Court generally are lower in amount than those which might be expected to be awarded in the Courts and tribunals of England & Wales.

88. The costs regimes in some other jurisdictions (which cater for appeals in trade remedies cases) may also be noted:

(i) In Australia, a general costs jurisdiction exists in the Federal Court (under part 40 of its Rules). It is understood that in most matters in the Federal Court, the unsuccessful party is ordered to pay part of the legal costs of the successful party;

(ii) In Canada, a general costs jurisdiction exists in the Federal Court, under rule 400 of the Federal Court Rules, with the Court having full discretionary power over their amount and allocation between the parties; and

(iii) In the United States, a general costs jurisdiction exists in the Court of Appeals for the Federal Circuit, by Federal Circuit Rules rule 47.7.

89. The UT is not like ordinary civil Courts. As a general rule, tribunals are intended to provide users with speedy and inexpensive access to justice. They are intended to be more user-friendly and less legalistic than the Courts, and they have a particular specialist expertise in the cases they consider.

90. Under the UT Rules, there is no scope for costs recovery (winner obtaining costs from the loser) save in respect of specified jurisdictions, or as wasted costs or due to what may be termed “unreasonable conduct”. A costs regime under which no party may recover its costs from its opponent is termed “no costs shifting”. UT rule 10 provides (insofar as relevant) as follows.

***Orders for costs***

*10.—*

*….*

*(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—*

*(a) in judicial review proceedings;*

*(b) …*

*(c) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;*

*(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;*

*(e) if, in a financial services case or a wholesale energy case, the Upper Tribunal considers that the decision in respect of which the reference was made was unreasonable.*

91. Access to justice must always be considered by the TPC. Amongst interested parties who may consider an appeal, a trade or business association of producers, exporters or importers of the goods subject to investigation or review might well not have funds readily capable of satisfying an adverse costs award. Producers, exporters or importers of the goods may likewise be in a relatively modest line of business.

92. There is also the process of reconsideration to consider. It may be thought that interested parties, if they are inclined to spend money on costs, will do so in connection with that process. Their focus may be more on incurring costs then, rather than later on a possible appeal which will be resolved by reference to judicial review principles.

93. Further, an award of costs against a foreign party (such as an interested party may be) may in practice be difficult if not impossible to enforce. The UT has no jurisdiction to enforce any costs orders it may make. Cost orders made by tribunals can only be the subject of enforcement via the County Court or the High Court.

94. The factors above might suggest that a general costs regime allowing the winner to obtain costs from the loser (termed “costs shifting”) would be inappropriate for trade remedies appeals.

95. The “Costs in Tribunals Report” by the Costs Review Group to the Senior President of Tribunals (December 2011) may be accessed via the link below: www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf

    That report included the following.

***Costs where the decision challenged was unreasonable***

*150. We have also considered whether, in a jurisdiction where costs may be awarded only if there is unreasonable behaviour, there should be a power to make an award of costs against a public body where the decision leading to the appeal was itself unreasonable. The rules already allow an adverse costs award to be made against a regulator (the Financial Services Authority, the Charity Commission, the Gambling Commission and the Information Commissioner) and others performing a statutory duty (e.g. a person relating to the assessment of any compensation or consideration under the Banking (Special Provisions) Act 2008 or the Banking Act 2009). This is recognition that those charged with statutory duties can not only get things wrong but can get things seriously or unreasonably wrong. It is not easy to see a justification for the different treatment of different regulators and TPC may wish to consult on this issue in relation to appeals against [other] regulators …*

*151. [dealing with chambers or tribunals that have no jurisdiction to award costs at all]*

*152. The position is different where the chamber or tribunal already has power to make an order in respect of unreasonable conduct or to make a wasted costs order …. The relevant judicial and administrative structures exist (or should exist) and to add another instance in which a costs order can be made should not be to introduce a significant burden. Accordingly, TPC may wish to consult on the question whether, where there is already a power to make a costs award, there should be introduced an additional power to do so where the decision giving rise to the appeal was, in the view of the tribunal, unreasonable. …*

96. Potential liability for costs in a financial services case or a wholesale energy case (see UT rule 10, set out above) may be noted. To the regulators mentioned in the Costs in Tribunals Report may be added the TRA (and the Secretary of State). The UT would only set aside a determination/recommendation if it considered that the decision made was unreasonable (upon application of the principles of judicial review). Hence, it might be thought that there is a reasoned argument in favour of the decision maker being potentially liable for costs (but not the appellant): this is termed “one - way costs shifting”.

97. The following question is raised, by reference to possibilities of no costs shifting, full costs shifting, one-way costs shifting, or any other regime for costs.

**Question 8**: What should be the costs regime for these appeals, by reference to (i) no costs shifting; (ii) full costs shifting; (iii) one-way costs shifting; or (iv) any other regime for costs? Please provide your reasoning.

***Confidentiality of information***

98. The need to protect the confidentiality of information provided to any agency undertaking a trade remedies investigation or review is enshrined in the relevant WTO Agreements. It is also followed through in the EU trade defence instruments.

99. Thus, for example, in the WTO Anti-Dumping Agreement:

> *6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.*
>
> *6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.*
>
> *6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.*

100. The EU Anti-dumping regulation also recognises this need (in Article 19). Similar provisions appear in the WTO Agreement on Subsidies and Countervailing Measures (at Article 12.4), and in the EU Subsidy regulation (in Article 29). Likewise, in the WTO Agreement on Safeguards (at Article 2) and the EU Safeguarding regulations (at Article 8 (exports from WTO members) and Article 5 (exports from non-WTO members)).

101. It is intended that the new trade remedies system will provide for a similar regime of respecting the confidentiality of information as provided to the TRA, utilising the same principles, and to be provided by statutory instrument. The intention is that a specific regulation within the Trade Remedies (Reconsideration and Appeals)

Regulations will cater for this. For the purposes of this consultation, we term this "regulation [x]".

*Confidentiality in the General Court*

102. Article 91 of the General Court Rules deals with "Measures of Inquiry", including (at (b)) a request to a party for information or for production of any material relating to the case. Article 103 then deals with treatment of confidential information and material.

> ***Article 103***
>
> *Treatment of confidential information and material*
>
> *1. Where it is necessary for the General Court to examine, on the basis of the matters of law and of fact relied on by a main party, the confidentiality, vis-à-vis the other main party, of certain information or material produced before the General Court following a measure of inquiry referred to in Article 91(b) that may be relevant in order for the General Court to rule in a case, that information or material shall not be communicated to that other party at the stage of such examination.*
>
> *2. Where the General Court concludes in the examination provided for in paragraph 1 that certain information or material produced before it is relevant in order for it to rule in the case and is confidential vis-à-vis the other main party, it shall weigh that confidentiality against the requirements linked to the right to effective judicial protection, particularly observance of the adversarial principle.*
>
> *3. After weighing up the matters referred to in paragraph 2, the General Court may decide to bring the confidential information or material to the attention of the other main party, making its disclosure subject, if necessary, to the giving of specific undertakings, or it may decide not to communicate such information or material, specifying, by reasoned order, the procedures enabling the other main party, to the greatest extent possible, to make his views known, including ordering the production of a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof.*

103. Thus, issues of confidentiality of information may arise in the General Court, and that Court may maintain confidentiality through ordering the production of a non-confidential version or a non-confidential summary of the information or material, containing the essential content. As such, given the procedure by which confidential information will have been dealt with by the Commission, in an EU trade remedies case, in practice the confidentiality of information will be respected at the General Court stage unless weighing that confidentiality against the

requirements linked to the right to “effective judicial protection” means that it must give way.

104. Under the UT Rules, rule 14 provides for confidentiality in certain limited circumstances. Relevant provisions are now emphasised (by underlining).

> ***Use of documents and information***
>
> *14.— (1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—*
>
> *(a) specified documents or information relating to the proceedings; or*
>
> *(b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.*
>
> *(2) <u>The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—</u>*
>
> *<u>(a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and</u>*
>
> *<u>(b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.</u>*
>
> *(3<u>) If a party (“the first party”) considers that the Upper Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party (“the second party”), the first party must—</u>*
>
> *<u>(a) exclude the relevant document or information from any documents that will be provided to the second party; and</u>*
>
> *<u>(b) provide to the Upper Tribunal the excluded document or information, and the reason for its exclusion, so that the Upper Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).</u>*
>
> *(4) ...*
>
> *(5) If the Upper Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Upper Tribunal may give a direction that the documents or information be disclosed to that representative if the Upper Tribunal is satisfied that—*
>
> *(a) disclosure to the representative would be in the interests of the party; and*
>
> *(b) the representative will act in accordance with paragraph (6).*
>
> *(6) Documents or information disclosed to a representative in accordance with a direction under paragraph (5) must not be disclosed either directly or indirectly to any other person without the Upper Tribunal’s consent.*
>
> *(7) Unless the Upper Tribunal gives a direction to the contrary, information about mental health cases and the names of any persons concerned in such cases must not be made public.*

*(8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.*

*(9) A party making an application for a direction under paragraph (8) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.*

*(10) In a case involving matters relating to national security, the Upper Tribunal must ensure that information is not disclosed contrary to the interests of national security.*

*(11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (8) or the duty imposed by paragraph (10).*

105. Under the new trade remedies system, the UT will be under an obligation to treat as confidential any information which the TRA is treating as confidential (see paragraph 55 above). This raises the prospect that there will or may be "closed material", in the sense that the TRA (and the Secretary of State) have access to confidential information, and such information may (legitimately) have played its part in the determination or recommendation under appeal. Thus, in its consideration of the appeal, it may conceivably become the case that the UT too may have access to such information, and it may (legitimately) play a part in its disposal of the appeal.

106. It is a common law principle that (subject to certain established and limited exceptions) a court or tribunal cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. Among the recognised exceptions are, for example, where the litigation concerns intellectual property proceedings to protect commercial interest, and disclosure would undermine the very object of the proceedings.

107. Although the WTO rules do not specify how a court or tribunal is to handle confidential information, the relevant provisions that govern how this is done by an investigating authority (such as the TRA) strike a balance between transparency

and the protection of commercially sensitive information. The TPC considers that it is logical and appropriate to extend this approach to appeals to the UT, as is the case (in general terms) with the General Court.

108. We consider the position by reference to UT rule 14(8) and rule 14(2), and relevant case law.

*UT rule 14(8)*

109. It is accepted that in information rights cases in the General Regulatory Chamber of the First-tier Tribunal (the "GRC") the equivalent rule to UT rule 14(8) in The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "GRC Rules"), namely GRC rule 14(6), permits a "closed material procedure" (or "CMP"). A Practice Note issued by the GRC deals with this:

www.judiciary.uk/wp-content/uploads/2014/07/practicenote-closed-material.pdf

110. In the case of *Browning v Information Commissioner [2014] 1 WLR 3848*, the Court of Appeal was concerned with GRC rule 35 (enabling the tribunal to sit in private in the course of the hearing of an appeal relating to a request by a journalist for material to be disclosed under the Freedom of Information Act 2000 ("FOI"). It was not in issue that a CMP was permitted under the GRC Rules; in its consideration of whether the material should be disclosed, the tribunal had held a closed session attended only by the advocate for the public authority (that held the information) and that of the Information Commissioner. The journalist, whilst accepting that he could be properly excluded from this procedure, contended before the tribunal that his advocate should have been permitted to be present, but this was refused.

111. The issue for the Court of Appeal was whether the provisions of GRC rules 5 and 35, permitting this course to be adopted, were within the powers afforded by section 22 of the TCEA. The Court concluded that they were: the words of section 22 did not need to be "read down" in order to avoid conflict with the common law principle of fairness. It was considered that the power to have a CMP was to be exercised sparingly having regard to the unique features of the FOI

system of appeals; where exclusion of a party does take place, the Tribunal does its utmost to minimise the disadvantage to them by being as open as possible as to what has taken place. It was considered that in substance, the issue in a FOI appeal of the type involved in the case was whether the information should be provided to the applicant: it would undermine the whole nature of the hearing if the person seeking access to the material could be present where the nature of the material was discussed in order to see whether it should be disclosed.

112. The TPC considers that although an appeal in a trade remedies case will most likely not be raising the very issue of disclosure of confidential information as its substantive heart (yet it may do so), nevertheless since the UT must respect the confidentiality of the information, disclosure to an appellant of confidential information would defeat what will be a statutory imperative.

113. The TPC therefore considers that UT rule 14(8) is engaged, as permitting (in general terms) a CMP in trade remedies cases. Whether a CMP is "fair", having regard to the common law principle, will depend on the statutory context. The statutory context will be that the TRA will (by statutory instrument) not be "precluded" from considering confidential information in its determination or recommendation, and furthermore that the UT must respect what the TRA is treating as confidential information. It follows, in the view of the TPC, that a CMP should be permissible as regards trade remedies cases. If that is correct, the question becomes how the UT Rules should reflect that.

*UT rule 14(2)*

114. The Administrative Court in R. (*Immigration Law Practitioners' Association*) *v Tribunal Procedure Committee and another* [2016] 1 WLR 3519 considered rule 13(2) of the Tribunal Procedure (First-Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "IAC Rules"). That rule is in similar terms to UT rule 14(2). The Court stated that "'*Serious harm' is not defined in the Rules but I agree*

*…, that it must be limited to significant physical and mental suffering; harm to commercial or privacy interests, distress or anxiety is not enough."*

115. That case also discussed the making of decisions based on information withheld from an appellant. It had been a feature of all the previous Immigration Tribunal rules that although there were no formal provisions governing the admissibility of evidence, the Tribunal determining the appeal had to decide appeals on the basis of evidence made available to all parties: rule 51(7) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, in force prior to the IAC Rules, had stated that (the Tribunal) *"must not take account of any evidence that has not been made available to all the parties'"*.

116. The defendants in that case had disputed that any part of IAC rule 13 created a general CMP power, drawing a distinction between IAC rule 13(2) and IAC rule 13(7) (the latter being in equivalent terms to UT rule 14(8)). It was contended that although rules enabled the Tribunal to exclude people (including the appellant and his/her advocate) from the hearing and permitted it to restrict the information given in the decision letter, these rules only applied to rule IAC rule 13(2) decisions. Thus, it was argued, by inference, that IAC rule 13(7) was about the ability of the Tribunal to obtain documents on terms that it will not be disclosed to others but did not enable the Tribunal to use such documents in a decision without first providing it to an appellant and his or her representative.

117. The Court considered that those submissions on the scope of IAC rule 13 were well founded. It was stated that the broad language used in IAC rule 13(7) and (9) was considered potentially confusing, given that the clarity earlier provided by rule 51 of the predecessor rules (see above) had been withdrawn. The Court considered that if the TPC had merely intended to create a new exception to the principle articulated by rule 51(1), namely where an IAC rule 13(2) direction had been made, it would have been happier if the principle had been retained, so that judges were fully aware that in other circumstances they could not decide a case on material that had not been made available to the appellant.

118. The TPC considers that this case, and the *Browning* case, are valuable in highlighting the distinctions between various jurisdictions. UT rule 14 follows a form which is "generic" across other procedure rules for First-tier Tribunals, and the procedure rules for the Upper Tribunal (Lands Chamber) as well. The application of such a generic form of rule may well vary by jurisdiction, given the types of cases with which such jurisdictions deal. Further, these cases confirm to the TPC that, in the context of trade remedies appeals and the need to respect confidentiality of information, the focus of possible rule change ought to be on UT rule 14(8) rather than on UT rule 14(2).

119. Thus, the TPC considers it appropriate that there be revision to UT rule 14 to cater expressly for the maintenance of confidentiality, in the context of a possible CMP. There are several aspects to consider:

(i) A determination or recommendation that is subject to appeal may have been made, in part, on the basis of a document or information that the TRA, and the Secretary of State, are treating as confidential. The UT must be placed in a position whereby it can maintain such confidentiality;

(ii) It is theoretically possible that an appeal may involve the consideration by the UT of some <u>further</u> documents or information provided to it for the purposes of the appeal, but which are sought by the party providing it to remain confidential;

(iii) The TRA will be expressly "not precluded" from relying on confidential information when making a determination or recommendation. The same ought to be the case for the UT, when making its decision. It would be, the TPC considers, absurd if the UT was in a different position to that of the TRA; and

(iv) The requirement to protect confidentiality is imposed by WTO Agreements and no distinction is made as to which public body of a given WTO Member must observe this.

120. The TPC considers that in a jurisdiction which is not self-evidently (as in FOI cases) providing for the Tribunal to be permitted to rely on "closed material" in making a decision, it would be prudent to acknowledge in the UT Rules that in

trade remedies cases the UT is not precluded from having regard to such confidential information in making a decision (if it considers it appropriate so to do). To provide for this in UT rule 14 would not be intended to be informative as to how the generic form of rule should or might be applied in other types of case, either before the UT or any First-tier Tribunal.

121. The TPC does not consider it necessary to deal expressly with a CMP or exclusion of a party from a hearing when a CMP is taking place. That is because section 22 of TCEA allows rules being made which may permit a CMP. A CMP is permitted within the equivalent GRC Rules, and because appeals in FOI cases are heard by the UT, and the UT Rules on this subject are materially the same as the GRC Rules, it must logically follow that a CMP is permitted under the UT Rules (but as to whether it is "fair" depends on the statutory context of the type of case in which it may arise). The only remaining question is whether (c.f. the position in immigration cases) clarity is required as to the ability of the UT to utilise confidential information in making its decision. The TPC considers that such clarity is desirable as regards trade remedies cases.

122. A possibility for amendment of UT rule 14 is therefore as follows (through indicative drafting). The reference to "regulation [x]" is to the regulation referred to in paragraph 101 above.

*14 –*

*……*

*(8) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.*

*(8A) In a trade remedies case, the Upper Tribunal may give a direction under paragraph (8) if the Upper Tribunal is satisfied that-*

*(i) where such documents or information have been supplied to the Trade Remedies Authority, that Authority is treating such documents or information as confidential in accordance with regulation [x] of the Trade Remedies (Reconsideration and Appeals) Regulations [ ]; or*

*(ii) where such documents or information have not been supplied to the Trade Remedies Authority, if such documents or information were to be*

*supplied to that Authority in accordance with regulation [x] of the Trade Remedies (Reconsideration and Appeals) Regulations [ ], that Authority would be entitled to treat such documents or information as confidential in accordance with that regulation,*

*and the Upper Tribunal is not precluded from considering such documents or information in making its decision in the case.*

*(9) A party making an application for a direction under paragraph (8) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.*

*(10) In a case involving matters relating to national security, the Upper Tribunal must ensure that information is not disclosed contrary to the interests of national security.*

*(11) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2), or (8) or the duty imposed by paragraph (10).*

123. The questions raised are as follows.

**Question 10**: Do you agree that it is appropriate to reflect the process of the UT respecting the confidentiality approach of the TRA by amendment to UT rule 14? If not, why not?

**Question 11**: Do you agree that the correct approach is to consider UT rule 14(8) rather than UT rule 14(2)? If not, why not?

**Question 12**: Do you have any comments on the indicative drafting proposal?

***Hardship applications***

124. It is intended that one provision in the new trade remedies system will be equivalent to section 16(3) of the Finance Act 1994:

*An appeal which relates to, or to any decision on a review of, any decision falling within any of paragraphs (a) to (c) of section 14(1) above shall not be entertained if any amount is outstanding from the appellant in respect of any liability of the appellant to pay any relevant duty to the Commissioners (including an amount of any such duty which would be so outstanding if the appeal had already been decided in favour of the Commissioners) unless—*

*(a) the Commissioners have, on the application of the appellant, issued a certificate stating either—*

*(i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or*

*(ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;*

*or*

*(b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners.*

125. It will therefore be necessary for there to be provision in the UT Rules for a "hardship application" to be made by an appellant. It appears to the TPC that the correct respondent to such an application would be HMRC.

126. Use might be made of UT rule 26A (see above) but the TPC does not consider that to be the appropriate route.

127. A rule in The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 deals with similar applications being made to that Chamber:

***Hardship applications***

*22.— (1) This rule applies where an enactment provides, in any terms, that an appeal may not proceed if the liability to pay the amount in dispute is outstanding unless HMRC or the Tribunal consent to the appeal proceeding.*

*(2) When starting proceedings, the appellant must include or provide the following in or with the notice of appeal—*

*(a) a statement as to whether the appellant has paid the amount in dispute;*

*(b) if the appellant has not paid the amount in dispute, a statement as to the status or outcome of any application to HMRC for consent to the appeal proceeding; and*

*(c) if HMRC have refused such an application, an application to the Tribunal for consent to the appeal proceeding.*

*(3) An application under paragraph (2)(c) must include the reasons for the application and a list of any documents the appellant intends to produce or rely upon in support of that application.*

*(4) If the appellant requires the consent of HMRC or the Tribunal before the appeal may proceed, the Tribunal must stay the proceedings until any applications to HMRC or the Tribunal in that respect have been determined.*

128. A possible amendment is to insert a new paragraph (3A) in UT rule 23, as follows (by indicative drafting).

*(3A) In a trade remedies case,*

*(a) the notice of appeal must include the following in or with the notice of appeal—*

*(i) a statement as to whether the appellant has paid to HMRC the amount in dispute;*

*(ii) if the appellant has not paid the amount in dispute, a statement as to the status or outcome of any application to HMRC for consent to the appeal proceeding; and*

*(iii) if HMRC have refused such an application, an application to the Upper Tribunal for consent to the appeal proceeding which must include the grounds on which the appellant relies, a list of any documents the appellant intends to rely upon in support of that application, and whether the appellant wants the application to be dealt with at a hearing.*

*(b) if an application is made under (a)(iii), the Tribunal must give directions for determination of the application and stay the proceedings until it has been determined.*

129. The reason for this proposal (rather than a freestanding new rule) is that the decision maker (HMRC) as regards adequacy of security, or hardship, is not the respondent to the proceedings: that will be the TRA and/or the Secretary of State. It appears to the TPC that the correct rule in which to deal with this is that concerned with initiation of the proceedings, for the following reasons.

(i) If an application is made, the proceedings are stayed until the application is resolved, and thus there will be no immediate requirement for the Tribunal to send the respondent the notice of appeal; and

(ii) It would be a matter for the UT(TCC) what directions it gave. The TPC anticipates that by reference to UT rule 9 (Addition, substitution and removal of parties), the UT(TCC) may give a direction adding HMRC as a respondent to the application, and give such further directions as it considers appropriate.

130. The question raised is as follows.

**Question 13**: Do you agree with the proposal for an amendment to UT rule 23? If not, why not?

## Consultation Questions

131. The TPC is interested to receive your views on possible changes to the UT Rules to accommodate trade remedies cases, including your replies to the questions below. When responding, please keep in mind that the rules should be simple and easy to follow. They should not impose unnecessary requirements or unnecessarily repeat requirements that are contained elsewhere. The TPC must secure the objectives set out in section 22(4) of the TCEA and it aims to do so in a consistent manner across all jurisdictions. Where your views are based upon practical problems which do or could arise, the TPC would be assisted by reference to relevant evidence.

### Definitions

**Question 1**: Do you agree with the possible changes to the definitions? If not, why not?

**Question 2**: Should any further changes be made to the definitions in the UT Rules? If so, what changes and why?

### Procedural steps and time limits

**Question 3**: Is it appropriate that an appeal be initiated via UT rule 23? If not, why not?

**Question 4**: Should the time limit for initiating an appeal be (i) in the case of a decision required to be published by notice, within one month of the coming into effect of the notice; and (ii) in the case of a decision that is not required to be published, within one month of the TRA sending its decision? In either case, if not, why not?

**Question 5**: If UT rule 23 is to govern the making of an appeal, should the time limit for a response be as provided for in UT rule 24? If not, why not?

**Question 6**: If UT rule 23 is to govern the making of an appeal, should the time limit for a reply to a response be as provided for in UT rule 25? If not, why not?

**Referrals to the UT**

**Question 7**: Should a referral by the TRA to the UT(TCC) be made via UT rule 26A? If not, why not?

**Costs**

**Question 8**: What should be the costs regime for these appeals, by reference to (i) no costs shifting; (ii) full costs shifting; (iii) one-way costs shifting; or (iv) any other regime for costs? Please provide your reasoning.

**Confidentiality of information**

**Question 9**: Do you agree that it is appropriate to reflect the process of the UT respecting the confidentiality approach of the TRA by amendment to UT rule 14? If not, why not?

**Question 10**: Do you agree that the correct approach is to consider UT rule 14(8) rather than UT rule 14(2)? If not, why not?

**Question 11**: Do you have any comments on the drafting proposal?

**Hardship applications**

**Question 12**: Do you agree with the proposal for an amendment to UT rule 23? If not, why not?

**Generally**

**Question 13**: Do you have any further comments?

## How to respond

### Contact Details

Please reply using the response questionnaire template.

Please send your response by 14 December 2018 to:

**Tony Allman**
**Secretary to the Tribunal Procedure Committee**
**Justice Policy Group**
**Ministry of Justice**
**1st Floor Piccadilly Exchange – 2 Piccadilly Plaza**
**Manchester**
**M1 4AH**

Email: tpcsecretariat@justice.gsi.gov.uk

Extra copies of this consultation document can be obtained using the above contact details or online at: www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations