

Formulating Negotiating Texts and Proposals

Version 01

Learning Objectives



Understand the structure and components of FTA texts and proposals



Assess compliance with international norms and standards in language

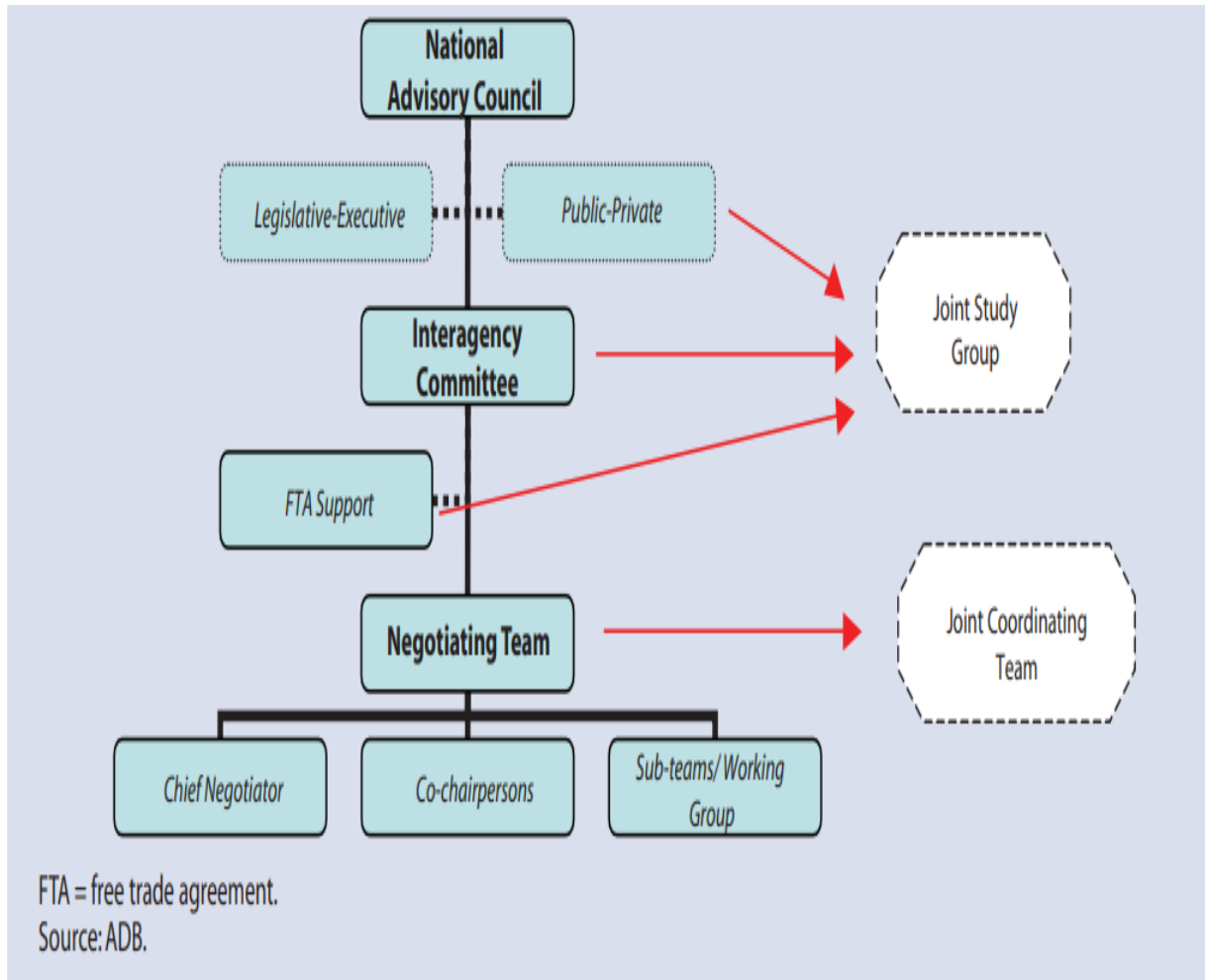


Develop effective drafting techniques and strategies to reflect national interests

Setting the Context

- The FTA mandate serves as a blueprint for the negotiating and drafting process
 - The ambition of the FTA impacts the overall objectives which feeds into the mandate and into the negotiating strategy of a country
- The mandate contains approval to proceed with formal negotiations along with a clear understanding of
 - Sensitive Sectors
 - Offensive and Defensive Interests
 - National Priorities
 - Strategic Interests
- FTA negotiations are usually spread over several rounds
 - Example – The UK-Australia FTA signed in December 2021 after five formal rounds of negotiations
- Each round contributes towards developing and finalising the legal text of the FTA by a team of negotiating and legal experts
 - Textual proposals are exchanged, areas of convergence and divergence are identified, and a common ground established

Setting the Context - Team Structure



- The Chief Negotiator is the guiding authority leading the negotiations and oversees the drafting of the proposed FTA text
- In addition, negotiating workings groups with lead negotiators, with subject matter expertise, negotiate and draft specific and technical areas of the FTA
- Each group then generates its own texts, typically in the form of chapters or articles
- It is important to note that the core negotiating team must be retained as much as possible for consistency in drafting and faster resolution of outstanding issues

Distinction between Structure and Components of an FTA

Structure:

- Is the overall organization, framework, or arrangement of the FTA
- The structure outlines the hierarchy, sequence, and organization of different elements within the agreement
- It encompasses the logical order and placement of various chapters or provisions
- It provides a bird's-eye view of how different components relate to each other within the FTA

Components:

- These are individual parts, chapters, or sections that make up the FTA
- Components are the specific building blocks or elements that constitute the FTA
- These include chapters addressing trade in goods, trade in services, rules of origin, investment, intellectual property, dispute resolution, and other specific subjects
- Each component addresses a particular aspect of the trade relationship between participating countries

Structure of an FTA

Preamble



```
graph TD; A[Preamble] --> B[Main Body]; B --> C[Final Clauses]; C --> D[Annexes];
```

Main Body

Final Clauses

Annexes

Components of an FTA

- Each component has its specific function which should be taken care of when drafting the agreement
- The legal text and its drafting must be curated accordingly
- Components can vary depending on the level of ambition of FTA Parties and their respective national priorities
- The EU Market Access [tool](#) provides the following comprehensive view of the components that comprise an FTA structure:

1. Preamble:

- The preamble mentions the Parties, affirms their common objectives regarding the development of their economic relations and recognizes the foundation of these relations.

Components of an FTA

2. Main Body

The legal text of an FTA in the main body comprises of substantive clauses agreed by the parties on major areas of liberalization

- The legal drafting is curated to the function in each sub-component of the main body:
 - Definitions, objectives and initial provisions
 - This chapter explains the terms used in the agreement to foster ensure a common understanding of the language
 - National treatment and market access for goods
 - The chapter details the gradual reduction or elimination of duties, taxes, and import fees for traded goods, specifying the applicable duties and tariffs
 - Trade Remedies
 - This chapter refers to counteracting measures that one party can take in response to the negative effects of unfair trade practices, such as dumping and illegitimate subsidies.

Components of an FTA

2. Main Body

➤ Technical Barriers to Trade

- This chapter facilitates regulatory harmonization, acknowledging equivalence in quality certification procedures and enabling mutual recognition of conformity assessment processes, streamlining product acceptance in the importing country based on documents issued in the exporting country

➤ Sanitary and Phytosanitary Measures

- This chapter outlines rules for food safety, animal, and plant health, streamlining compliance procedures to prevent unjustified trade barriers and specifying competent authorities and approval mechanisms for exports

➤ Customs and Trade Facilitation

- This chapter aims to streamline customs procedures, covering documentation requirements, rules of origin compliance, customs valuation, fees, and the appeals process for decisions

➤ Investment

- This chapter promotes investment by removing restrictions, ensuring fair treatment, and implementing efficient dispute resolution mechanisms for investors

➤ Trade in Services

- This chapter covers cross-border services trade, mirroring the General Agreement on Trade in Services structure, with added commitments in sectors like finance, telecommunications, and e-commerce, detailed in separate schedules for each party

Components of an FTA

2. Main Body (contd.)

- Government Procurement
 - This chapter details areas for procurement with each other's government at different administrative and entity levels
- Intellectual Property
 - Usually building on existing international intellectual property (IP) conventions, this chapter outlines procedures and rules regarding copyright, trademarks, designs, patents, data protection, etc. It could also define new areas of cooperation, such as protection for geographical indications
- Digital trade and e-commerce
 - e-commerce is an umbrella term, it encompasses goods, services, and data, along with associated policies
 - Digital trade extends beyond e-commerce chapters, and encompasses diverse aspects
- Competition and related matters
 - Guidelines on competition related issues

3. Final Clauses:

- This chapter establishes a system for resolving disputes arising from the parties' application or interpretation of the agreement
- It typically addresses the agreement's entry into force, provides for the inclusion of new parties post-signing, and sets procedures for future amendments
- Additionally, it may contain unique information, such as specific rules of origin for each product category, not covered elsewhere

4. Annexes:

- Usually, there are separate annexes containing specific commitments undertaken by each party for every category of goods

Navigating the Components of an FTA

- The components and their sub-components are tied arranged into chapters with articles
- Individual Articles are referred to as Article (Chapter Number).(Article Number)
 - For example, Article 22.3 is actually Article 3 of Chapter 22
- The same system applies to paragraphs and subparagraphs of Articles
 - For example, Article 22.3.1 refers to paragraph 1 of Article 3 of Chapter 22
- Annexes are referred to as Annex (Chapter Number)-(Letter)
 - For example, Annex 2-A is the first Annex of Chapter 2
- A common cross-referencing system applies

Proposal Formulation (1)

- While drafting, it is important to validate that the proposals are:
 - Aligned with national objectives and strategies
 - Guided by a robust impact assessments (qualitative and quantitative) that support evidence-driven negotiations
- The proposal for a legal text is tabled for discussion with FTA Party
- Counter proposals are made by other FTA partners
- The FTA partner presenting the proposal generally reserves the right to:
 - Make subsequent modifications to the proposed text
 - Complement proposals at a later stage, by modifying, supplementing or withdrawing all, or any part, at any time
- The actual text in the final agreement is the result of negotiations between the partners

Proposal Formulation (2)

- The proposal accommodates the needs of countries at different levels of development. It provides Special and Differential treatment, which for example includes:
 - Easier transition into the FTA regime
 - Longer and phased implementation of commitments

Policy Formulation (3)



Form an outline of the intended proposal should before starting the draft



Avoid using ambiguous language



Technical language should be precisely used



Due care and attention should be placed on the rules of legal interpretation and the case law pertaining to the related matter



Provisions should be arranged logically while using numbers and alphabets for the paragraph



It should be self-explanatory



It should be self-explanatory



Draft should be in a format that both parties should clearly understand

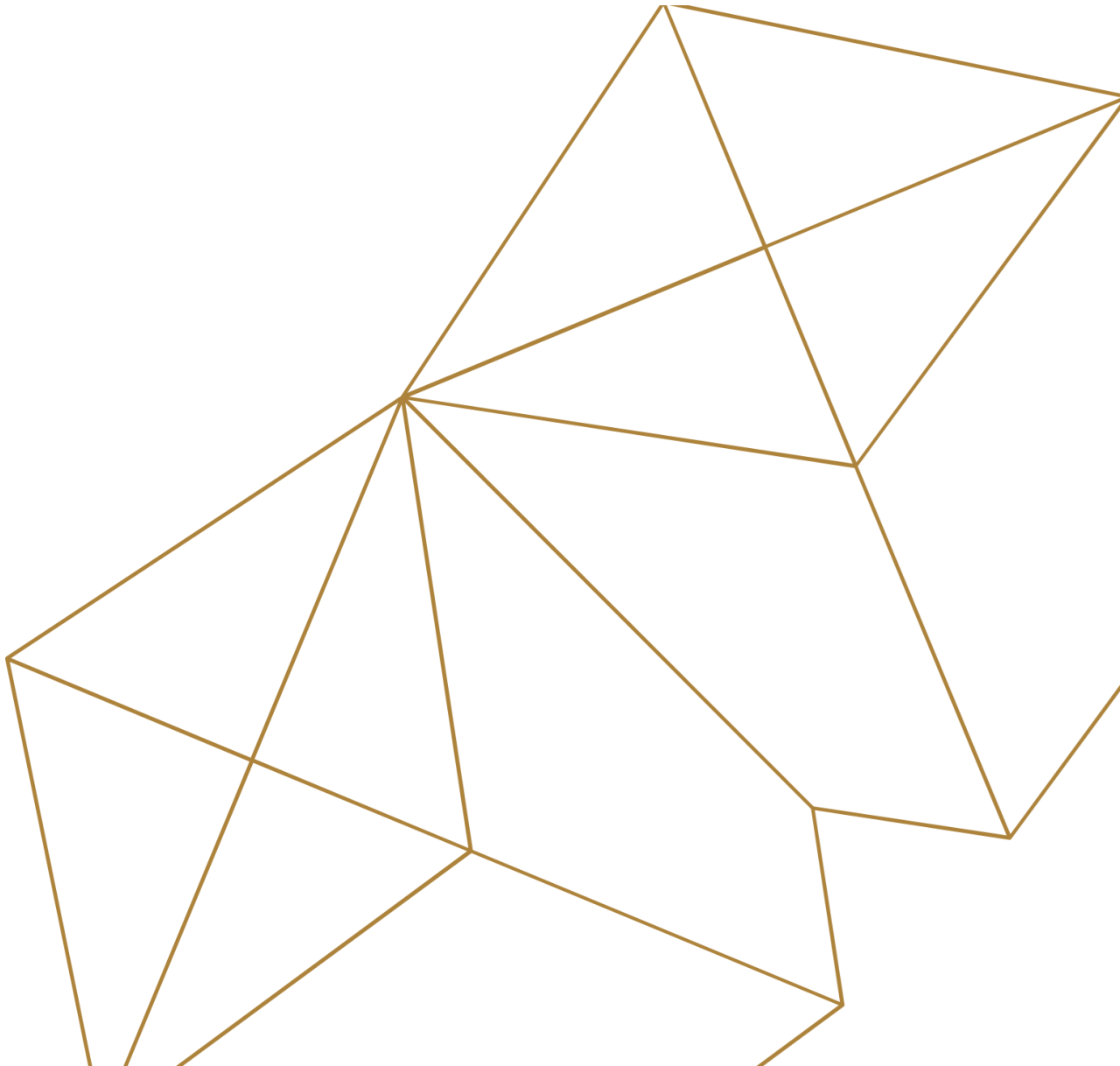
Proposal Formulation – In Practice

Proposal formulation plays a pivotal role in shaping the contours of the FTA

An example is the EU's textual [proposal](#) for trade in goods with India for which FTA negotiations are currently ongoing

- The proposal articulates:
 - Objectives and General Principles
 - Definitions
 - Scope
 - National Treatment
 - Elimination of customs duties
 - Export duties, taxes or other charges
 - Fees and formalities
 - Import and export restrictions
 - Transit
 - Origin marking
 - Custom's valuation
 - Elimination of Sectoral Non-Tariff Measures
- It is commonly observed that the language of the negotiating text generally refers or includes provisions aligned with international standards

Compliance with International Norms and Standards



Compliance with International Norms and Standards (1)

- FTAs that refer to international standards ensure that the negotiating text is effective, transparent, and compatible with the broader global economic system
- Complying with international norms/standards ensures:
 - A common reference point
 - Reduction of transaction costs
 - Regulatory compatibility and harmonisation of rules – minimises the “noodle bowl” effect
 - Reduction of unnecessary trade barriers
 - A lower likelihood of being challenged for disputes
 - Trust which encourages wider participation
- It overall promotes a more stable, inclusive and predictable international trade environment

Compliance with International Norms and Standards (2)

Consistency with WTO rules

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
- Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)
- Technical Barriers to Trade (TBT) Agreement
- WTO Trade Facilitation Agreement
- WTO Agreement on Customs Valuation
- Dispute Settlement Mechanism

Key International Standards

- International Convention on the Harmonized Commodity Description and Coding System
- ILO Declaration on Fundamental Principles and Rights at Work
- Universal Declaration of Human Rights
- UNDP Social and Environmental Standards (SES)
- Convention of Biological Diversity
- International Plant Protection Convention (IPPC)
- Paris Agreement
- Berne Convention for the Protection of Literary and Artistic Works
- The Patent Cooperation Treaty
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States
- Standards developed by the International Organization for Standardization

Example - EU – Japan Economic Partnership Agreement

Chapter 6: Sanitary and Phytosanitary Measures

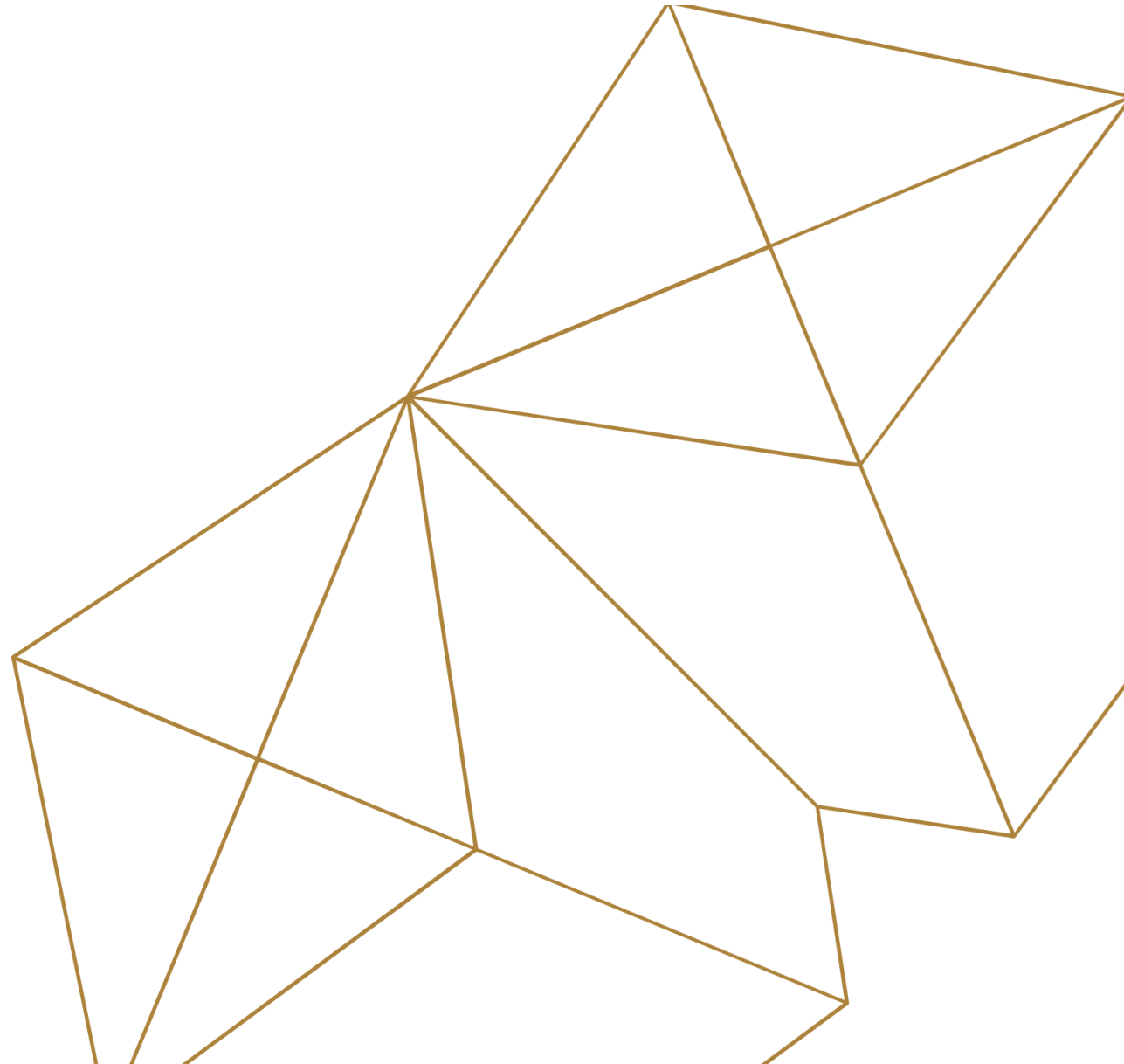
Article 6.3 (3) – “**In addition, the Committee on Sanitary and Phytosanitary Measures** established pursuant to Article 22.3 may agree on other definitions for the application of this Chapter taking into consideration the glossaries and definitions developed **by relevant international organizations, such as the Codex Alimentarius Commission (hereinafter referred to as ‘Codex Alimentarius’), the World Organization for Animal Health (hereinafter referred to as ‘OIE’) and the relevant international organizations operating within the framework of the International Plant Protection Convention (hereinafter referred to as ‘IPPC’)...**”

Article 6.4 – “The Parties **affirm their rights and obligations relating to sanitary and phytosanitary measures under the SPS Agreement.** Nothing in this Chapter shall affect the rights and obligations of each Party under the SPS Agreement.”

Article 6.7 (5) – “Taking into account the **applicable standards developed under the IPPC,** the Parties shall maintain adequate information on their pest status, including surveillance, eradication and containment programmes and their results, in order to support the categorization of pests and to justify phytosanitary import conditions.”

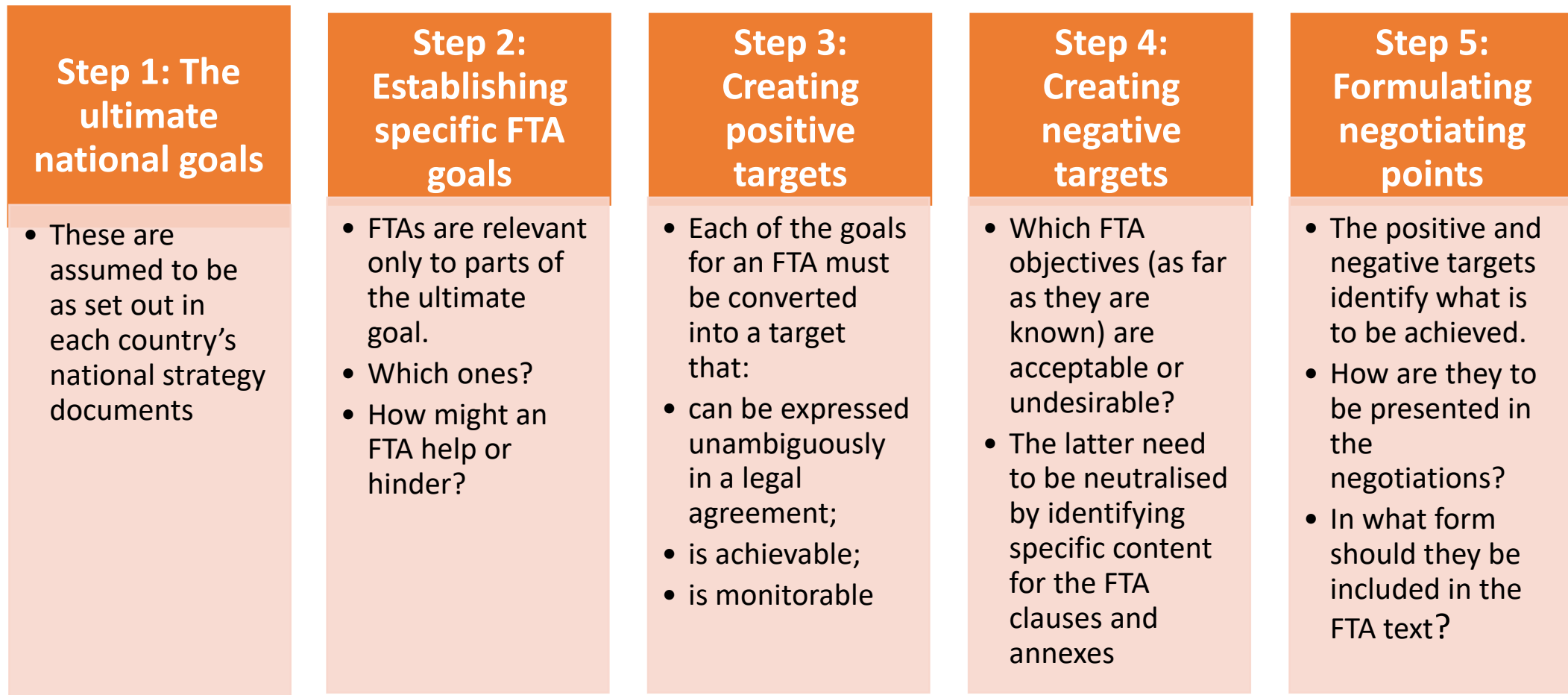
Article 6.10 (1) – “With regard to animals, animal products and animal by-products, the Parties recognize the concept of zone and compartment specified in the **OIE Terrestrial Animal Health Code and the OIE Aquatic Animal Health Code.**”

Effective Drafting Techniques and Strategies to Reflect National Interests



Translating National Strategy into Legal Text

A systematic approach to translating broad goals into detailed legal texts:



Tracking the Development of Negotiating Text to Ensure Alignment with National Strategy

- Summaries play a crucial role in clarifying proposals and agreement terms during negotiations to ensure that the negotiating text is aligned with the national strategy
- Summaries should be tracked at regular intervals especially:
 - whenever the progress of the negotiation is stalled;
 - when you are not sure what has been said or agreed
 - when the time is ready to begin to close the meeting
- Summaries significantly impact the negotiation process
 - Precision and accuracy are paramount
 - Inaccuracies can lead to a breakdown in trust between parties
- Any discrepancies in the summary should be addressed carefully and promptly to prevent potential disruptions

Drafting Strategy for the Text (1)

- **Stage 1: At the Start of the Negotiations**

- Designate a lead individual responsible for crafting the initial text
- Establish consensus on overarching editorial principles and chapter structures
- Embrace the liberal use of square brackets without hesitation

- **Stage 2: When Negotiations are Ongoing**

- Clearly define the functioning of the country's treaty approvals system at the outset of negotiations
- Maintain frequent consultations with legal advisers, as addressing drafting issues early is more manageable than in the later stages
- Avoid altering the numbering of articles, considering cross-references in other sections of the text
- Ensure accurate tracking of changes to provision with each revised text
- Regular communication across negotiating teams and government stakeholders

Drafting Strategy of the Text (2)

- **Stage 3: When Negotiations are Over**

- Verify that the text aligns with the negotiating team's shared understanding of the agreements reached, and expect reciprocity from the other side
- Be prepared to participate in numerous "briefing" sessions with high-level officials when requested
- Address discrepancies promptly and recognize that certain issues may require a dedicated meeting for resolution to prevent unintentional renegotiation
 - Example – In October 2016, the Walloon parliament in Belgium, with a decisive vote of 46-16, rejected the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, posing a significant obstacle to the landmark trade deal. Concerns over potential empowerment of multinational corporations and the erosion of public authority led to the rejection, adding complexity to Belgium's approval process. This decision raised doubts about the EU's ability to finalize major trade agreements, potentially jeopardizing CETA's signing before the EU-Canada summit. The rejection underscored the challenges of reconciling economic interests and public concerns within the EU's decision-making framework.

Legal Scrubbing of the Text

Legal scrubbing ensures that parties agree on the precise meaning of the text, not least the obligations and responsibilities therein

- Ensuring Consistency, Coherence, and Legal Accuracy:
 - Verify references to other provisions for consistency
 - Ensure proper numbering of articles
 - Confirm the accuracy of official titles of Agreements
- Correcting Grammatical Errors and Ensuring Terminological Consistency:
 - Address grammatical errors and inconsistencies in term usage
 - Maintain coherent and consistent terminology
 - Conduct a comprehensive "dictionary" review
- Technical, Non-Political Process:
 - Conducted by legal professionals
 - Focus on technical aspects; no alteration to content
 - Implement minor changes as necessary

Takeaway points

- The ambition of the FTA impacts the overall objectives which feeds into the mandate and into the negotiating strategy of a country and ultimately shapes the proposals and the negotiating text
- At the time of drafting the proposal, negotiators ensure:
 - Alignment with national objectives and strategies
 - Utilise impact assessments for evidence-driven negotiations
- The components and their sub-components are tied/arranged into chapters with articles and often common cross-referencing system applies
- The language of the negotiating text generally refers or includes provisions aligned with international standards
- Each round of negotiations develops and after several rounds the legal text of the FTA is finalized

Thank you for the attention!

