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**THE INTERNATIONAL ENERGY CHARTER  
CONSOLIDATED ENERGY CHARTER TREATY**

**with Related Documents**

**TRANSPARENCY DOCUMENT  
(WITH ANNEX W, MODIFIED INTO A POSITIVE LIST OF  
THE APPLICABLE WTO PROVISIONS)**

**Last Updated: 22 February 2016**

## FOREWORD

*The Energy Charter Treaty* is a unique instrument for the promotion of international cooperation in the energy sector. The Treaty, which entered into force on 16 April 1998, and its related documents, all set out in a consolidated version in this booklet, provide an important legal and political basis for the creation of an open international energy market.

The Treaty was preceded by a political declaration, *the European Energy Charter* adopted in The Hague on 17 December 1991. The European Energy Charter contained a commitment to negotiate in good faith a legally binding Energy Charter Treaty and Protocols. *The International Energy Charter* is a further political declaration adopted and signed in The Hague on 20 May 2015. This more recent political declaration reflects global modern energy challenges and maps out common principles and areas of international cooperation in the field of energy for the 21<sup>st</sup> Century. As a result of the increased interest by the international community the Energy Charter Process has expanded to involve over 90 states from all continents.

For many years the primary focus of the Contracting Parties was to ensure full implementation of the Treaty's commitments. This entailed increased multilateral cooperation over transit, trade, investments, dispute resolution and energy efficiency. As global energy markets evolved, modernisation of the Energy Charter Process became a major objective for the Energy Charter constituency. Today there is a focus on the geographical expansion of the Energy Charter Treaty. The Treaty is open for accession by all countries and Regional Economic Integration Organisations (REIOs) committed to the observance of its principles of open and non-discriminatory energy markets. Several countries are today engaged in the accession process to the Treaty. Up-to-date information on the Energy Charter and its membership can be found at <http://www.energycharter.org/>.

There is recognition by all of the need to ensure that the Energy Charter Process continues to build on its core principles while adapting to new challenges. The Energy Charter stands ready to play a key role in international energy governance in the 21<sup>st</sup> Century.

Dr. Urban Rusnák  
Secretary General  
Energy Charter Secretariat  
15 January 2016

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## **DECISIONS OF THE ENERGY CHARTER CONFERENCE<sup>2</sup>**

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<sup>2</sup> Editor's note: Decisions adopted by the Energy Charter Conference (CCDECs) are published at <http://www.energycharter.org/>.

## EXPLANATORY NOTE

This publication reproduces:

- The Concluding Document of the Ministerial Conference on the International Energy Charter, as adopted in The Hague on 20 May 2015,
- The Concluding Document of the Hague Conference on the European Energy Charter, as signed at The Hague on 17 December 1991,
- The consolidated version of the Energy Charter Treaty based on the following texts (as contained in copies certified by the Depositary):

Final Act of the European Energy Charter Conference, as opened for signature in Lisbon on 17 December 1994 and corrected by the Protocol of Correction of 2 August 1996,

The Chairman's Statement at Adoption Session on 17 December 1994, as reported in the Note from the Secretariat 42/94 CONF 115,

The Joint Memorandum of the Delegations of the Russian Federation and the European Communities on Nuclear Trade, as reported in the Note from the Secretariat 42/94 CONF 115,

The exchange of letters between the European Communities and the Russian Federation on Decision No 3 of the Energy Charter Treaty,

The Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, as adopted on 24 April 1998,

The Chairman's Statement at the Adoption Session on 24 April 1998, as reported in the Note from the Secretariat CS (98) 338 CC 124,

The Chairman's Conclusion on Implementation of Trade-Related Rules, as reported in the Note from the Secretariat CS (98) 338 CC 124,

Decisions with respect to the Energy Charter Treaty,

Decisions in connection with the adoption of the Amendment to the Trade-related Provisions of the Energy Charter Treaty,

Conference Decision CCDEC 2013 (17) TTG, of 6 December 2013, on technical changes to Annexes EM I, NI and EQ I.

- And the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects.

This publication has been produced for documentary purposes and does not involve any responsibility of the Energy Charter Conference and the Energy Charter Secretariat.<sup>3</sup>

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<sup>3</sup> Scanned copies of authenticated texts: <http://www.energycharter.org/>.



## **CONCLUDING DOCUMENT OF THE MINISTERIAL (“THE HAGUE II”) CONFERENCE ON THE INTERNATIONAL ENERGY CHARTER**

The Ministerial (“The Hague II”) Conference on the International Energy Charter was held in The Hague on 20<sup>th</sup> and 21<sup>st</sup> May 2015 to adopt the International Energy Charter as an update of the European Energy Charter. At that Conference, the high representatives of the signatories of the European Energy Charter of 1991, as well as non-signatories of the European Energy Charter of 1991, signed or expressed their consent to the International Energy Charter. The signatories of the International Energy Charter who signed it or expressed their consent at the Conference, or will do so after are hereinafter referred to as the “signatories”.<sup>4</sup>

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4 Actual signatories: <http://www.energycharter.org/>.

## INTERNATIONAL ENERGY CHARTER

The representatives of the signatories meeting in The Hague on 20<sup>th</sup> and 21<sup>st</sup> May 2015;

Desirous to better reflect the new realities of the energy sector, especially the growing weight from developing countries, including emerging economies, and to serve the interests of the existing and potential participants of the Energy Charter constituency;

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991 signature of which allows states and Regional Economic Integration Organisations to accede to the Energy Charter Treaty of 1994 and which will continue to exist for this purpose;

Recalling the Decision adopted by the Energy Charter Conference in its 23<sup>rd</sup> Meeting in Warsaw in 2012 to engage in a process that could lead to the adoption of an updated version of the European Energy Charter;

Aware that the concept of the International Energy Charter aims at enhancing international cooperation in order to meet common challenges related to energy at national, regional and international levels, including the evolution of global energy architecture;

Recalling the objectives of the International Energy Charter:

- to support the Charter's policy of Consolidation, Expansion and Outreach with the aim to facilitate the expansion of the geographical scope of the Energy Charter Treaty and Process;
- to engage in a structured dialogue with non-signatories of the European Energy Charter in order to promote the principles of the Charter and its framework for cooperation on the global scale;
- to modernise the European Energy Charter as the basic political declaration of the Energy Charter Process;
- to support active observership in the Energy Charter Conference, aiming at close political cooperation and early accession of observer countries to the Energy Charter Treaty;

Whereas the International Energy Charter is a declaration of political intention aiming at strengthening the energy cooperation between the signatories and does not bear any legally binding obligation;

Having regard to the principles of the UN Charter and to the outcome documents of various energy-related regional and international conferences and other events as well as initiatives listed in the Annex to this declaration;

Recognising the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations;

Recognising the global challenge posed by the trilemma between energy security, economic development and environmental protection, and efforts by all countries to achieve sustainable development;

Recognising the importance of energy security of energy producing, transit and consuming countries, regardless of their state of economic development, as well as access to modern energy services, which needs to be based on environmentally sound, socially acceptable and economically viable policies, with emphasis on mutual responsibilities and benefits;

Anxious to give a new impulse to the desire for enhanced regional and global cooperation based on mutual respect and confidence;

Resolved to promote long-term energy cooperation at regional and global levels within the framework of a market economy and based on mutual assistance and the principle of non discrimination, being understood as most-favoured nation treatment as a minimum standard;

Aware that account must be taken of the problems of construction and restructuring faced by a considerable number of countries, and that it is desirable for the signatories to participate in joint efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in these countries;

Certain that taking advantage of the complementary features of energy sectors in the markets represented by the signatories will benefit the world economy;

Acknowledging that enhanced energy trade is a powerful catalyst for strengthening regional and international cooperation in energy security and for sustainable use of energy among all stakeholders, including energy producing, transit and consuming countries;

Persuaded that broader energy cooperation among signatories is essential for economic progress and more generally for social development, energy poverty alleviation, and a better quality of life;

Convinced of the signatories' common interest in problems of energy security, safety of industrial plants, including nuclear facilities, and environmental protection;

Willing to do more to attain the objectives of energy security and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development;

Willing to develop cooperation with regional and international organisations for sharing experience and specific examples from national practice in the area of sustainable development, access to modern energy services, energy poverty reduction, green economy, clean energy, energy efficiency, as well as development, introduction and broader use of new clean technologies;

Convinced of the essential importance of efficient energy systems in the production, conversion, transport, distribution and use of energy for energy security and for the protection of the environment;

Convinced that investing in energy efficiency and renewable energies can enhance energy security and contribute to sustainable economic growth;

Encouraging synergies among energy-related multilateral fora;

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy cooperation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of this Charter;

Recognising the role of entrepreneurs, operating within a transparent and equitable legal framework, in promoting cooperation under this Charter;

Determined to promote closer, mutually beneficial commercial relations and investments in the energy field;

Affirming the importance of freedom of movement of energy products, and of developing an efficient international energy infrastructure in order to facilitate the development of stable and transparent trade in energy;

Aware of the need to promote technical and technological cooperation among signatories;

Affirming that the energy policies of signatories are linked by common interests of all countries and that they should be implemented, including by taking the consequent action and applying the principles set out below;

## **HAVE ADOPTED THE FOLLOWING**

### **Title I: Objectives**

The signatories are desirous of sustainable energy development, improving energy security and maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety in a manner which would be socially acceptable, economically viable, and environmentally sound.

Recognising the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations, and in a spirit of political and economic cooperation, they decide to promote the development of efficient, stable and transparent energy markets at regional and global levels based on the principle of non-discrimination and market-oriented price formation, taking into account environmental concerns and the role of energy in each country's national development.

They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies to achieve the above objectives.

To this end, and in line with these principles, they will take action in the following fields:

1. Development of trade in energy consistent with major relevant multilateral agreements such as the WTO Agreement and its related instruments, where applicable, and nuclear non-proliferation obligations and undertakings, which will be achieved by means of:
  - an open and competitive market for energy products, materials, equipment and services;
  - access to energy resources, and exploration and development thereof on a commercial basis;
  - access to national, regional and international markets;

- providing transparency for all segments of international energy markets (production/export, transit, consumption/import);
- removal of technical, administrative and other barriers to trade in energy and associated equipment, technologies and energy-related services;
- promoting the compatibility of national and regional energy systems and to create a common energy space;
- promotion of the harmonisation of rules, regulations and standards in the field of energy;
- promoting the realisation of infrastructure projects important for providing global and regional energy security;
- modernisation, renewal and rationalisation by industry of services and installations for the production, conversion, transport, distribution and use of energy;
- promoting the development and interconnection of energy transport infrastructure and the regional integration of energy markets;
- promoting best possible access to capital, particularly through appropriate existing financial institutions;
- facilitating access to transport infrastructure, for international transit purposes in line with the objectives of this Charter;
- access on commercial terms to technologies for the exploration, development, conversion and use of energy resources;

2. Cooperation in the energy field, which will entail:

- coordination of energy policies, as necessary for promoting the objectives of this Charter;
- exchange of information and experiences relevant for this Charter;
- enhancing capacity building of the countries involved;
- mutual access to technical and economic data, consistent with proprietary rights;
- formulation of stable and transparent legal frameworks creating conditions for the development of energy resources in the context of sustainable development;

- coordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level;
  - facilitating the exchange of technology information and know-how in the energy and environment fields, including training activities;
  - research, technological development, demonstration projects and their commercialisation;
  - creating a favourable environment for investments, including joint venture investments, for design, construction and operation of energy installations.
3. Energy efficiency and environmental protection, which will imply:
- creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market based instruments;
  - encouraging the clean and efficient use of fossil fuels;
  - promotion of a sustainable energy mix designed to minimise negative environmental consequences in a cost-effective way through:
    - i. market-oriented energy prices which more fully reflect environmental costs and benefits;
    - ii. efficient and coordinated policy measures related to energy;
    - iii. use of renewable energy sources and clean technologies, including clean fossil fuel technologies;
  - achieving and maintaining a high level of nuclear safety and ensuring effective cooperation in this field;
  - promotion of cooperation to reduce, as much as possible, gas flaring and venting;
  - sharing of best practices on clean energy development and investment;
  - promotion and use of low emission technologies.

## **Title II: Implementation**

In order to attain the objectives set out above, the signatories will, without prejudice to the sovereignty of each State over its energy resources, and its rights to regulate energy transmission and transportation within its territory respecting all its relevant international obligations, take coordinated action to achieve greater coherence of energy policies, which should be based on the principle of non discrimination and on market-oriented price formation, taking due account of environmental concerns.

They underline that practical steps to define energy policies are necessary in order to intensify cooperation in this sector and further stress the importance of regular exchanges of views on action taken, taking full advantage of the experience of existing international organisations and institutions in this field.

The signatories recognise that commercial forms of cooperation may need to be complemented by intergovernmental cooperation, particularly in the area of energy policy formulation and analysis, as well as in areas which are essential and not suitable to private capital funding.

They decide to pursue the objectives of this Charter by strengthening and integrating regional energy markets and enhancing the efficient functioning of the global energy market by joint or coordinated action under this Charter in the following fields:

- access to and development of energy sources;
- access to energy markets;
- liberalisation of trade in energy;
- promotion and protection of investments in all energy sectors;
- safety principles and guidelines;
- research, technological development technology transfer, innovation and dissemination;
- energy efficiency, environmental protection and sustainable and clean energy;
- access to sustainable energy;
- education and training;
- diversification of energy sources and routes.



In implementing this joint or coordinated action, they decide to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial sources, and to facilitate cooperation including through technical cooperation, between such enterprises or institutions from different countries, acting on the basis of market principles.

The signatories will ensure that the international rules on the protection of industrial, commercial and intellectual property are respected.

### 1. Access to and development of energy sources

Considering that efficient development of energy resources is a sine qua non for attaining the objectives of this Charter, the signatories decide to facilitate access to and development of resources by the interested operators. To this end, they will ensure that relevant rules are publicly available and transparent in consistence with domestic legislation and international obligations; they recognise the need to formulate such rules wherever this has not yet been done, and to take all necessary measures to coordinate their actions in this area. Development of energy resources should take place in economic and environmentally sound conditions.

With a view to facilitating the development and diversification of resources, the signatories decide to avoid imposing discriminatory rules on operators, notably rules governing the ownership of resources, internal operation of companies and taxation.

### 2. Access to markets

The signatories will strongly promote access to national, regional and international markets for energy products for the implementation of the objectives of this Charter. Such access to markets should take account of the need to facilitate the operation of market forces, and promote competition.

### 3. Liberalisation of trade in energy

In order to develop and diversify trade in energy, the signatories decide progressively to remove the barriers to such trade with each other in energy products, equipment and services in a manner consistent with the provisions of the WTO Agreement and its related instruments, where applicable, and nuclear non-proliferation obligations and undertakings.

They will work together in view of the further development of market-oriented energy prices.

The signatories recognise that transit of energy products through their territories is essential for the liberalisation of trade in energy products. Transit should take place in economic and environmentally and commercially sound conditions.

They stress the importance of the development of international energy transmission networks and their interconnection, including cross-border oil and gas networks and power grids. They recognise the need to intensify efforts to coordinate among themselves, and to encourage cooperation among relevant entities in view of their development, the compatibility of technical specifications governing the installation, and the operation of such networks.

#### 4. Promotion and protection of investments

In order to promote the international flow of investments, the signatories will make every effort to remove all barriers to investment in the energy sector and provide, at national level, for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to enter into bilateral and/or multilateral agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes.

The signatories affirm the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration in accordance with national laws and regulations, including investment and arbitration laws and rules, all the relevant bilateral and multilateral treaties and international agreements.

Moreover, the signatories recognise the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed.

They also recognise the importance of the avoidance of double taxation to foster private investment.

#### 5. Safety principles and guidelines

Consistent with relevant major multilateral agreements, the signatories will:

- cooperate to implement safety principles and guidelines, designed to achieve and/or maintain high levels of safety standards and the protection of health and the environment;

- develop such common safety principles and guidelines as are appropriate and/or concur on the mutual recognition of their safety principles and guidelines.
6. Research, technological development technology transfer, innovation and dissemination

The signatories decide to promote exchanges of technology and cooperation on their technological development and innovation activities in the fields of energy production, conversion, transport, distribution and the efficient and clean use of energy, in a manner consistent with nuclear non-proliferation obligations and undertakings.

To this end, they will encourage cooperative efforts on:

- research and development activities;
  - pilot or demonstration projects;
  - the application of technological innovations;
  - the dissemination and exchange of know-how and information on technologies.
7. Energy efficiency, environmental protection and sustainable and clean energy

The signatories confirm that cooperation is necessary in the field of efficient use of energy, development of renewable energy sources and energy-related environmental protection.

This should include:

- ensuring, in a cost-effective manner, consistency between relevant energy policies and environmental agreements and conventions;
- ensuring market-oriented price formation, including a fuller reflection of environmental costs and benefits;
- the use of transparent and equitable market-based instruments designed to achieve energy objectives and reduce environmental problems;
- the creation of framework conditions for the exchange of know-how regarding environmentally sound energy technologies, renewable energy sources and efficient use of energy;
- the creation of framework conditions for profitable investment in energy efficiency and environmental friendly energy projects.

## 8. Access to sustainable energy

The signatories underline the importance of access to sustainable, modern, affordable, and cleaner energy, in particular in developing countries, which may contribute to energy poverty alleviation.

To this end, the signatories confirm that they will make efforts to strengthen their cooperation and to support initiatives and partnerships at international level which are conducive to these goals.

## 9. Education and training

The signatories, recognising industry's role in promoting vocational education and training in the energy field, decide to cooperate in such activities, including:

- professional education;
- occupational training;
- public information in the energy efficiency and renewable energy field.

## 10. Diversification of energy sources and supply routes

The signatories confirm that in order to enhance energy security, energy generation from a diverse set of sources and diversification of supply routes is of significant importance.

### **Title III: Specific Agreements**

The signatories decide to pursue the objectives and principles of this Charter and implement and broaden their cooperation, including in the following areas:

- horizontal and organisational issues;
- energy efficiency, including environmental protection;
- prospecting, production, transportation and use of oil and oil products and modernisation of refineries;
- prospecting, production and use of natural gas, interconnection of gas networks and transmission via high-pressure gas pipelines;
- all aspects of the nuclear fuel cycle including improvements in safety in that sector;

- modernisation of power stations, interconnection of power networks and transmission of electricity via high-voltage power lines;
- development of integrated regional energy markets;
- all aspects of the coal cycle, including clean coal technologies;
- development of renewable energy sources;
- access to sustainable energy;
- transfers of technology and encouragement of innovation;
- cooperation in dealing with the effects of major accidents, or of other events in the energy sector with transfrontier consequences.

#### **Title IV: Final Provisions**

The original of this Charter will be transmitted to the Government of the Netherlands which will retain it in its archives. Each of the signatories will receive from the government of the Netherlands a true copy of the Charter.

The signatories request the Government of the Netherlands to transmit the text of the International Energy Charter, as adopted during the High Level Conference on the 20<sup>th</sup> and 21<sup>st</sup> May in The Hague, along with a note verbal to the Secretary General of the United Nations for his/her information and circulation among all UN Member States. The text of the International Energy Charter will be officially translated in Arabic, Chinese, French, German, Italian, Russian, and Spanish languages and distributed.

Done at The Hague on the 20<sup>th</sup> of May 2015.

## **ANNEX: OUTCOME DOCUMENTS OF ENERGY-RELATED REGIONAL AND INTERNATIONAL CONFERENCES AND OTHER EVENTS AS WELL AS INITIATIVES REFERRED TO ON PAGE 2<sup>5</sup>**

- The Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects which entered into force on 16 April 1998 establishing an international framework encouraging cooperation in the field of energy efficiency in a way compatible with sustainable development;
- The Plan of Implementation of the World Summit on Sustainable Development adopted in Johannesburg on 4 September 2002, calling for enhancing international and regional cooperation to improve access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services, as an integral part of poverty reduction programmes, by facilitating the creation of enabling environments and addressing capacity-building needs, with special attention to rural and isolated areas, as appropriate;
- The declaration “Global Energy Security” of the Summit of the G8 in St. Petersburg on 16 July 2006 where the G8 Leaders expressed their support for the principles of the Energy Charter and the efforts of participating countries to improve international energy cooperation;
- The “Riyadh Declaration” of the Third OPEC Summit of 18 November 2007 in which the heads of State and Government underscored the interrelationships between global security of energy supply and security and predictability of demand. They also expressed their decision to strengthen and broaden the dialogue between energy producers and consumers through the relevant/competent international and regional fora, for the benefit of all;
- The Statute of the International Renewable Energy Agency (IRENA), signed at the Conference on the Establishment of the IRENA in Bonn on 26 January 2009, in which the parties express their desire to promote the increased adoption of renewable energy with a view to sustainable development and their firm belief in the vast opportunities offered by renewable energy for addressing and gradually alleviating problems of energy security and volatile energy prices;

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5 Editor’s note: Page 2 in this title refers to the document of the International Energy Charter, which corresponds to page 11 of the present document (see paragraph 2 of page 11).

- The Joint Statement by the G8 Energy Ministers Meeting in Rome on 25 May 2009, where the G8 Energy Ministers, the European Commissioner for Energy, and the Energy Ministers of Algeria, Australia, Brazil, China, Egypt, India, Indonesia, Korea, Libya, Mexico, Nigeria asked the Energy Charter Secretariat and International Financial Institutions to prepare a strategy for the development of energy networks and corridors assuring transit towards the integration of national energy markets in Africa, while identifying financing mechanisms;
- The Rome Statement adopted by the Energy Charter Conference on 9 December 2009 to address global energy challenges in the framework of the modernisation of the Energy Charter Process;
- The Agreements of the United Nations Climate Change Conference reached in Cancun on 11 December 2010, in which the international community agreed on a set of significant decisions to address the long-term challenge of climate change collectively and comprehensively and that the parties should take urgent action to meet this long-term goal with a view to reducing global greenhouse gas emissions so as to hold the increase in global average temperature below 2°C above pre-industrial levels;
- The International Energy Forum Charter approved and signed at the IEF Ministerial Meeting held in Riyadh on 22 February 2011 demonstrating a reinforced political commitment to an open global energy dialogue among the energy consuming and energy producing members of the IEF, including transit States, in order to ensure global energy security;
- The objectives under the global “Sustainable Energy for All” (SE4All) initiative of the UN of September 2011 and the “2014-2024 World Decade for Sustainable Energy” aiming to achieve universal energy access, improve energy efficiency and increase the use of renewable energy;
- The objectives under the “EU-Africa Energy Partnership”;
- The Doha Declaration adopted at the First Summit of the Gas Exporting Countries Forum on 15 November 2011, which called for promotion and development of new and effective channels of dialogue between natural gas producers and consumers, through international and regional energy organisations and for a, for the purpose of ensuring technology transfer, market transparency, stability, and growth for the benefit of all.
- The conclusions of the Council of the European Union of 24 November 2011 on strengthening the external dimension of the EU energy policy

where EU called for a need of geographical enlargement of Energy Charter Treaty which will aim at strengthening the role of the Treaty as a global instrument, recognised as the basis for international energy regulation in its main fields of competence;

- The Outcome Document entitled 'The Future We Want' which was endorsed by the UN Conference on Sustainable Development of 22 June 2012 and was annexed in the UN General Assembly Resolution 66/288, which recognised the critical role that energy plays in the development process, as access to sustainable modern energy services contributes to poverty eradication, saves lives, improves health and helps provide basic human needs;
- "The St. Petersburg Resolution" of the 2012 APEC Energy Ministerial Meeting on 24-25 June 2012, in which APEC Energy Ministers recognise that enhancing energy security requires concerted action in many areas and commit to continue their efforts to improve the sustainability, efficiency, predictability and transparency of traditional energy markets;
- The OSCE Parliamentary Assembly Resolution "Promotion and use of new and renewable sources of energy" adopted at the 21<sup>st</sup> OSCE PA Annual Session in Monaco on 9 July 2012, stressing the crucial role of energy security in the new security environment and the imperative need for fairness and transparency, in accordance with international law and the European Energy Charter;
- The Final Document of the 16<sup>th</sup> Summit of Heads of State or Government of Non Aligned Movement, which took place on 26-31 August 2012 in Teheran, in which the Heads of State or Government stressed the importance of enhancing international Cooperation through partnership in all forms of energy including clean and renewable Energy. They called upon the developed countries to transfer more efficient and environmentally sound technologies to developing countries, and for the United Nations to promote and facilitate this;
- The Concluding Declaration of the Rabat Energy Forum of 21 September 2012 in which the Energy Charter was recognised as an efficient instrument to contribute and strengthen energy cooperation in the MENA region;
- UN General Assembly Resolution 67/263 "Reliable and stable transit of energy and its role in ensuring sustainable development and international cooperation" adopted on 17 May 2013, noting that



stable, efficient and reliable energy transportation, as a key factor of sustainable development, is in the interest of the entire international community, and welcoming the efforts at the national, bilateral, sub-regional, regional and international levels in building energy transportation systems and facilitating the trade of energy resources to promote sustainable development;

- The Ministerial declaration on regional cooperation for enhanced energy security and the sustainable use of energy in Asia and the Pacific adopted on the Asian and Pacific Energy Forum in Vladivostok, Russian Federation, on 30 May 2013 where energy security is recognised as a key development issue for all countries in the Asia-Pacific region and the crucial importance of energy as a prerequisite to poverty eradication and ensuring economic growth is stressed;
- The Leaders' Declaration of the Summit of the G20 in St. Petersburg on 5-6 September 2013 expressing their commitment to enhance energy cooperation, to make energy market data more accurate and available and to take steps to support the development of cleaner and more efficient energy technologies to enhance the efficiency of markets and shift towards a more sustainable energy future.

## **CONCLUDING DOCUMENT OF THE HAGUE CONFERENCE ON THE EUROPEAN ENERGY CHARTER**

The representatives of Albania, Armenia, Australia, Austria, Azerbaijan, Belgium, Belorussia, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Estonia, The European Communities, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, The Interstate Economic Committee, Ireland, Italy, Japan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, The Netherlands, Norway, Poland, Portugal, Romania, The Russian Federation, Spain, Sweden, Switzerland, Tadjikistan,<sup>6</sup> Turkey, Turkmenistan, Ukraine, The United Kingdom of Great Britain and Northern Ireland, The United States of America, Uzbekistan, Yugoslavia convened in the Hague, The Netherlands, from 16 to 17 December 1991 in order to adopt the European Energy Charter.<sup>7</sup>

The Conference was opened and closed by the Minister of Economic Affairs of The Netherlands.

Her Majesty, Queen Beatrix of The Netherlands, attended the opening of the Conference.

The Prime Minister of The Netherlands and the Commissioner for Energy of the European Commission addressed the Conference.

During the Conference, contributions were received and statements made by delegates of the signatories.

Determined to give full effect to the results of the Conference, the representatives of the signatories adopted the following text for the European Energy Charter:

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6 Editor's note: Spelling as in authenticated version.

7 Actual signatories: <http://www.energycharter.org/>.

## EUROPEAN ENERGY CHARTER

The representatives of the signatories meeting in The Hague on 16 and 17 December 1991,

Having regard to the Charter of Paris for a New Europe, signed in Paris on 21 November 1990 at the summit meeting of the Conference on Security and Co-operation in Europe (CSCE);

Having regard to the document adopted in Bonn on 11 April 1990 by the CSCE Conference on Economic Co-operation in Europe;

Having regard to the declaration of the London Economic Summit adopted on 17 July 1991;

Having regard to the report on the conclusions and recommendations of the CSCE meeting in Sofia on 3 November 1989, on the protection of the environment, as well as its follow-up;

Having regard to the Agreement establishing the European Bank for Reconstruction and Development signed in Paris on 29 May 1990;

Anxious to give formal expression to this new desire for a European-wide and global cooperation based on mutual respect and confidence;

Resolved to promote a new model for energy cooperation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination;

Aware that account must be taken of the problems of reconstruction and restructuring in the countries of Central and Eastern Europe and in the USSR and that it is desirable for the signatories to participate in joint efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in these countries;

Certain that taking advantage of the complementary features of energy sectors within Europe will benefit the world economy; persuaded that broader energy cooperation among signatories is essential for economic progress and more generally for social development and a better quality of life;

Convinced of the signatories' common interest in problems of energy supply, safety of industrial plants, particularly nuclear facilities, and environmental protection;

Willing to do more to attain the objectives of security of supply and efficient management and use of resources, and to utilise fully the potential for environmental improvement, in moving towards sustainable development;

Convinced of the essential importance of efficient energy systems in the production, conversion, transport, distribution and use of energy for security of supply and for the protection of the environment;

Recognising State sovereignty and sovereign rights over energy resources;

Assured of support from the European Community, particularly through completion of its internal energy market;

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy cooperation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter;

Recognising the role of entrepreneurs, operating within a transparent and equitable legal framework, in promoting cooperation under the Charter;

Determined to establish closer, mutually beneficial commercial relations and promote energy investments;

Convinced of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market-based trade in energy;

Aware of the need to promote technological cooperation among signatories;

Affirming that the energy policies of signatories are linked by interests common to all their countries and that they should be implemented in accordance with the principles set out below:

Affirming, finally, their desire to take the consequent action and apply the principles set out below:

**HAVE ADOPTED THE FOLLOWING DECLARATION CONSTITUTING THE  
“EUROPEAN ENERGY CHARTER”**

## Title I: Objectives

The signatories are desirous of improving security of energy supply and of maximising the efficiency of production, conversion, transport, distribution and use of energy, to enhance safety and to minimise environmental problems, on an acceptable economic basis.

Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic cooperation, they undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy.

To this end, and in accordance with these principles, they will take action in the following fields:

1. Development of trade in energy consistent with major relevant multilateral agreements such as GATT, its related instruments, and nuclear non-proliferation obligations and undertakings, which will be achieved by means of:
  - an open and competitive market for energy products, materials, equipment and services;
  - access to energy resources, and exploration and development thereof on a commercial basis;
  - access to local and international markets;
  - removal of technical, administrative and other barriers to trade in energy and associated equipment, technologies and energy-related services;
  - modernisation, renewal and rationalisation by industry of services and installations for the production, conversion, transport, distribution and use of energy;
  - promoting the development and interconnection of energy transport infrastructure;
  - promoting best possible access to capital, particularly through appropriate existing financial institutions;

- facilitating access to transport infrastructure, for international transit purposes in accordance with the objectives of the Charter expressed in the first paragraph of this Title;
  - access on commercial terms to technologies for the exploration, development and use of energy resources;
2. Cooperation in the energy field, which will entail:
- coordination of energy policies, as necessary for promoting the objectives of the Charter;
  - mutual access to technical and economic data, consistent with proprietary rights;
  - formulation of stable and transparent legal frameworks creating conditions for the development of energy resources;
  - coordination and, where appropriate, harmonisation of safety principles and guidelines for energy products and their transport, as well as for energy installations, at a high level;
  - facilitating the exchange of technology information and know-how in the energy and environment fields, including training activities;
  - research, technological development and demonstration projects.
3. Energy efficiency and environmental protection, which will imply:
- creating mechanisms and conditions for using energy as economically and efficiently as possible, including, as appropriate, regulatory and market-based instruments;
  - promotion of an energy mix designed to minimise negative environmental consequences in a cost-effective way through:
    - (i) market-oriented energy prices which more fully reflect environmental costs and benefits;
    - (ii) efficient and coordinated policy measures related to energy;
    - (iii) use of new and renewable energies and clean technologies;
  - achieving and maintaining a high level of nuclear safety and ensuring effective cooperation in this field.

## Title II: Implementation

In order to attain the objectives set out above, the signatories will, within the framework of State sovereignty and sovereign rights over energy resources, take coordinated action to achieve greater coherence of energy policies, which should be based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns.

They underline that practical steps to define energy policies are necessary in order to intensify cooperation in this sector and further stress the importance of regular exchanges of views on action taken, taking full advantage of the experience of existing international organisations and institutions in this field.

The signatories recognise that commercial forms of cooperation may need to be complemented by intergovernmental cooperation, particularly in the area of energy policy formulation and analysis as well as in areas which are essential and not suitable to private capital funding.

They undertake to pursue the objectives of creating a broader European energy market and enhancing the efficient functioning of the global energy market by joint or coordinated action under the Charter in the following fields:

- access to and development of energy resources;
- access to markets;
- liberalisation of trade in energy;
- promotion and protection of investments;
- safety principles and guidelines;
- research, technological development, innovation and dissemination;
- energy efficiency and environmental protection;
- education and training.

In implementing this joint or coordinated action, they undertake to foster private initiative, to make full use of the potential of enterprises, institutions and all available financial sources, and to facilitate cooperation between such enterprises or institutions from different countries, acting on the basis of market principles.

The signatories will ensure that the international rules on the protection of industrial, commercial and intellectual property are respected.

## 1. Access to and development of energy resources

Considering that efficient development of energy resources is a sine qua non for attaining the objectives of the Charter, the signatories undertake to facilitate access to and development of resources by the interested operators.

To this end, they will ensure that rules on the exploration, development and acquisition of resources are publicly available and transparent; they recognise the need to formulate such rules wherever this has not yet been done and to take all necessary measures to coordinate their actions in this area.

With a view to facilitating the development and diversification of resources, the signatories undertake to avoid imposing discriminatory rules on operators, notably rules governing the ownership of resources, internal operation of companies and taxation.

## 2. Access to Markets

The signatories will strongly promote access to local and international markets for energy products for the implementation of the objectives of the Charter. Such access to markets should take account of the need to facilitate the operation of market forces, and promote competition.

## 3. Liberalisation of trade in energy

In order to develop and diversify trade in energy, the signatories undertake progressively to remove the barriers to such trade with each other in energy products, equipment and services in a manner consistent with the provisions of GATT, its related instruments, and nuclear non-proliferation obligations and undertakings.

The signatories recognise that transit of energy products through their territories is essential for the liberalisation of trade in energy products. Transit should take place in economic and environmentally sound conditions.

They stress the importance of the development of commercial international energy transmission networks and their interconnection, with particular reference to electricity and natural gas and with recognition of the relevance of long-term commercial commitments. To this end, they will ensure the compatibility of technical specifications governing



the installation and operation of such networks, notably as regards the stability of electricity systems.

#### 4. Promotion and protection of investments

In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade.

They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes.

Moreover, the signatories will guarantee the right to repatriate profits or other payments relating to an investment and to obtain or use the convertible currency needed.

They also recognise the importance of the avoidance of double taxation to foster private investment.

#### 5. Safety principles and guidelines

Consistent with relevant major multilateral agreements, the signatories will:

- implement safety principles and guidelines, designed to achieve and/or maintain high levels of safety, in particular nuclear safety and the protection of health and the environment;
- develop such common safety principles and guidelines as are appropriate and/or agree to the mutual recognition of their safety principles and guidelines.

#### 6. Research, technological development, innovation and dissemination

The signatories undertake to promote exchanges of technology and Cooperation on their technological development and innovation activities in the fields of energy production, conversion, transport, distribution and the efficient and clean use of energy, in a manner consistent with nuclear non-proliferation obligations and undertakings.

To this end, they will encourage cooperative efforts on:

- research and development activities;

- pilot or demonstration projects;
- the application of technological innovations;
- the dissemination and exchange of know-how and information on technologies.

## 7. Energy efficiency and environmental protection

The signatories agree that cooperation is necessary in the field of efficient use of energy and energy-related environmental protection.

This should include:

- ensuring, in a cost-effective manner, consistency between relevant energy policies and environmental agreements and conventions;
- ensuring market-oriented price formation, including a fuller reflection of environmental costs and benefits;
- the use of transparent and equitable market-based instruments designed to achieve energy objectives and reduce environmental problems;
- the creation of framework conditions for the exchange of know-how regarding environmentally sound energy technologies and efficient use of energy;
- the creation of framework conditions for profitable investment in energy efficiency projects.

## 8. Education and training

The signatories, recognising industry's role in promoting vocational education and training in the energy field, undertake to cooperate in such activities, including:

- professional education;
- occupational training;
- public information in the energy efficiency field.

### **Title III: Specific Agreements**

The signatories undertake to pursue the objectives and principles of the Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith a Basic Agreement and Protocols.

Areas of cooperation could include:

- horizontal and organisational issues;
- energy efficiency, including environmental protection;
- prospecting, production, transportation and use of oil and oil products and modernisation of refineries;
- prospecting, production and use of natural gas, interconnection of gas networks and transmission via high-pressure gas pipelines;
- all aspects of the nuclear fuel cycle including improvements in safety in that sector;
- modernisation of power stations, interconnection of power networks and transmission of electricity via high-voltage power lines;
- all aspects of the coal cycle, including clean coal technologies;
- development of renewable energy sources;
- transfers of technology and encouragement of innovation;
- cooperation in dealing with the effects of major accidents, or of other events in the energy sector with transfrontier consequences.

The signatories will, in exceptional cases, consider transitional arrangements. They, in particular, take into account the specific circumstances facing some states of Central and Eastern Europe and the USSR as well as their need to adapt their economies to the market system, and accept the possibility of a stage-by-stage transition in those countries for the implementation of those particular provisions of the Charter, Basic Agreement and related Protocols that they are, for objective reasons, unable to implement immediately and in full.

Specific arrangements for coming into full compliance with Charter provisions as elaborated in the Basic Agreement and Protocols will be negotiated by each Party requesting transitional status, and progress towards full compliance will be subject to periodic review.

#### **Title IV: Final Provisions**

The signatories request the Government of The Netherlands, President-in-office of the Council of the European Communities, to transmit to the Secretary General of the United Nations the text of the European Energy Charter which is not eligible for registration under Article 102 of the Charter of the United Nations.

In adopting the European Energy Charter Ministers or their representatives record that the following understanding has been reached:

The representatives of the Signatories understand that in the context of the European Energy Charter, the principle of non-discrimination means Most-Favoured-Nation Treatment as a minimum standard. National Treatment may be agreed to in provisions of the Basic Agreement and/or Protocols.

The original of this Concluding Document, drawn up in English, French, German, Italian, Russian and Spanish texts, will be transmitted to the Government of the Kingdom of The Netherlands, which will retain it in its archives. Each of the Signatories will receive from the Government of the Kingdom of The Netherlands a true copy of the Concluding Document.

Done at The Hague on the seventeenth day of December in the year one thousand nine hundred and ninety-one.

## THE ENERGY CHARTER TREATY

(Annex 1 to the Final Act of the European Energy Charter Conference)

[UNDERSTANDING *With respect to the Treaty as a whole*

- (a) *The representatives underline that the provisions of the Treaty have been agreed upon bearing in mind the specific nature of the Treaty aiming at a legal framework to promote long-term cooperation in a particular sector and as a result cannot be construed to constitute a precedent in the context of other international negotiations.*
- (b) *The provisions of the Treaty do not:*
  - (i) *oblige any Contracting Party to introduce mandatory third party access; or*
  - (ii) *prevent the use of pricing systems which, within a particular category of consumers, apply identical prices to customers in different locations.*
- (c) *Derogations from most favoured nation treatment are not intended to cover measures which are specific to an Investor or group of Investors, rather than applying generally.]<sup>8</sup>*

[DECISION *With respect to the Treaty as a whole*

*In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.]<sup>9</sup>*

### PREAMBLE

The Contracting Parties to this Treaty,

Having regard to the Charter of Paris for a New Europe signed on 21 November 1990;

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991;

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<sup>8</sup> Final Act of the European Energy Charter Conference, Understanding 1.

<sup>9</sup> Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

Recalling that all signatories to the Concluding Document of the Hague Conference undertook to pursue the objectives and principles of the European Energy Charter and implement and broaden their cooperation as soon as possible by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis;

Desiring also to establish the structural framework required to implement the principles enunciated in the European Energy Charter;

Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalise investment and trade in energy;

Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty;

Having regard to the objective of progressive liberalisation of international trade and to the principle of avoidance of discrimination in international trade as enunciated in the Agreement Establishing the World Trade Organization<sup>10</sup> and as otherwise provided for in this Treaty;

Determined progressively to remove technical, administrative and other barriers to trade in Energy Materials and Products and Energy-Related Equipment,<sup>11</sup> technologies and services;

Looking to the eventual membership in the World Trade Organization<sup>12</sup> of those Contracting Parties which are not currently members thereof<sup>13</sup> and concerned to provide interim trade arrangements which will assist those Contracting Parties and not impede their preparation for such membership;

Mindful of the rights and obligations of certain Contracting Parties which are also members of the World Trade Organization;<sup>14</sup>

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10 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

11 Id.

12 Id.

13 Id.

14 Id.

Having regard to competition rules concerning mergers, monopolies, anti-competitive practices and abuse of dominant position;

Having regard also to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear non-proliferation obligations or understandings;

Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;

Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and

Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes,

## **HAVE AGREED AS FOLLOWS:**

### **Part I: Definitions and Purpose**

#### **Article 1: Definitions**

As used in this Treaty:

- (1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.
- (2) "Contracting Party" means a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force.
- (3) "Regional Economic Integration Organisation" means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters.
- (4) "Energy Materials and Products", based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of

the European Communities, means the items included in Annexes EM I or EM II.<sup>15</sup>

- (4<sup>bis</sup>) “Energy-Related Equipment”, based on the Harmonised System of the World Customs Organization, means the items included in Annexes EQ I or EQ II.<sup>16</sup>
- (5) “Economic Activity in the Energy Sector” means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

[UNDERSTANDING                      *With respect to Article 1(5)*

- (a) *It is understood that the Treaty confers no rights to engage in economic activities other than Economic Activities in the Energy Sector.*
- (b) *The following activities are illustrative of Economic Activity in the Energy Sector:*
- (i) *prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;*
  - (ii) *construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;*
  - (iii) *land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;*
  - (iv) *removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;*
  - (v) *decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;*
  - (vi) *marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and*
  - (vii) *research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.]<sup>17</sup>*

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15 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

16 *Id.*

17 Final Act of the European Energy Charter Conference, Understanding 2.



- (6) "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
  - (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
  - (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
  - (d) Intellectual Property;
  - (e) Returns;
  - (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

[UNDERSTANDING                      *With respect to Article 1(6)*

*For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's*

- (a) *financial interest, including equity interest, in the Investment;*

- (b) *ability to exercise substantial influence over the management and operation of the Investment; and*
- (c) *ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.*

*Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.]<sup>18</sup>*

*[DECLARATION With respect to Article 1(6)*

*The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).]<sup>19</sup>*

- (7) "Investor" means:
  - (a) with respect to a Contracting Party:
    - (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
    - (ii) a company or other organisation organised in accordance with the law applicable in that Contracting Party;
  - (b) with respect to a "third state", a natural person, company or other organisation which fulfils, *mutatis mutandis*, the conditions specified in subparagraph (a) for a Contracting Party.
- (8) "Make Investments" or "Making of Investments" means establishing new Investments, acquiring all or part of existing Investments or moving into different fields of Investment activity.

*[UNDERSTANDING With respect to Article 1(8)*

*Consistent with Australia's foreign investment policy, the establishment of a new mining or raw materials processing project in Australia with total investment of \$A 10 million or more by a foreign interest, even where that foreign interest is already operating a similar business in Australia, is considered as the making of a new investment.]<sup>20</sup>*

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18 Final Act of the European Energy Charter Conference, Understanding 3.

19 Id, Declaration 1.

20 Id, Understanding 4.

- (9) “Returns” means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.
- (10) “Area” means with respect to a state that is a Contracting Party:
- (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and
  - (b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

With respect to a Regional Economic Integration Organisation which is a Contracting Party, Area means the Areas of the member states of such Organisation, under the provisions contained in the agreement establishing that Organisation.

- (11) (a) “WTO” means the World Trade Organization established by the Agreement Establishing the World Trade Organization.<sup>21</sup>
- (b) “WTO Agreement” means the Agreement Establishing the World Trade Organization, its Annexes and the decisions, declarations and understandings related thereto, as subsequently rectified, amended and modified from time to time.<sup>22</sup>
- (c) “GATT 1994” means the General Agreement on Tariffs and Trade as specified in Annex 1A to the Agreement Establishing the World Trade Organization, as subsequently rectified, amended or modified from time to time.<sup>23</sup>
- (12) “Intellectual Property” includes copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.

[UNDERSTANDING                      *With respect to Article 1(12)*

*The representatives recognise the necessity for adequate and effective protection of Intellectual Property rights according to the highest internationally-accepted standards.]<sup>24</sup>*

21 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

22 Id.

23 Id.

24 Final Act of the European Energy Charter Conference, Understanding 5.

- (13) (a) “Energy Charter Protocol” or “Protocol” means a treaty, the negotiation of which is authorised and the text of which is adopted by the Charter Conference, which is entered into by two or more Contracting Parties in order to complement, supplement, extend or amplify the provisions of this Treaty with respect to any specific sector or category of activity within the scope of this Treaty, or to areas of cooperation pursuant to Title III of the Charter.
- (b) “Energy Charter Declaration” or “Declaration” means a non-binding instrument, the negotiation of which is authorised and the text of which is approved by the Charter Conference, which is entered into by two or more Contracting Parties to complement or supplement the provisions of this Treaty.
- (14) “Freely Convertible Currency” means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

## **Article 2: Purpose of the Treaty**

This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.

## **Part II: Commerce**

### **Article 3: International Markets**

The Contracting Parties shall work to promote access to international markets on commercial terms, and generally to develop an open and competitive market, for Energy Materials and Products and Energy-Related Equipment.<sup>25</sup>

### **Article 4: Non-Derogation from WTO Agreement<sup>26</sup>**

Nothing in this Treaty shall derogate, as between particular Contracting Parties which are members of the WTO,<sup>27</sup> from the provisions of the WTO Agreement<sup>28</sup> as they are applied between those Contracting Parties.

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25 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

26 Id.

27 Id.

28 Id.

## Article 5: Trade-Related Investment Measures<sup>29</sup>

[DECLARATION

*With respect to Articles 5 and 10(11)*

*Australia notes that the provisions of Articles 5 and 10(11) do not diminish its rights and obligations under the GATT, including as elaborated in the Uruguay Round Agreement on Trade-Related Investment Measures, particularly with respect to the list of exceptions in Article 5(3), which it considers incomplete.*

*Australia further notes that it would not be appropriate for dispute settlement bodies established under the Treaty to give interpretations of GATT articles III and XI in the context of disputes between parties to the GATT or between an Investor of a party to the GATT and another party to the GATT. It considers that with respect to the application of Article 10(11) between an Investor and a party to the GATT, the only issue that can be considered under Article 26 is the issue of the awards of arbitration in the event that a GATT panel or the WTO dispute settlement body first establishes that a trade-related investment measure maintained by the Contracting Party is inconsistent with its obligations under the GATT or the Agreement on Trade-Related Investment Measures.<sup>30</sup>*

- (1) A Contracting Party shall not apply any trade-related investment measure that is inconsistent with the provisions of article III or XI of the GATT 1994;<sup>31</sup> this shall be without prejudice to the Contracting Party's rights and obligations under the WTO Agreement<sup>32</sup> and Article 29.

[UNDERSTANDING

*With respect to Article 5(1)*

*The representatives' agreement to Article 5 is not meant to imply any position on whether or to what extent the provisions of the "Agreement on Trade-Related Investment Measures" annexed to the Final Act of the Uruguay Round of Multilateral Trade Negotiations are implicit in articles III and XI of the GATT.<sup>33</sup>*

- (2) Such measures include any investment measure which is mandatory or enforceable under domestic law or under any administrative ruling, or compliance with which is necessary to obtain an advantage, and which requires:

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29 See also Article 28 and Annex D.

30 Final Act of the European Energy Charter Conference, Declaration 2.

31 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

32 Id.

33 Final Act of the European Energy Charter Conference, Understanding 6.

- (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
- (b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports;

or which restricts:

- (c) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
  - (d) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
  - (e) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.
- (3) Nothing in paragraph (1) shall be construed to prevent a Contracting Party from applying the trade-related investment measures described in subparagraphs (2)(a) and (c) as a condition of eligibility for export promotion, foreign aid, government procurement or preferential tariff or quota programmes.
- (4) Notwithstanding paragraph (1), a Contracting Party may temporarily continue to maintain trade-related investment measures which were in effect more than 180 days before its signature of this Treaty, subject to the notification and phase-out provisions set out in Annex TRM.

## **Article 6: Competition**

*[UNDERSTANDING*

*With respect to Article 6*

- (a) *The unilateral and concerted anti-competitive conduct referred to in Article 6(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses.*
- (b) *"Enforcement" and "enforces" include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative*

*action as well as by way of any decision or further law granting or continuing an authorisation.*<sup>34</sup>

- (1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.
- (2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector.
- (3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties.
- (4) Contracting Parties may cooperate in the enforcement of their competition rules by consulting and exchanging information.
- (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development.

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34 Final Act of the European Energy Charter Conference, Understanding 7.

- (6) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy.
- (7) The procedures set forth in paragraph (5) and Article 27(1) shall be the exclusive means within this Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article.

## **Article 7: Transit**

*[DECLARATION*

*With respect to Article 7*

*The European Communities and their Member States and Austria, Norway, Sweden and Finland declare that the provisions of Article 7 are subject to the conventional rules of international law on jurisdiction over submarine cables and pipelines or, where there are no such rules, to general international law.*

*They further declare that Article 7 is not intended to affect the interpretation of existing international law on jurisdiction over submarine cables and pipelines, and cannot be considered as doing so.]<sup>35</sup>*

- (1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges.
- (2) Contracting Parties shall encourage relevant entities to cooperate in:
  - (a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products;
  - (b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party;
  - (c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products;
  - (d) facilitating the interconnection of Energy Transport Facilities.
- (3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products in Transit in no less favourable a

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<sup>35</sup> Final Act of the European Energy Charter Conference, Declaration 3.



manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise.

- (4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1).

*[UNDERSTANDING With respect to Article 7(4)*

*The applicable legislation would include provisions on environmental protection, land use, safety, or technical standards.]<sup>36</sup>*

- (5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to
  - (a) permit the construction or modification of Energy Transport Facilities; or
  - (b) permit new or additional Transit through existing Energy Transport Facilities,

which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply.

Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties.

- (6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision.

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<sup>36</sup> Final Act of the European Energy Charter Conference, Understanding 8.

- (7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute:
- (a) A Contracting Party party to the dispute may refer it to the Secretary General by a notification summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral.
  - (b) Within 30 days of receipt of such a notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned.
  - (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved.
  - (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier.
  - (e) Notwithstanding subparagraph (b) the Secretary General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute.
  - (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators.

- (8) Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines.
- (9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4).
- (10) For the purposes of this Article:
  - (a) "Transit" means
    - (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or
    - (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification.
  - (b) "Energy Transport Facilities" consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products.

### **Article 8: Transfer of Technology**

- (1) The Contracting Parties agree to promote access to and transfer of energy technology on a commercial and non-discriminatory basis to assist effective trade in Energy Materials and Products and Investment

and to implement the objectives of the Charter subject to their laws and regulations, and to the protection of Intellectual Property rights.

- (2) Accordingly, to the extent necessary to give effect to paragraph (1) the Contracting Parties shall eliminate existing and create no new obstacles to the transfer of technology in the field of Energy Materials and Products and related equipment and services, subject to non-proliferation and other international obligations.

### **Article 9: Access to Capital**

*[UNDERSTANDING With respect to Articles 9, 10 and Part V*

*As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not Connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.]<sup>37</sup>*

- (1) The Contracting Parties acknowledge the importance of open capital markets in encouraging the flow of capital to finance trade in Energy Materials and Products and for the making of and assisting with regard to Investments in Economic Activity in the Energy Sector in the Areas of other Contracting Parties, particularly those with economies in transition. Each Contracting Party shall accordingly endeavour to promote conditions for access to its capital market by companies and nationals of other Contracting Parties, for the purpose of financing trade in Energy Materials and Products and for the purpose of Investment in Economic Activity in the Energy Sector in the Areas of those other Contracting Parties, on a basis no less favourable than that which it accords in like circumstances to its own companies and nationals or companies and nationals of any other Contracting Party or any third state, whichever is the most favourable.
- (2) A Contracting Party may adopt and maintain programmes providing for access to public loans, grants, guarantees or insurance for facilitating trade or Investment abroad. It shall make such facilities available, consistent with the objectives, constraints and criteria of such programmes (including any objectives, constraints or criteria relating to the place of business of an applicant for any such facility or the place of delivery of goods or services supplied with the support of any such facility) for Investments in the Economic

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<sup>37</sup> Final Act of the European Energy Charter Conference, Understanding 9.

Activity in the Energy Sector of other Contracting Parties or for financing trade in Energy Materials and Products with other Contracting Parties.

- (3) Contracting Parties shall, in implementing programmes in Economic Activity in the Energy Sector to improve the economic stability and investment climates of the Contracting Parties, seek as appropriate to encourage the operations and take advantage of the expertise of relevant international financial institutions.
- (4) Nothing in this Article shall prevent:
  - (a) financial institutions from applying their own lending or underwriting practices based on market principles and prudential considerations; or
  - (b) a Contracting Party from taking measures:
    - (i) for prudential reasons, including the protection of Investors, consumers, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or
    - (ii) to ensure the integrity and stability of its financial system and capital markets.

### Part III: Investment Promotion and Protection

#### Article 10: Promotion, Protection and Treatment of Investments

*[UNDERSTANDING With respect to Articles 9, 10 and Part V*

*As a Contracting Party's programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting Parties in its Area, such programmes may be subject to constraints with respect to participation in them.<sup>38</sup>*

*[DECLARATION With respect to Article 10*

*Canada and the United States each affirm that they will apply the provisions of Article 10 in accordance with the following considerations:*

*For the purposes of assessing the treatment which must be accorded to Investors of other Contracting Parties and their Investments, the circumstances will need to be*

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38 Final Act of the European Energy Charter Conference, Understanding 9.

*considered on a case-by-case basis. A comparison between the treatment accorded to Investors of one Contracting Party, or the Investments of Investors of one Contracting Party, and the Investments or Investors of another Contracting Party, is only valid if it is made between Investors and Investments in similar circumstances. In determining whether differential treatment of Investors or Investments is consistent with Article 10, two basic factors must be taken into account.*

*The first factor is the policy objectives of Contracting Parties in various fields insofar as they are consistent with the principles of non-discrimination set out in Article 10. Legitimate policy objectives may justify differential treatment of foreign Investors or their Investments in order to reflect a dissimilarity of relevant circumstances between those Investors and Investments and their domestic counterparts. For example, the objective of ensuring the integrity of a country's financial system would justify reasonable prudential measures with respect to foreign Investors or Investments, where such measures would be unnecessary to ensure the attainment of the same objectives insofar as domestic Investors or Investments are concerned. Those foreign Investors or their Investments would thus not be "in similar circumstances" to domestic Investors or their Investments. Thus, even if such a measure accorded differential treatment, it would not be contrary to Article 10.*

*The second factor is the extent to which the measure is motivated by the fact that the relevant Investor or Investment is subject to foreign ownership or under foreign control. A measure aimed specifically at Investors because they are foreign, without sufficient countervailing policy reasons consistent with the preceding paragraph, would be contrary to the principles of Article 10. The foreign Investor or Investment would be "in similar circumstances" to domestic Investors and their Investments, and the measure would be contrary to Article 10.<sup>39</sup>*

- (1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe

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39 Final Act of the European Energy Charter Conference, Declaration 4.

any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.<sup>40</sup>

[UNDERSTANDING                      *With respect to Articles 26 and 27*

*The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.]<sup>41</sup>*

[CHAIRMAN'S STATEMENT    *I would like to note that the Russian Federation believes that the reference to international law in Article 10(1) is not intended to impose most favoured nation obligations with regard to Making of Investments. This is clearly in accordance with the intent of the negotiators who decided not to include in this first Treaty MFN obligations for the pre-investment stage.]<sup>42</sup>*

- (2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).
- (3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.
- (4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organisations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.

[UNDERSTANDING                      *With respect to Article 10(4)*

*The supplementary treaty will specify conditions for applying the Treatment described in Article 10(3). Those conditions will include, inter alia, provisions relating to the sale or other divestment of state assets (privatisation) and to the dismantling of monopolies (demonopolisation).*

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40 See Article 26(3)(c), Article 27(2), and Annex IA.

41 Final Act of the European Energy Charter Conference, Understanding 17.

42 Chairman's Statement at Adoption Session on 17 December 1994.



UNDERSTANDING                      *With respect to Articles 10(4) and 29(6)*

*Contracting Parties may consider any connection between the provisions of Article 10(4) and Article 29(6).<sup>43</sup>*

[DECLARATION                      *With respect to Article 1(6)*

*The Russian Federation wishes to have reconsidered, in negotiations with regard to the supplementary treaty referred to in Article 10(4), the question of the importance of national legislation with respect to the issue of control as expressed in the Understanding to Article 1(6).<sup>44</sup>*

[CHAIRMAN'S STATEMENT    *In addition, the Russian Federation has expressed the view that the consideration of appropriate amendments to the Treaty pursuant to Article 30 affecting sectors of services within the scope of this Treaty to which measures of the GATS apply, and the negotiations towards the supplementary investment treaty provided for in Article 10(4), should be conducted in such a manner as to assure mutual consistency of the Treaty provisions arrived at. Here again, I am sure that all delegations would fully endorse the need to achieve such consistency in the future incorporation in the Treaty of the results of the Uruguay Round, and in negotiation of the second Treaty for the pre-investment stage.<sup>45</sup>*

- (5) Each Contracting Party shall, as regards the Making of Investments in its Area, endeavour to:
- (a) limit to the minimum the exceptions to the Treatment described in paragraph (3);
  - (b) progressively remove existing restrictions affecting Investors of other Contracting Parties.
- (6) (a) A Contracting Party may, as regards the Making of Investments in its Area, at any time declare voluntarily to the Charter Conference, through the Secretariat, its intention not to introduce new exceptions to the Treatment described in paragraph (3).
- (b) A Contracting Party may, furthermore, at any time make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area, the Treatment described in paragraph (3). Such commitments shall be notified to the Secretariat and listed in Annex VC and shall be binding under this Treaty.

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43 Final Act of the European Energy Charter Conference, Understanding 10 and 11.

44 Id, Declaration 1.

45 Chairman's Statement at Adoption Session on 17 December 1994.



- (7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

[DECISION

*With respect to Article 10(7)*

*The Russian Federation may require that companies with foreign participation obtain legislative approval for the leasing of federally-owned property, provided that the Russian Federation shall ensure without exception that this process is not applied in a manner which discriminates among Investments of Investors of other Contracting Parties.]<sup>46</sup>*

- (8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.
- (9) Each state or Regional Economic Integration Organisation which signs or accedes to this Treaty shall, on the date it signs the Treaty or deposits its instrument of accession, submit to the Secretariat a report summarising all laws, regulations or other measures relevant to:
- (a) exceptions to paragraph (2); or
  - (b) the programmes referred to in paragraph (8).

A Contracting Party shall keep its report up to date by promptly submitting amendments to the Secretariat. The Charter Conference shall review these reports periodically.

In respect of subparagraph (a) the report may designate parts of the energy sector in which a Contracting Party accords to Investors of other Contracting Parties the Treatment described in paragraph (3).

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<sup>46</sup> Decision 2 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

In respect of subparagraph (b) the review by the Charter Conference may consider the effects of such programmes on competition and Investments.

- (10) Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.
- (11) For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

*[DECLARATION With respect to Articles 5 and 10(11)]*

*Australia notes that the provisions of Articles 5 and 10(11) do not diminish its rights and obligations under the GATT, including as elaborated in the Uruguay Round Agreement on Trade-Related Investment Measures, particularly with respect to the list of exceptions in Article 5(3), which it considers incomplete.*

*Australia further notes that it would not be appropriate for dispute settlement bodies established under the Treaty to give interpretations of GATT articles III and XI in the context of disputes between parties to the GATT or between an Investor of a party to the GATT and another party to the GATT. It considers that with respect to the application of Article 10(11) between an Investor and a party to the GATT, the only issue that can be considered under Article 26 is the issue of the awards of arbitration in the event that a GATT panel or the WTO dispute settlement body first establishes that a trade-related investment measure maintained by the Contracting Party is inconsistent with its obligations under the GATT or the Agreement on Trade-Related Investment Measures.]<sup>47</sup>*

- (12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations.

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<sup>47</sup> Final Act of the European Energy Charter Conference, Declaration 2.

## Article 11: Key Personnel

- (1) A Contracting Party shall, subject to its laws and regulations relating to the entry, stay and work of natural persons, examine in good faith requests by Investors of another Contracting Party, and key personnel who are employed by such Investors or by Investments of such Investors, to enter and remain temporarily in its Area to engage in activities connected with the making or the development, management, maintenance, use, enjoyment or disposal of relevant Investments, including the provision of advice or key technical services.
- (2) A Contracting Party shall permit Investors of another Contracting Party which have Investments in its Area, and Investments of such Investors, to employ any key person of the Investor's or the Investment's choice regardless of nationality and citizenship provided that such key person has been permitted to enter, stay and work in the Area of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such key person.

## Article 12: Compensation for Losses

- (1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state.
- (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from
  - (a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or
  - (b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

### **Article 13: Expropriation**

- (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:
  - (a) for a purpose which is in the public interest;
  - (b) not discriminatory;
  - (c) carried out under due process of law; and
  - (d) accompanied by the payment of prompt, adequate and effective compensation.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

- (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).
- (3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

### **Article 14: Transfers Related to Investments**

*[DECISION*

*With respect to Article 14*

- (1) *The term "freedom of transfer" in Article 14(1) does not preclude a Contracting Party (hereinafter referred to as the "Limiting Party") from applying restrictions on movement of capital by its own Investors, provided that:*

- (a) *such restrictions shall not impair the rights granted under Article 14(1) to Investors of other Contracting Parties with respect to their Investments;*
  - (b) *such restrictions do not affect Current Transactions; and*
  - (c) *the Contracting Party ensures that Investments in its Area of the Investors of all other Contracting Parties are accorded, with respect to transfers, treatment no less favourable than that which it accords to Investments of Investors of any other Contracting Party or of any third state, whichever is the most favourable.*
- (2) *This Decision shall be subject to examination by the Charter Conference five years after entry into force of the Treaty, but not later than the date envisaged in Article 32(3).*
- (3) *No Contracting Party shall be eligible to apply such restrictions unless it is a Contracting Party which is a state that was a constituent part of the former Union of Soviet Socialist Republics, which has notified the provisional Secretariat in writing no later than 1 July 1995 that it elects to be eligible to apply restrictions in accordance with this Decision.<sup>48</sup>*
- (4) *For the avoidance of doubt, nothing in this Decision shall derogate, as concerns Article 16, from the rights hereunder of a Contracting Party, its Investors or their Investments, or from the obligations of a Contracting Party.*
- (5) *For the purposes of this Decision:*
- “Current Transactions” are current payments connected with the movement of goods, services or persons that are made in accordance with normal international practice, and do not include arrangements which materially constitute a combination of a current payment and a capital transaction, such as deferrals of payments and advances which is meant to circumvent respective legislation of the Limiting Party in the field.<sup>49</sup>*

*[CHAIRMAN’S STATEMENT Having followed the long and difficult discussions on the Freedom of Transfers, I note that certain countries in transition have drawn attention to their interpretation of Decision No 3 which I think to be correct: the rights granted to Investors of other Contracting Parties under paragraph 1(a) of Decision No 3 do not preclude these countries from applying, without derogating from paragraphs 1(b) and (c), (2), (3) and (4) of that Decision, restrictions on movement of capital made by their Investors.]<sup>50</sup>*

48 Editor’s note: a notification of the Russian Federation has been received by the provisional Secretariat on 29 June 1995.

49 Decision 3 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

50 Chairman’s Statement at Adoption Session on 17 December 1994.

*[Letter from the European Communities to Russia*

*The purpose of this letter is to confirm that with regard to Decision No 3 of the Energy Charter Treaty (ECT) concerning transfer of payments and especially to the footnote<sup>51</sup> to this Decision, Article 105 in our Partnership and Cooperation Agreement (PCA), signed at Corfu, 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision No 3.*

*I propose that this letter and your reply will establish a formal agreement between us.*

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*Letter from the Russian Federation*

*I took note of your letter of 17 December 1994, the purpose of which is the confirmation that with regard to Decision N° 3 of the Energy Charter Treaty (ECT) concerning transfer of payments, and especially to the footnote<sup>52</sup> to this Decision, Article 105 of the Agreement on Partnership and Cooperation establishing a partnership between the Russian Federation, of the one part, and the European Communities and their Member States, of the other part (PCA), signed at Corfu on 24 June 1994, shall not have the effect of disapplying Article 16 of the ECT in relation to Decision N° 3.*

*I agree that your letter and this reply will establish a formal agreement between us.<sup>53</sup>*

- (1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:
  - (a) the initial capital plus any additional capital for the maintenance and development of an Investment;
  - (b) Returns;
  - (c) payments under a contract, including amortisation of principal and accrued interest payments pursuant to a loan agreement;
  - (d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;

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51 Editor's note: This footnote which was deleted from the final text reads: "This Decision has been drafted on the understanding that Contracting Parties which intend to avail themselves of it and which have also entered into Partnership and Cooperation Agreements with the European Union and its member states containing an article disapplying those Agreements in favour of this Treaty will exchange letters of understanding which have the legal effect of making Article 16 of this Treaty applicable between them in relation to this Decision. The exchange of letters shall be completed in good time prior to signature."

52 Id.

53 Exchange of Letters with the European Communities on Decision No 3 of the Energy Charter Treaty.

- (e) proceeds from the sale or liquidation of all or any part of an Investment;
  - (f) payments arising out of the settlement of a dispute;
  - (g) payments of compensation pursuant to Articles 12 and 13.
- (2) Transfers under paragraph (1) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency.

[DECISION

*With respect to Article 14(2)]<sup>54</sup>*

- (3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.
- (4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.
- (5) Notwithstanding paragraph (2), Contracting Parties which are states that were constituent parts of the former Union of Soviet Socialist Republics may provide in agreements concluded between them that transfers of payments shall be made in the currencies of such Contracting Parties, provided that such agreements do not treat Investments in their Areas of Investors of other Contracting Parties less favourably than either Investments of Investors of the Contracting Parties which have entered into such agreements or Investments of Investors of any third state.

[UNDERSTANDING

*With respect to Article 14(5)*

*It is intended that a Contracting Party which enters into an agreement referred to in Article 14(5) ensure that the conditions of such an agreement are not in contradiction*

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54 Decision 4 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference): <http://www.energycharter.org/>. Editor's note: The applicability of this Decision terminated since Romania introduced full convertibility of its currency.



*with that Contracting Party's obligations under the Articles of Agreement of the International Monetary Fund.*<sup>55</sup>

- (6) Notwithstanding subparagraph (1)(b), a Contracting Party may restrict the transfer of a Return in kind in circumstances where the Contracting Party is permitted under Article 29(2)(a) or the WTO Agreement<sup>56</sup> to restrict or prohibit the exportation or the sale for export of the product constituting the Return in kind; provided that a Contracting Party shall permit transfers of Returns in kind to be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and either an Investor of another Contracting Party or its Investment.

### **Article 15: Subrogation**

- (1) If a Contracting Party or its designated agency (hereinafter referred to as the "Indemnifying Party") makes a payment under an indemnity or guarantee given in respect of an Investment of an Investor (hereinafter referred to as the "Party Indemnified") in the Area of another Contracting Party (hereinafter referred to as the "Host Party"), the Host Party shall recognise:
  - (a) the assignment to the Indemnifying Party of all the rights and claims in respect of such Investment; and
  - (b) the right of the Indemnifying Party to exercise all such rights and enforce such claims by virtue of subrogation.
- (2) The Indemnifying Party shall be entitled in all circumstances to:
  - (a) the same treatment in respect of the rights and claims acquired by it by virtue of the assignment referred to in paragraph (1); and
  - (b) the same payments due pursuant to those rights and claims,as the Party Indemnified was entitled to receive by virtue of this Treaty in respect of the Investment concerned.
- (3) In any proceeding under Article 26, a Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged

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55 Final Act of the European Energy Charter Conference, Understanding 12.

56 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.



damages has been received or will be received pursuant to an insurance or guarantee contract.

## Article 16: Relation to Other Agreements

[DECISION

*With respect to the Treaty as a whole*

*In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.<sup>57</sup>*

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

- (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
- (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,

where any such provision is more favourable to the Investor or Investment.

## Article 17: Non-Application of Part III in Certain Circumstances

Each Contracting Party reserves the right to deny the advantages of this Part to:

- (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or
- (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
  - (a) does not maintain a diplomatic relationship; or

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<sup>57</sup> Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

- (b) adopts or maintains measures that:
  - (i) prohibit transactions with Investors of that state; or
  - (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

## Part IV: Miscellaneous Provisions

### Article 18: Sovereignty over Energy Resources

- (1) The Contracting Parties recognise state sovereignty and sovereign rights over energy resources. They reaffirm that these must be exercised in accordance with and subject to the rules of international law.
- (2) Without affecting the objectives of promoting access to energy resources, and exploration and development thereof on a commercial basis, the Treaty shall in no way prejudice the rules in Contracting Parties governing the system of property ownership of energy resources.

*[DECLARATION                      The representatives declared that Article 18(2) shall not be construed to allow the circumvention of the application of the other provisions of the Treaty.]*<sup>58</sup>

*[CHAIRMAN'S STATEMENT    In particular in the context of Article 18(2) they recalled that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose.]*<sup>59</sup>

- (3) Each state continues to hold in particular the rights to decide the geographical areas within its Area to be made available for exploration and development of its energy resources, the optimisation of their recovery and the rate at which they may be depleted or otherwise exploited, to specify and enjoy any taxes, royalties or other financial payments payable by virtue of such exploration and exploitation, and to regulate the environmental and safety aspects of such exploration, development and reclamation within its Area, and to participate in such exploration and

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58 Final Act of the European Energy Charter Conference, Declaration V.

59 Chairman's Statement at Adoption Session on 17 December 1994.

exploitation, *inter alia*, through direct participation by the government or through state enterprises.

- (4) The Contracting Parties undertake to facilitate access to energy resources, *inter alia*, by allocating in a non-discriminatory manner on the basis of published criteria authorisations, licences, concessions and contracts to prospect and explore for or to exploit or extract energy resources.

### **Article 19: Environmental Aspects**

- (1) In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including transboundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. Contracting Parties shall accordingly:
  - (a) take account of environmental considerations throughout the formulation and implementation of their energy policies;
  - (b) promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle;
  - (c) having regard to Article 34(4), encourage cooperation in the attainment of the environmental objectives of the Charter and cooperation in the field of international environmental standards for the Energy Cycle, taking into account differences in adverse effects and abatement costs between Contracting Parties;
  - (d) have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution;
  - (e) promote the collection and sharing among Contracting Parties of information on environmentally sound and economically efficient energy policies and Cost-Effective practices and technologies;

- (f) promote public awareness of the Environmental Impacts of energy systems, of the scope for the prevention or abatement of their adverse Environmental Impacts, and of the costs associated with various prevention or abatement measures;
- (g) promote and cooperate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimise harmful Environmental Impacts of all aspects of the Energy Cycle in an economically efficient manner;
- (h) encourage favourable conditions for the transfer and dissemination of such technologies consistent with the adequate and effective protection of Intellectual Property rights;
- (i) promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects;

[UNDERSTANDING                      *With respect to Article 19(1)(i)*

*It is for each Contracting Party to decide the extent to which the assessment and monitoring of Environmental Impacts should be subject to legal requirements, the authorities competent to take decisions in relation to such requirements, and the appropriate procedures to be followed.]<sup>60</sup>*

- (j) promote international awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards;
  - (k) participate, upon request, and within their available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties.
- (2) At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.
- (3) For the purposes of this Article:

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60 Final Act of the European Energy Charter Conference, Understanding 13.

- (a) “Energy Cycle” means the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimising harmful Environmental Impacts;
- (b) “Environmental Impact” means any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;
- (c) “Improving Energy Efficiency” means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output;
- (d) “Cost-Effective” means to achieve a defined objective at the lowest cost or to achieve the greatest benefit at a given cost.

### Article 20: Transparency

- (1) Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products or Energy Related Equipment<sup>61</sup> are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the WTO Agreement.<sup>62</sup>
- (2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor.

61 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

62 Id.

- (3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request.

### **Article 21: Taxation**

- (1) Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.
- (2) Article 7(3) shall apply to Taxation Measures other than those on income or on capital, except that such provision shall not apply to:
  - (a) an advantage accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii); or
  - (b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure of a Contracting Party arbitrarily discriminates against Energy Materials and Products originating in, or destined for the Area of another Contracting Party or arbitrarily restricts benefits accorded under Article 7(3).
- (3) Article 10(2) and (7) shall apply to Taxation Measures of the Contracting Parties other than those on income or on capital, except that such provisions shall not apply to:
  - (a) impose most favoured nation obligations with respect to advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement or arrangement described in subparagraph (7)(a)(ii) or resulting from membership of any Regional Economic Integration Organisation; or
  - (b) any Taxation Measure aimed at ensuring the effective collection of taxes, except where the measure arbitrarily discriminates against an Investor of another Contracting Party or arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.

- (4) Article 29(2) to (8)<sup>63</sup> shall apply to Taxation Measures other than those on income or on capital.
- (5) (a) Article 13 shall apply to taxes.
- (b) Whenever an issue arises under Article 13, to the extent it pertains to whether a tax constitutes an expropriation or whether a tax alleged to constitute an expropriation is discriminatory, the following provisions shall apply:
- (i) The Investor or the Contracting Party alleging expropriation shall refer the issue of whether the tax is an expropriation or whether the tax is discriminatory to the relevant Competent Tax Authority. Failing such referral by the Investor or the Contracting Party, bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) shall make a referral to the relevant Competent Tax Authorities;
  - (ii) The Competent Tax Authorities shall, within a period of six months of such referral, strive to resolve the issues so referred. Where non-discrimination issues are concerned, the Competent Tax Authorities shall apply the non-discrimination provisions of the relevant tax convention or, if there is no non-discrimination provision in the relevant tax convention applicable to the tax or no such tax convention is in force between the Contracting Parties concerned, they shall apply the non-discrimination principles under the Model Tax Convention on Income and Capital of the Organisation for Economic Cooperation and Development;
  - (iii) Bodies called upon to settle disputes pursuant to Article 26(2)(c) or 27(2) may take into account any conclusions arrived at by the Competent Tax Authorities regarding whether the tax is an expropriation. Such bodies shall take into account any conclusions arrived at within the six-month period prescribed in subparagraph (b)(ii) by the Competent Tax Authorities regarding whether the tax is discriminatory. Such bodies may also take into account any conclusions arrived at by the Competent Tax Authorities after the expiry of the six-month period;
  - (iv) Under no circumstances shall involvement of the Competent Tax Authorities, beyond the end of the six-month period

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<sup>63</sup> Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

referred to in subparagraph (b)(ii), lead to a delay of proceedings under Articles 26 and 27.

- (6) For the avoidance of doubt, Article 14 shall not limit the right of a Contracting Party to impose or collect a tax by withholding or other means.
- (7) For the purposes of this Article:
  - (a) The term “Taxation Measure” includes:
    - (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
    - (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.
  - (b) There shall be regarded as taxes on income or on capital all taxes imposed on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, or substantially similar taxes, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.
  - (c) A “Competent Tax Authority” means the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorised representatives.
  - (d) For the avoidance of doubt, the terms “tax provisions” and “taxes” do not include customs duties.

## **Article 22: State and Privileged Enterprises**

*[UNDERSTANDING With respect to Articles 22 and 23*

*With regard to trade in Energy Materials and Products governed by Article 29, that Article specifies the provisions relevant to the subjects covered by Articles 22 and 23.]<sup>64</sup>*

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64 Final Act of the European Energy Charter Conference, Understanding 14.



- (1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.
- (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty.
- (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.
- (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty.
- (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organisation or individual.

### **Article 23: Observance by Sub-National Authorities**

*[UNDERSTANDING With respect to Articles 22 and 23*

*With regard to trade in Energy Materials and Products governed by Article 29 that Article specifies the provisions relevant to the subjects covered by Articles 22 and 23.]<sup>65</sup>*

- (1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.
- (2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.

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<sup>65</sup> Final Act of the European Energy Charter Conference, Understanding 14.

## Article 24: Exceptions

[UNDERSTANDING                      *With respect to Article 24*

*Exceptions contained in the GATT and Related Instruments apply between particular Contracting Parties which are parties to the GATT, as recognised by Article 4. With respect to trade in Energy Materials and Products governed by Article 29, that Article specifies the provisions relevant to the subjects covered by Article 24.]<sup>66</sup>*

- (1) This Article shall not apply to Articles 12, 13 and 29.
- (2) The provisions of this Treaty other than
  - (a) those referred to in paragraph (1); and
  - (b) with respect to subparagraph (i), Part III of the Treaty

shall not preclude any Contracting Party from adopting or enforcing any measure

- (i) necessary to protect human, animal or plant life or health;
- (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
  - (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
  - (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or
- (iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure
  - (A) has no significant impact on that Contracting Party's economy; and
  - (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended,

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<sup>66</sup> Final Act of the European Energy Charter Conference, Understanding 15.

provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.

- (3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:
- (a) for the protection of its essential security interests including those
    - (i) relating to the supply of Energy Materials and Products to a military establishment; or
    - (ii) taken in time of war, armed conflict or other emergency in international relations;
  - (b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or
  - (c) for the maintenance of public order.

Such measure shall not constitute a disguised restriction on Transit.

- (4) The provisions of this Treaty which accord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:
- (a) resulting from its membership of a free-trade area or customs union; or

*[DECISION*

*With respect to Articles 24(4)(a) and 25*

*An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA or a member of a free-trade area or a customs union, shall be entitled to treatment accorded under such EIA, free-trade area or customs union, provided that the Investment:*

- (a) *has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or*
- (b) *in case it only has its registered office in that Area, has an effective and Continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union.]<sup>67</sup>*
  - (b) which is accorded by a bilateral or multilateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.

### **Article 25: Economic Integration Agreements**

*[DECLARATION With respect to Article 25*

*The European Communities and their Member States recall that, in accordance with article 58 of the Treaty establishing the European Community:*

- a) *companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the right of establishment pursuant to Part Three, Title III, Chapter 2 of the Treaty establishing the European Community, be treated in the same way as natural persons who are nationals of Member States; companies or firms which only have their registered office within the Community must, for this purpose, have an effective and continuous link with the economy of one of the Member States;*
- (b) *“companies and firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.*

*The European Communities and their Member States further recall that:*

*Community law provides for the possibility to extend the treatment described above to branches and agencies of companies or firms not established in one of the Member States; and that, the application of Article 25 of the Energy Charter Treaty will allow only those derogations necessary to safeguard the preferential treatment resulting from the wider process of economic integration resulting from the Treaties establishing the European Communities.]<sup>68</sup>*

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67 Decision 5 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

68 Final Act of the European Energy Charter Conference, Declaration 5.

[DECISION

With respect to Articles 24(4)(a) and 25

*An Investment of an Investor referred to in Article 1(7)(a)(ii), of a Contracting Party which is not party to an EIA or a member of a free-trade area or a customs union, shall be entitled to treatment accorded under such EIA, free-trade area or customs union, provided that the Investment:*

- (a) *has its registered office, central administration or principal place of business in the Area of a party to that EIA or member of that free-trade area or customs union; or*
  - (b) *in case it only has its registered office in that Area, has an effective and continuous link with the economy of one of the parties to that EIA or member of that free-trade area or customs union.]*<sup>69</sup>
- (1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as “EIA”) to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.
  - (2) For the purposes of paragraph (1), “EIA” means an agreement substantially liberalising, *inter alia*, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.
  - (3) This Article shall not affect the application of the WTO Agreement<sup>70</sup> according to Article 29.

## Part V: Dispute Settlement

[UNDERSTANDING

With respect to Articles 9, 10 and Part V

*As a Contracting Party’s programmes which provide for public loans, grants, guarantees or insurance for facilitating trade or Investment abroad are not connected with Investment or related activities of Investors from other Contracting*

69 Decision 5 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

70 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

*Parties in its Area, such programmes may be subject to constraints with respect to participation in them.]<sup>71</sup>*

*[DECISION*

*With respect to the Treaty as a whole*

*In the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict, without prejudice to the positions of the Contracting Parties in respect of the Svalbard Treaty. In the event of such conflict or a dispute as to whether there is such conflict or as to its extent, Article 16 and Part V of the Energy Charter Treaty shall not apply.]<sup>72</sup>*

### **Article 26: Settlement of Disputes between an Investor and a Contracting Party**

*[UNDERSTANDING*

*With respect to Articles 26 and 27*

*The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.]<sup>73</sup>*

- (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
- (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
  - (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

*[UNDERSTANDING*

*With respect to Article 26(2)(a)*

*Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law.]<sup>74</sup>*

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71 Final Act of the European Energy Charter Conference, Understanding 9.

72 Decision 1 with respect to the Energy Charter Treaty (Annex 2 to the Final Act of the European Energy Charter Conference).

73 Final Act of the European Energy Charter Conference, Understanding 17.

74 Id., Understanding 16.

- (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
  - (c) in accordance with the following paragraphs of this Article.
- (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
- (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
  - (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
- (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).
- (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:
- (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or
  - (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the

- Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;
- (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or
  - (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.
- (5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:
- (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;
  - (ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and
  - (iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.
- (b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.
- (6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.
- (7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a “national of another State”.



- (8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

## Article 27: Settlement of Disputes between Contracting Parties

[UNDERSTANDING                      *With respect to Articles 26 and 27*

*The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.]<sup>75</sup>*

- (1) Contracting Parties shall endeavour to settle disputes concerning the application or interpretation of this Treaty through diplomatic channels.
- (2) If a dispute has not been settled in accordance with paragraph (1) within a reasonable period of time, either party thereto may, except as otherwise provided in this Treaty or agreed in writing by the Contracting Parties, and except as concerns the application or interpretation of Article 6 or Article 19 or, for Contracting Parties listed in Annex IA, the last sentence of Article 10(1), upon written notice to the other party to the dispute submit the matter to an ad hoc tribunal under this Article.
- (3) Such an ad hoc arbitral tribunal shall be constituted as follows:
- (a) The Contracting Party instituting the proceedings shall appoint one member of the tribunal and inform the other Contracting Party to the dispute of its appointment within 30 days of receipt of the notice referred to in paragraph (2) by the other Contracting Party;
  - (b) Within 60 days of the receipt of the written notice referred to in paragraph (2), the other Contracting Party party to the dispute shall appoint one member. If the appointment is not made within the time limit prescribed, the Contracting Party having instituted the proceedings may, within 90 days of the receipt of the written notice referred to in paragraph (2), request that the appointment be made in accordance with subparagraph (d);

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75 Final Act of the European Energy Charter Conference, Understanding 17.

- (c) A third member, who may not be a national or citizen of a Contracting Party party to the dispute, shall be appointed by the Contracting Parties parties to the dispute. That member shall be the President of the tribunal. If, within 150 days of the receipt of the notice referred to in paragraph (2), the Contracting Parties are unable to agree on the appointment of a third member, that appointment shall be made, in accordance with subparagraph (d), at the request of either Contracting Party submitted within 180 days of the receipt of that notice;
- (d) Appointments requested to be made in accordance with this paragraph shall be made by the Secretary General of the Permanent Court of International Arbitration within 30 days of the receipt of a request to do so. If the Secretary General is prevented from discharging this task, the appointments shall be made by the First Secretary of the Bureau. If the latter, in turn, is prevented from discharging this task, the appointments shall be made by the most senior Deputy;
- (e) Appointments made in accordance with subparagraphs (a) to (d) shall be made with regard to the qualifications and experience, particularly in matters covered by this Treaty, of the members to be appointed;
- (f) In the absence of an agreement to the contrary between the Contracting Parties, the Arbitration Rules of UNCITRAL shall govern, except to the extent modified by the Contracting Parties parties to the dispute or by the arbitrators. The tribunal shall take its decisions by a majority vote of its members;
- (g) The tribunal shall decide the dispute in accordance with this Treaty and applicable rules and principles of international law;
- (h) The arbitral award shall be final and binding upon the Contracting Parties parties to the dispute;
- (i) Where, in making an award, a tribunal finds that a measure of a regional or local government or authority within the Area of a Contracting Party listed in Part I of Annex P is not in conformity with this Treaty, either party to the dispute may invoke the provisions of Part II of Annex P;
- (j) The expenses of the tribunal, including the remuneration of its members, shall be borne in equal shares by the Contracting Parties parties to the dispute. The tribunal may, however, at its discretion

- direct that a higher proportion of the costs be paid by one of the Contracting Parties parties to the dispute;
- (k) Unless the Contracting Parties parties to the dispute agree otherwise, the tribunal shall sit in The Hague, and use the premises and facilities of the Permanent Court of Arbitration;
  - (l) A copy of the award shall be deposited with the Secretariat which shall make it generally available.

### **Article 28: Non-Application of Article 27 to Certain Disputes**

A dispute between Contracting Parties with respect to the application or interpretation of Article 5 or 29 shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree.

## **Part VI: Transitional Provisions**

### **Article 29: Interim Provisions on Trade-Related Matters<sup>76</sup>**

*[CHAIRMAN'S CONCLUSION ON THE IMPLEMENTATION OF TRADE-RELATED RULES:*

*The Chairman concluded with respect to the future implementation of trade-related rules that there was a consensus among delegations that the Secretariat was to be invited to develop the elements for one implementation system based on the regime in the Trade Amendment. In particular, where the Trade Amendment foresees notification requirements and procedures, including with regard to Understanding 2 to the Amendment,<sup>77</sup> they would follow WTO practice, provided that duplication of notifications with the WTO did not occur. ...<sup>78</sup>*

*Finally, whenever necessary to maintain the principle of harmonious implementation of trade-related rules based on WTO practice, appropriate rules of procedure should include the elements necessary to achieve that aim.]<sup>79</sup>*

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76 As amended by Art. 1 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

77 Referring to Article 29(7).

78 Referring to Annex D.

79 Editor's note: Document CS (98) 338 CC 124, point 13, of 24 May 1998 (not published). The Conclusion was drawn by the Chairman to the first Energy Charter Conference on 24 April 1998. The Conference agreed without objection to this conclusion.

- (1) The provisions of this Article shall apply to trade in Energy Materials and Products and Energy-Related Equipment while any Contracting Party is not a member of the WTO.
- (2) (a) Trade in Energy Materials and Products and Energy-Related Equipment between Contracting Parties at least one of which is not a member of the WTO shall be governed, subject to subparagraph (b) and to the exceptions and rules provided for in Annex W,<sup>80</sup> by the provisions of the WTO Agreement, as applied and practised with regard to Energy Materials and Products and Energy-Related Equipment by members of the WTO among themselves, as if all Contracting Parties were members of the WTO.

*[UNDERSTANDING With respect to Article 29(2)(a) and Annex W:*

*Notwithstanding the listing of paragraph 6 of article XXIV of the GATT 1994 in Annex W (A)(1)(a)(i),<sup>81</sup> any signatory affected by an increase in customs duties or other charges of any kind imposed on or in connection with importation or exportation referred to in the first sentence of that paragraph, is entitled to seek consultations in the Charter Conference.]<sup>82</sup>*

*[UNDERSTANDING With respect to Article 29(2)(a)*

- (a) *Where a provision of [WTO]<sup>83</sup> referred to in this paragraph provides for joint action by [Members of the WTO],<sup>84</sup> it is intended that the Charter Conference take such action.]<sup>85</sup>*
  - (b) Such trade of a Contracting Party which is a state that was a constituent part of the former Union of Soviet Socialist Republics may instead be governed, subject to the provisions of Annex TFU, by an agreement between two or more such states, until 1 December 1999 or the admission of that Contracting Party to the WTO, whichever is the earlier.

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80 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

81 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

82 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 1.

83 Original: "GATT 1947 or a Related Instrument", adapted by editors.

84 Original: "parties to the GATT", adapted by editors.

85 Final Act of the European Energy Charter Conference, Understanding 18. Part (b) of the Understanding became irrelevant following the entry into force of the Amendment to the Trade-Related Provisions of the ECT.

- (3) (a) Each signatory to this Treaty, and each state or Regional Economic Integration Organisation acceding to this Treaty before 24 April 1998, shall on the date of its signature or of its deposit of its instrument of accession provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy Materials and Products, notifying the level of such customs duties and charges applied on such date of signature or deposit. Each signatory to this Treaty, and each state or Regional Economic Integration Organisation acceding to this Treaty before 24 April 1998, shall on that date provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy-Related Equipment, notifying the level of such customs duties and charges applied on that date.
- (b) Each state or Regional Economic Integration Organisation acceding to this Treaty on or after 24 April 1998, shall, on the date of its deposit of its instrument of accession, provide to the Secretariat a list of all customs duties and charges of any kind imposed on or in connection with importation or exportation of Energy Materials and Products and Energy-Related Equipment, notifying the level of such customs duties and charges applied on such date of deposit.

Any changes to such customs duties or charges of any kind imposed on or in connection with importation or exportation shall be notified to the Secretariat, which shall inform the Contracting Parties of such changes.

- (4) Each Contracting Party shall endeavour not to increase any customs duty or charge of any kind imposed on or in connection with importation or exportation:
- (a) in the case of the importation of Energy Materials and Products listed in Annex EM I or Energy-Related Equipment listed in Annex EQ I and described in Part I of the Schedule relating to the Contracting Party referred to in article II of the GATT 1994, above the level set forth in that Schedule, if the Contracting Party is a member of the WTO;
- (b) in the case of the exportation of Energy Materials and Products listed in Annex EM I or Energy-Related Equipment listed in Annex EQ I, and that of their importation if the Contracting Party is not

a member of the WTO, above the level most recently notified to the Secretariat, except as permitted by the provisions made applicable by subparagraph (2)(a).

- (5) A Contracting Party may increase such customs duty or other charge above the level referred to in paragraph (4) only if:
- (a) in case of a customs duty or other charge imposed on or in connection with importation, such action is not inconsistent with the applicable provisions of the WTO Agreement, other than those provisions of the WTO Agreement listed in Annex W;<sup>86</sup> or
  - (b) it has, to the fullest extent practicable under its legislative procedures, notified the Secretariat of its proposal for such an increase, given other interested Contracting Parties reasonable opportunity for consultation with respect to its proposal, and accorded consideration to any representations from such Contracting Parties.
- (6) In respect of trade between Contracting Parties at least one of which is not a member of the WTO, no such Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with importation or exportation of Energy Materials and Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II above the lowest of the levels applied on the date of the decision by the Charter Conference to list the particular item in the relevant Annex .

*[UNDERSTANDING With respect to Articles 29(6) and (7) and 34(3)(o):*

*The Charter Conference shall conduct an annual review with respect to any possibility of moving items of Energy Materials and Products or Energy-Related Equipment from Annexes EM I or EQ I to Annexes EM II or EQ II]<sup>87</sup>*

*[CHAIRMAN'S STATEMENT*

*In particular, where the Trade Amendment foresees notification requirements and procedures, including with regard to Understanding 2 to the Amendment, they would follow WTO practice, provided that duplication of notifications with the WTO did not occur.]<sup>88</sup>*

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86 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

87 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 3.

88 Chairman's Statement at the Adoption Session on 24 April 1998.

A Contracting Party may increase such customs duty or other charge above that level only if:

- (a) in case of a customs duty or other charge imposed on or in connection with importation, such action is not inconsistent with the applicable provisions of the WTO Agreement, other than those provisions of the WTO Agreement listed in Annex W;<sup>89</sup> or
  - (b) in exceptional circumstances not elsewhere provided for in this Treaty, the Charter Conference decides to waive the obligation otherwise imposed on a Contracting Party by this paragraph, consenting to an increase in a customs duty, subject to any conditions the Charter Conference may impose.
- (7) Notwithstanding paragraph (6), in the case of trade referred to in that paragraph, Contracting Parties listed in Annex BR in respect of Energy Materials and Products listed in Annex EM II, or in Annex BRQ in respect of Energy-Related Equipment listed in Annex EQ II, shall not increase any customs duty or other charge above the level resulting from their commitments or any provisions applicable to them under the WTO Agreement.

*[UNDERSTANDING with respect to Articles 29(6) and (7) and 34(3)(o):*

*The Charter Conference shall conduct an annual review with respect to any possibility of moving items of Energy Materials and Products or Energy-Related Equipment from Annexes EM I or EQ I to Annexes EM II or EQ II<sup>90</sup>*

*[UNDERSTANDING with respect to Article 29(7):*

*In the case of a signatory, not a member of the WTO, which is listed in Annexes BR or BRQ or both, any concession offered formally in the process of its accession to the WTO with respect to Energy Materials or Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II shall, for the purpose of this Article, be regarded as a commitment under the WTO.<sup>91</sup>*

- (8) Other duties and charges imposed on or in connection with importation or exportation of Energy Materials and Products or Energy-Related Equipment shall be subject to the provisions of the Understanding

89 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

90 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 3.

91 Id., Understanding 2.



on the Interpretation of Article II: 1(b) of the GATT 1994 as modified according to Annex W.<sup>92</sup>

- (9) Annex D shall apply:
- (a) to disputes regarding compliance with provisions applicable to trade under this Article;
  - (b) to disputes regarding the application by a Contracting Party of any measure, whether or not it conflicts with the provisions of this Article, which is considered by another Contracting Party to nullify or impair any benefit accruing to it directly or indirectly under this Article; and
  - (c) unless the Contracting Parties parties to the dispute agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a member of the WTO,

Except that Annex D shall not apply to any dispute between Contracting Parties, the substance of which arises under an agreement that:

- (i) has been notified in accordance with and meets the other requirements of sub-paragraph (2)(b) and Annex TFU; or
- (ii) establishes a free-trade area or a customs union as described in article XXIV of the GATT 1994.

### **Article 30: Developments in International Trading Arrangements<sup>93</sup>**

Contracting Parties undertake that in the light of the results of the Uruguay Round of Multilateral Trade Negotiations embodied principally in the Final Act thereof done at Marrakesh, 15 April 1994, they will commence consideration not later than 1 July 1995 or the entry into force of this Treaty, whichever is the later, of appropriate amendments to this Treaty with a view to the adoption of any such amendments by the Charter Conference.

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92 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

93 Editor's note: this Article refers to the Amendment to the Trade-Related Provisions of the ECT adopted in 1998.



## Article 31: Energy-Related Equipment<sup>94</sup>

The provisional Charter Conference shall at its first meeting commence examination of the inclusion of energy-related equipment in the trade provisions of this Treaty.

## Article 32: Transitional Arrangements<sup>95</sup>

- (1) In recognition of the need for time to adapt to the requirements of a market economy, a Contracting Party listed in Annex T may temporarily suspend full compliance with its obligations under one or more of the following provisions of this Treaty, subject to the conditions in paragraphs (3) to (6):

Article 6(2) and (5)

Article 7(4)

Article 9(1)

Article 10(7) specific measures

Article 14(1)(d) related only to transfer of unspent earnings

Article 20(3)

Article 22(1) and (3)

- (2) Other Contracting Parties shall assist any Contracting Party which has suspended full compliance under paragraph (1) to achieve the conditions under which such suspension can be terminated. This assistance may be given in whatever form the other Contracting Parties consider most effective to respond to the needs notified under subparagraph (4)(c) including, where appropriate, through bilateral or multilateral arrangements.
- (3) The applicable provisions, the stages towards full implementation of each, the measures to be taken and the date or, exceptionally, contingent event, by which each stage shall be completed and measure taken are listed in Annex T for each Contracting Party claiming transitional arrangements. Each such Contracting Party shall take the measure listed by the date indicated for the relevant provision and stage as set

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94 Editor's note: energy-related equipment was included by the Amendment to the Trade-Related Provisions of the ECT adopted in 1998.

95 Editor's note: the applicability of these transitional arrangements (and of Annex T) terminated on 1 July 2001.

out in Annex T. Contracting Parties which have temporarily suspended full compliance under paragraph (1) undertake to comply fully with the relevant obligations by 1 July 2001. Should a Contracting Party find it necessary, due to exceptional circumstances, to request that the period of such temporary suspension be extended or that any further temporary suspension not previously listed in Annex T be introduced, the decision on a request to amend Annex T shall be made by the Charter Conference.

- (4) A Contracting Party which has invoked transitional arrangements shall notify the Secretariat no less often than once every 12 months:
  - (a) of the implementation of any measures listed in its Annex T and of its general progress to full compliance;
  - (b) of the progress it expects to make during the next 12 months towards full compliance with its obligations, of any problem it foresees and of its proposals for dealing with that problem;
  - (c) of the need for technical assistance to facilitate completion of the stages set out in Annex T as necessary for the full implementation of this Treaty, or to deal with any problem notified pursuant to subparagraph (b) as well as to promote other necessary market-oriented reforms and modernisation of its energy sector;
  - (d) of any possible need to make a request of the kind referred to in paragraph (3).
- (5) The Secretariat shall:
  - (a) circulate to all Contracting Parties the notifications referred to in paragraph (4);
  - (b) circulate and actively promote, relying where appropriate on arrangements existing within other international organisations, the matching of needs for and offers of technical assistance referred to in paragraph (2) and subparagraph (4)(c);
  - (c) circulate to all Contracting Parties at the end of each six month period a summary of any notifications made under subparagraph (4)(a) or (d).
- (6) The Charter Conference shall annually review the progress by Contracting Parties towards implementation of the provisions of this Article and the matching of needs and offers of technical assistance referred to in paragraph (2) and subparagraph (4)(c). In the course of that review it may decide to take appropriate action.

## Part VII: Structure and Institutions

### Article 33: Energy Charter Protocols and Declarations

[UNDERSTANDING                      *With respect to Article 33<sup>96</sup>*

*The provisional Charter Conference should at the earliest possible date decide how best to give effect to the goal of Title III of the European Energy Charter that Protocols be negotiated in areas of cooperation such as those listed in Title III of the Charter.]*

- (1) The Charter Conference may authorise the negotiation of a number of Energy Charter Protocols or Declarations in order to pursue the objectives and principles of the Charter.
- (2) Any signatory to the Charter may participate in such negotiation.
- (3) A state or Regional Economic Integration Organisation shall not become a party to a Protocol or Declaration unless it is, or becomes at the same time, a signatory to the Charter and a Contracting Party to this Treaty.
- (4) Subject to paragraph (3) and subparagraph (6)(a), final provisions applying to a Protocol shall be defined in that Protocol.
- (5) A Protocol shall apply only to the Contracting Parties which consent to be bound by it, and shall not derogate from the rights and obligations of those Contracting Parties not party to the Protocol.
- (6)
  - (a) A Protocol may assign duties to the Charter Conference and functions to the Secretariat, provided that no such assignment may be made by an amendment to a Protocol unless that amendment is approved by the Charter Conference, whose approval shall not be subject to any provisions of the Protocol which are authorised by subparagraph (b).
  - (b) A Protocol which provides for decisions thereunder to be taken by the Charter Conference may, subject to subparagraph (a), provide with respect to such decisions:
    - (i) for voting rules other than those contained in Article 36;
    - (ii) that only parties to the Protocol shall be considered to be Contracting Parties for the purposes of Article 36 or eligible to vote under the rules provided for in the Protocol.

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96 Final Act of the European Energy Charter Conference, Understanding 19.

## Article 34: Energy Charter Conference

[UNDERSTANDING                      *With respect to Article 34*

- (a) *The provisional Secretary General should make immediate contact with other international bodies in order to discover the terms on which they might be willing to undertake tasks arising from the Treaty and the Charter. The provisional Secretary General might report back to the provisional Charter Conference at the meeting which Article 45(4) requires to be convened not later than 180 days after the opening date for signature of the Treaty.*
- (b) *The Charter Conference should adopt the annual budget before the beginning of the financial year.*<sup>97</sup>
- (1) The Contracting Parties shall meet periodically in the Energy Charter Conference (referred to herein as the “Charter Conference”) at which each Contracting Party shall be entitled to have one representative. Ordinary meetings shall be held at intervals determined by the Charter Conference.
- (2) Extraordinary meetings of the Charter Conference may be held at such times as may be determined by the Charter Conference, or at the written request of any Contracting Party, provided that, within six weeks of the request being communicated to the Contracting Parties by the Secretariat, it is supported by at least one-third of the Contracting Parties.
- (3) The functions of the Charter Conference shall be to:
- (a) carry out the duties assigned to it by this Treaty and any Protocols;
  - (b) keep under review and facilitate the implementation of the principles of the Charter and of the provisions of this Treaty and the Protocols;
  - (c) facilitate in accordance with this Treaty and the Protocols the coordination of appropriate general measures to carry out the principles of the Charter;
  - (d) consider and adopt programmes of work to be carried out by the Secretariat;
  - (e) consider and approve the annual accounts and budget of the Secretariat;

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<sup>97</sup> Final Act of the European Energy Charter Conference, Understanding 20.

- (f) consider and approve or adopt the terms of any headquarters or other agreement, including privileges and immunities considered necessary for the Charter Conference and the Secretariat;
- (g) encourage cooperative efforts aimed at facilitating and promoting market-oriented reforms and modernisation of energy sectors in those countries of Central and Eastern Europe and the former Union of Soviet Socialist Republics undergoing economic transition;
- (h) authorise and approve the terms of reference for the negotiation of Protocols, and consider and adopt the texts thereof and of amendments thereto;
- (i) authorise the negotiation of Declarations, and approve their issuance;
- (j) decide on accessions to this Treaty;

*[The provisional Charter Conference and the Charter Conference provided for in the Treaty shall henceforth be responsible for making decisions on requests to sign the Concluding Document of the Hague Conference on the European Energy Charter and the European Energy Charter adopted thereby.]*<sup>98</sup>

- (k) authorise the negotiation of and consider and approve or adopt association agreements;
- (l) consider and adopt texts of amendments to this Treaty;
- (m) consider and approve modifications of and technical changes to the Annexes to this Treaty;

*[UNDERSTANDING With respect to Article 34(3)(m)*

*The technical changes to Annexes might for instance include, the listing of non-signatories or of signatories that have evinced their intention not to ratify, or additions to Annexes N and VC. It is intended that the Secretariat would propose such changes to the Charter Conference when appropriate.]*<sup>99</sup>

- (n) consider and approve the listing of signatories in Annexes BR or BRQ or in both these Annexes;<sup>100</sup>

98 Final Act of the European Energy Charter Conference, VIII.

99 Id., Understanding 21.

100 Modification due to the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.



*The Amendment shall apply accordingly to such a signatory.*

*Any signatory may at any time withdraw the notification referred to above in writing to the Secretariat.]<sup>104</sup>*

[*UNDERSTANDING With respect to Article 29(7):*

*In the case of a signatory, not a member of the WTO, which is listed in Annexes BR or BRQ or both, any concession offered formally in the process of its accession to the WTO with respect to Energy Materials or Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II shall, for the purpose of this Article, be regarded as a commitment under the WTO.]<sup>105</sup>*

- (p)<sup>106</sup> appoint the Secretary General and take all decisions necessary for the establishment and functioning of the Secretariat including the structure, staff levels and standard terms of employment of officials and employees.
- (4) In the performance of its duties, the Charter Conference, through the Secretariat, shall cooperate with and make as full a use as possible, consistently with economy and efficiency, of the services and programmes of other institutions and organisations with established competence in matters related to the objectives of this Treaty.
  - (5) The Charter Conference may establish such subsidiary bodies as it considers appropriate for the performance of its duties.
  - (6) The Charter Conference shall consider and adopt rules of procedure and financial rules.
  - (7) In 1999 and thereafter at intervals (of not more than five years) to be determined by the Charter Conference, the Charter Conference shall thoroughly review the functions provided for in this Treaty in the light of the extent to which the provisions of the Treaty and Protocols have been implemented. At the conclusion of each review the Charter Conference may amend or abolish the functions specified in paragraph (3) and may discharge the Secretariat.

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104 Decision 1 in Connection with the Adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty (Annex 2 to the Final Act).

105 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 2.

106 Originally, (n) (modification due to the Amendment to the Trade-Related Provisions of the Energy Charter Treaty).

### **Article 35: Secretariat**

- (1) In carrying out its duties, the Charter Conference shall have a Secretariat which shall be composed of a Secretary General and such staff as are the minimum consistent with efficient performance.
- (2) The Secretary General shall be appointed by the Charter Conference. The first such appointment shall be for a maximum period of five years.
- (3) In the performance of its duties the Secretariat shall be responsible to and report to the Charter Conference.
- (4) The Secretariat shall provide the Charter Conference with all necessary assistance for the performance of its duties and shall carry out the functions assigned to it in this Treaty or in any Protocol and any other functions assigned to it by the Charter Conference.
- (5) The Secretariat may enter into such administrative and contractual arrangements as may be required for the effective discharge of its functions.

### **Article 36: Voting**

- (1) Unanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions by the Charter Conference to:
  - (a) adopt amendments to this Treaty other than amendments to Articles 34 and 35 and Annex T;
  - (b) approve accessions to this Treaty under Article 41 by states or Regional Economic Integration Organisations which were not signatories to the Charter as of 16 June 1995;
  - (c) authorise the negotiation of and approve or adopt the text of association agreements;
  - (d) approve modifications to Annexes EM, NI, W<sup>107</sup> and B;
  - (e) approve technical changes to the Annexes to this Treaty; and
  - (f) approve the Secretary General's nominations of panelists under Annex D, paragraph (7).

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<sup>107</sup> Originally G (modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty).



- (g) approve the addition of items to Annex EM II from Annex EM I with the corresponding deletion of those items from Annex EM I and approve the addition of items to Annex EQ II from Annex EQ I with the corresponding deletion of those items from Annex EQ I.<sup>108</sup>

The Contracting Parties shall make every effort to reach agreement by consensus on any other matter requiring their decision under this Treaty. If agreement cannot be reached by consensus, paragraphs (2) to (5) shall apply.

- (2) Decisions on budgetary matters referred to in Article 34(3)(e) shall be taken by a qualified majority of Contracting Parties whose assessed contributions as specified in Annex B represent, in combination, at least three-fourths of the total assessed contributions specified therein.
- (3) Decisions on matters referred to in Article 34(7) shall be taken by a three-fourths majority of the Contracting Parties.
- (4) Except in cases specified in subparagraphs (1)(a) to (g),<sup>109</sup> paragraphs (2) and (3), and subject to paragraph (6), decisions provided for in this Treaty shall be taken by a three-fourths majority of the Contracting Parties Present and Voting at the meeting of the Charter Conference at which such matters fall to be decided.
- (5) For purposes of this Article, "Contracting Parties Present and Voting" means Contracting Parties present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.
- (6) Except as provided in paragraph (2), no decision referred to in this Article shall be valid unless it has the support of a simple majority of the Contracting Parties.
- (7) A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Treaty; provided that such an Organisation

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108 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

109 Originally (f), modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

shall not exercise its right to vote if its member states exercise theirs, and vice versa.

- (8) In the event of persistent arrears in a Contracting Party's discharge of financial obligations under this Treaty, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.

### **Article 37: Funding Principles**

- (1) Each Contracting Party shall bear its own costs of representation at meetings of the Charter Conference and any subsidiary bodies.
- (2) The cost of meetings of the Charter Conference and any subsidiary bodies shall be regarded as a cost of the Secretariat.
- (3) The costs of the Secretariat shall be met by the Contracting Parties assessed according to their capacity to pay, determined as specified in Annex B, the provisions of which may be modified in accordance with Article 36(1)(d).
- (4) A Protocol shall contain provisions to assure that any costs of the Secretariat arising from that Protocol are borne by the parties thereto.
- (5) The Charter Conference may in addition accept voluntary contributions from one or more Contracting Parties or from other sources. Costs met from such contributions shall not be considered costs of the Secretariat for the purposes of paragraph (3).

## **Part VIII: Final Provisions**

### **Article 38: Signature**

This Treaty shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organisations which have signed the Charter.

### **Article 39: Ratification, Acceptance or Approval**

This Treaty shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

## Article 40: Application to Territories

[DECLARATION

*With respect to Article 40*

*Denmark recalls that the European Energy Charter does not apply to Greenland and the Faroe Islands until notice to this effect has been received from the local governments of Greenland and the Faroe Islands.*

*In this respect Denmark affirms that Article 40 of the Treaty applies to Greenland and the Faroe Islands.<sup>110</sup>*

- (1) Any state or Regional Economic Integration Organisation may at the time of signature, ratification, acceptance, approval or accession, by a declaration deposited with the Depositary, declare that the Treaty shall be binding upon it with respect to all the territories for the international relations of which it is responsible, or to one or more of them. Such declaration shall take effect at the time the Treaty enters into force for that Contracting Party.
- (2) Any Contracting Party may at a later date, by a declaration deposited with the Depositary, bind itself under this Treaty with respect to other territory specified in the declaration. In respect of such territory the Treaty shall enter into force on the ninetieth day following the receipt by the Depositary of such declaration.
- (3) Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification to the Depositary. The withdrawal shall, subject to the applicability of Article 47(3), become effective upon the expiry of one year after the date of receipt of such notification by the Depositary.
- (4) The definition of "Area" in Article 1(10) shall be construed having regard to any declaration deposited under this Article.

## Article 41: Accession

This Treaty shall be open for accession, from the date on which the Treaty is closed for signature, by states and Regional Economic Integration Organisations which have signed the Charter, on terms to be approved by the Charter Conference. The instruments of accession shall be deposited with the Depositary.

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<sup>110</sup> Final Act of the European Energy Charter Conference, Declaration 6.

## **Article 42: Amendments**

- (1) Any Contracting Party may propose amendments to this Treaty.
- (2) The text of any proposed amendment to this Treaty shall be communicated to the Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.
- (3) Amendments to this Treaty, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depository which shall submit them to all Contracting Parties for ratification, acceptance or approval.
- (4) Instruments of ratification, acceptance or approval of amendments to this Treaty shall be deposited with the Depository. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the ninetieth day after deposit with the Depository of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

## **Article 43: Association Agreements**

- (1) The Charter Conference may authorise the negotiation of association agreements with states or Regional Economic Integration Organisations, or with international organisations, in order to pursue the objectives and principles of the Charter and the provisions of this Treaty or one or more Protocols.
- (2) The relationship established with and the rights enjoyed and obligations incurred by an associating state, Regional Economic Integration Organisation, or international organisation shall be appropriate to the particular circumstances of the association, and in each case shall be set out in the association agreement.

## **Article 44: Entry into Force**

- (1) This Treaty shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance or approval

thereof, or of accession thereto, by a state or Regional Economic Integration Organisation which is a signatory to the Charter as of 16 June 1995.

- (2) For each state or Regional Economic Integration Organisation which ratifies, accepts or approves this Treaty or accedes thereto after the deposit of the thirtieth instrument of ratification, acceptance or approval, it shall enter into force on the ninetieth day after the date of deposit by such state or Regional Economic Integration Organisation of its instrument of ratification, acceptance, approval or accession.
- (3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to those deposited by member states of such Organisation.

#### **Article 45: Provisional Application**

- (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
- (2)
  - (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
  - (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
  - (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
- (3)
  - (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon

the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

- (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).
  - (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.
- (4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.
  - (5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.
  - (6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(c) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3). Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.
  - (7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

*[Provisional Application of the Trade Amendment: Article 6 "Provisional Application" of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty:*

- (1) *Each signatory which applies the Energy Charter Treaty provisionally in accordance with Article 45(1) and each Contracting Party agrees to apply this Amendment provisionally pending its entry into force for such signatory*

*or Contracting Party to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.*

- (2) (a) *Notwithstanding paragraph (1):*
- (i) *any signatory which applies the Energy Charter Treaty provisionally or Contracting Party may deliver to the Depository within 90 days from the date of the adoption of this Amendment by the Charter Conference a declaration that it is not able to accept the provisional application of this Amendment.*
  - (ii) *Any signatory which does not apply the Energy Charter Treaty provisionally in accordance with Article 45(2) may deliver to the Depository not later than the date on which it becomes a Contracting Party or begins to apply the Treaty provisionally a declaration that it is not able to accept the provisional application of this Amendment.*  
*The obligation contained in paragraph (1) shall not apply to a signatory or Contracting Party making such a declaration. Any such signatory or Contracting Party may at any time withdraw that declaration by written notification to the Depository.*
- (b) *Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).*
- (3) *Any signatory or Contracting Party may terminate its provisional application of this Amendment by written notification to the Depository of its intention not to ratify, accept or approve this Amendment. Termination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depository. Any signatory which terminates its provisional application of the Energy Charter Treaty in accordance with Article 45(3)(a) shall be considered as also having terminated its provisional application of this Amendment with the same date of effect.]*

#### **Article 46: Reservations**

No reservations may be made to this Treaty.

#### **Article 47: Withdrawal**

- (1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depository of its withdrawal from the Treaty.

- (2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.
- (3) The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.
- (4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.

#### **Article 48: Status of Annexes and Decisions<sup>111</sup>**

The Annexes to this Treaty and the Decisions set out in Annex 2 to the Final Act of the European Energy Charter Conference signed at Lisbon on 17 December 1994, as well as the Decisions adopted in connection with the adoption of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty are an integral part of the Energy Charter Treaty.

#### **Article 49: Depositary**

The Government of the Portuguese Republic shall be the Depositary of this Treaty.

#### **Article 50: Authentic Texts**

In witness whereof the undersigned, being duly authorised to that effect, have signed this Treaty in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic.

Done at Lisbon on the seventeenth day of December in the year one thousand nine hundred and ninety-four.<sup>112</sup>

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111 As amended by Art. 7 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

112 For signatories: <http://www.energycharter.org/>.



## ANNEXES TO THE ENERGY CHARTER TREATY

### 1. Annex EM I: Energy Materials and Products<sup>113</sup>

(in accordance with article 1(4))

#### Nuclear energy

- 26.12 Uranium or thorium ores and concentrates.
- 2612.10 - Uranium ores and concentrates
  - 2612.20 - Thorium ores and concentrates
- Ex 28.44<sup>114</sup> Radioactive chemical elements and radioactive isotopes (including the fissile or fertile chemical elements and isotopes) and their compounds; mixtures and residues containing these products.
- Ex 2844.10 - Natural uranium and its compounds
  - Ex 2844.20 - Uranium enriched in U 235 and its compounds; plutonium and its compounds
  - Ex 2844.30 - Uranium depleted in U 235 and its compounds; thorium and its compounds
  - Ex 2844.40 - Radioactive elements and isotopes and compounds other than those of subheading 2844.10, 2844.20 or 2844.30
  - 2844.50 - Spent (irradiated) fuel elements (cartridges) of nuclear reactors
- Ex 28.45 Isotopes other than those of heading 28.44; compounds, inorganic or organic, of such isotopes, whether or not chemically defined.<sup>115</sup>
- 2845.10 - Heavy water (deuterium oxide)

#### Coal, Natural Gas, Petroleum and Petroleum Products, Electrical Energy

- 27.01 Coal; briquettes, ovoids and similar solid fuels manufactured from coal.

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113 Originally, Annex EM (modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty).

114 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

115 Editor's note: Heading inserted for information purposes.

- 27.02 Lignite, whether or not agglomerated, excluding jet.
- 27.03 Peat (including peat litter), whether or not agglomerated.
- 27.04 Coke and semi-coke of coal, of lignite or of peat, whether or not agglomerated; retort carbon.
- 27.05 Coal gas, water gas, producer gas and similar gases, other than petroleum gases and other gaseous hydrocarbons.
- 27.06 Tar distilled from coal, from lignite or from peat, and other mineral tars, whether or not dehydrated or partially distilled, including reconstituted tars.
- 27.07<sup>116</sup> Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents.
- 27.08 Pitch and pitch coke, obtained from coal tar or from other mineral tars.
- 27.09 Petroleum oils and oils obtained from bituminous minerals, crude.
- Ex 27.10<sup>117</sup> Petroleum oils and oils obtained from bituminous minerals, other than crude.
- 27.11<sup>118</sup> Petroleum gases and other gaseous hydrocarbons.
- 27.13 Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals.
- 27.14 Bitumen and asphalt, natural; bituminous or oil shale and tar sands; asphaltites and asphaltic rocks.
- 27.15 Bituminous mixtures based on natural asphalt, on natural bitumen, on petroleum bitumen, on mineral tar or on mineral tar pitch (for example, bituminous mastics, cut-backs).
- 27.16 Electrical energy.

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116 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

117 Id.

118 Id.

## Other Energy

Ex 44.01<sup>119</sup> Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms.

4401.10 - Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms

44.02<sup>120</sup> Wood charcoal (including shell or nut charcoal), whether or not agglomerated.

### 2. Annex EM II: Energy Materials and Products<sup>121</sup>

(in accordance with article 1(4))

### 3. Annex EQ I: List of Energy-Related Equipment<sup>122</sup>

(in accordance with article 1(4bis))

For the purpose of this Annex, 'Ex' has been included to indicate that the product description referred to does not exhaust the entire range of products within the World Customs Organization Nomenclature headings or the Harmonised System codes listed below.

Ex 39.19 Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls.

Ex 3919.10 - In rolls of a width not exceeding 20 cm

-- To be used for oil and gas pipelines and sea lines protection<sup>123</sup>

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119 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

120 Id.

121 Modification based on Art. 5 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

122 Id.

123 Editor's note: specifications beyond HS 2012 are shown with deeper indent.

Ex 73.04\*<sup>124</sup> Tubes, pipes and hollow profiles, seamless, of iron (other than cast iron) or steel.

- Line pipe of a kind used for oil or gas pipelines:

7304.11 -- Of stainless steel

7304.19 -- Other

- Casing, tubing and drill pipe, of a kind used in drilling for oil or gas:

7304.22 -- Drill pipe of stainless steel

7304.23 -- Other drill pipe

7304.24 -- Other, of stainless steel

7304.29 -- Other

Ex 73.05 Other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross-sections, the external diameter of which exceeds 406.4 mm, of iron or steel.

- Line pipe of a kind used for oil or gas pipelines:

7305.11 -- Longitudinally submerged arc welded

7305.12 -- Other, longitudinally welded

7305.19 -- Other

7305.20 - Casing of a kind used in drilling for oil or gas

Ex 73.06\*<sup>125</sup> Other tubes, pipes and hollow profiles (for example, open seam or welded, riveted or similarly closed), of iron or steel.

- Line pipe of a kind used for oil or gas pipelines:

7306.11 -- Welded, of stainless steel

7306.19 -- Other

- Casing and tubing of a kind used in drilling for oil or gas:

7306.21 -- Welded, of stainless steel

7306.29 -- Other

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124 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

125 Id.

\* Except products for use in civil aircraft.

- 73.07 Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel.
- Ex 73.08 Structures (excluding prefabricated buildings of heading 94.06) and parts of structures (for example, bridges, and bridge-sections, lock-gates, towers, lattice masts, roofs, roofing frame-works, doors and windows and their frames and thresholds for doors, shutters, balustrades, pillars and columns), of iron or steel; plates, rods, angles, shapes, sections, tubes and the like, prepared for use in structures, of iron or steel.
- 7308.20 - Towers and lattice masts
- 7308.40 - Equipment for scaffolding, shuttering, propping or pitpropping
- Ex 7308.90 - Other
- Parts for oil and gas drilling platforms
- Ex 73.09 Reservoirs, tanks, vats and similar containers for any material (other than compressed or liquefied gas), of iron or steel, of a capacity exceeding 300 l, whether or not lined or heat-insulated, but not fitted with mechanical or thermal equipment.
- Ex 7309.00 -- For liquids
- Of a capacity exceeding 1,000,000 l, where specially designed for strategic oil reserves
- Heat insulated
- Ex 73.11 Containers for compressed or liquefied gas, of iron or steel.
- Of more than 1,000 l
- Ex 73.12\* Stranded wire, ropes, cables, plaited bands, slings and the like, of iron or steel, not electrically insulated.
- Ex 7312.10 - Stranded wires, ropes and cables
- Ropes and cables coated, non-coated or zinc coated of a kind used in the energy sector
- Ex 73.26<sup>126</sup> *(deleted, item now under 8536.70)*
- Ex 7326.90 - *(deleted, item now under 8536.70)*

126 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

\* Except products for use in civil aircraft.

- Ex 76.13 Aluminium containers for compressed or liquefied gas.  
 -- Of more than 1,000 l
- Ex 76.14 Stranded wire, cables, plaited bands and the like, of aluminium, not electrically insulated.  
 Ex 7614.10 - With steel core  
 -- Of a kind used in electricity generation, transmission and distribution  
 Ex 7614.90 - Other  
 -- Of a kind used in electricity generation, transmission and distribution
- Ex 78.06 Other articles of lead.  
 -- Containers with an anti-radiation lead covering, for the transport or storage of highly radioactive materials
- Ex 81.09 Zirconium and articles thereof, including waste and scrap.  
 Ex 8109.90 - Other  
 -- Cartridges or tubes for nuclear fuel elements
- Ex 82.07 Interchangeable tools for hand tools, whether or not power-operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screw driving), including dies for drawing or extruding metal, and rock drilling or earth boring tools.  
 - Rock drilling or earth boring tools:  
 8207.13 -- With working part of cermets  
 8207.19 -- Other, including parts
- Ex 83.07\* Flexible tubing of base metal, with or without fittings.  
 -- For exclusive use in oil and gas wells
- 84.01 Nuclear reactors; fuel elements (cartridges), non-irradiated, for nuclear reactors; machinery and apparatus for isotopic separation.

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\* Except products for use in civil aircraft.

- 84.02 Steam or other vapour generating boilers (other than central heating hot water boilers capable also of producing low pressure steam); super-heated water boilers.
- 84.03 Central heating boilers other than those of heading 84.02.
- 84.04 Auxiliary plant for use with boilers of heading 84.02 or 84.03 (for example, economisers, super-heaters, soot removers, gas recoverers); condensers for steam or other vapour power units.
- 84.05 Producer gas or water gas generators, with or without their purifiers; acetylene gas generators and similar water process gas generators, with or without their purifiers.
- Ex 84.06 Steam turbines and other vapour turbines.
  - Other turbines:
    - 8406.81 -- Of an output exceeding 40 MW
    - 8406.82 -- Of an output not exceeding 40 MW
    - 8406.90 - Parts
- Ex 84.08\* Compression-ignition internal combustion piston engines (diesel or semi-diesel engines).
  - Ex 8408.90 - Other engines
    - New, of a power exceeding 50 kW
- Ex 84.09 Parts suitable for use solely or principally with the engines of heading 84.07 or 84.08.
  - 8409.99 -- Other
- 84.10 Hydraulic turbines, water wheels, and regulators therefor.
- 84.11\* Turbo-jets, turbo-propellers and other gas turbines.
- 84.13\* Pumps for liquids, whether or not fitted with a measuring device; liquid elevators.

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\* Except products for use in civil aircraft.

- Ex 84.14\* Air or vacuum pumps, air or other gas compressors and fans; ventilating or recycling hoods incorporating a fan, whether or not fitted with filters.
- Fans:
  - Ex 8414.59 -- Other
    - For use in mining and power plants
  - 8414.80 - Other
  - 8414.90 - Parts
- 84.16 Furnace burners for liquid fuel, for pulverised solid fuel or for gas; mechanical stokers, including their mechanical grates, mechanical ash dischargers and similar appliances.
- Ex 84.17 Industrial or laboratory furnaces and ovens, including incinerators, non-electric.
- Ex 8417.80 - Other
    - Exclusively waste incinerators, laboratory furnaces and ovens and uranium sintering ovens
  - Ex 8417.90 - Parts
    - Exclusively for waste incinerators, laboratory furnaces and ovens and uranium sintering ovens
- Ex 84.18<sup>\*127</sup> Refrigerators, freezers, and other refrigerating or freezing equipment, electric or other; heat pumps other than air conditioning machines of heading 84.15.
- Other refrigerating or freezing equipment; heat pumps:
  - 8418.61 -- Heat pumps other than air conditioning machines of heading 84.15
  - 8418.69 -- Other
- Ex 84.19<sup>\*128</sup> Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment

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\* Except products for use in civil aircraft.

127 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

128 Id.



of heading 85.14), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.

8419.50 - Heat exchange units

8419.60 - Machinery for liquefying air or other gases  
- Other machinery, plant and equipment:

8419.89 -- Other

Ex 84.21\* Centrifuges, including centrifugal dryers; filtering or purifying machinery and apparatus, for liquids or gases.

- Filtering or purifying machinery and apparatus for liquids:

8421.21 -- For filtering or purifying water

- Filtering or purifying machinery and apparatus for gases:

8421.39 -- Other

Ex 84.25\*<sup>129</sup> Pulley tackle and hoists other than skip hoists; winches and capstans; jacks.

- Winches; capstans:

Ex 8425.31 -- Pit-head winding gear powered by electric motor; winches specially designed for use underground powered by electric motor

Ex 8425.39 -- Other pit-head winding gear; other winches specially designed for use underground

Ex 84.26\* Ships' derricks; cranes, including cable cranes; mobile lifting frames, straddle carriers and works trucks fitted with a crane.

Ex 8426.20 - Tower cranes

-- For offshore platforms and onshore rigs

\* Except products for use in civil aircraft.

129 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

- Other machinery:
- Ex 8426.91 -- Designed for mounting on road vehicles
  - Lifting equipment for repairing and completion of wells
- Ex 84.29 Self-propelled bulldozers, angledozers, graders, levellers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers.
  - Mechanical shovels, excavators and shovel loaders:
  - Ex 8429.51 -- Front-end shovel loaders
    - Loaders specially designed for underground use
- Ex 84.30 Other moving, grading, levelling, scraping, excavating, tamping, compacting, extracting or boring machinery, for earth, minerals or ores; pile-drivers and pile-extractors; snow-ploughs and snow-blowers.
  - Coal or rock cutters and tunnelling machinery:
  - 8430.31 -- Self-propelled
  - 8430.39 -- Other
  - Other boring or sinking machinery:
  - Ex 8430.41 -- Self-propelled
    - For the discovery or exploitation of deposits of oil and gas
  - Ex 8430.49 -- Other
- Ex 84.31 Parts suitable for use solely or principally with the machinery of heading 84.25 to 84.30.
  - Only for machinery covered
- Ex 84.43<sup>\*130</sup> Printing machinery used for printing by means of plates, cylinders and other printing components of heading 84.42; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof.

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\* Except products for use in civil aircraft.

130 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

- Other printers, copying machines and facsimile machines, whether or not combined:
- Ex 8443.31 -- Machines which perform two or more of the functions of printing, copying or facsimile transmission, capable of connecting to an automatic data processing machine or to a network
- Ex 8443.32 -- Other, capable of connecting to an automatic data processing machine or to a network
- 84.71\* Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.
- Ex 84.74 Machinery for sorting, screening, separating, washing, crushing, grinding, mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand.
  - 8474.10 - Sorting, screening, separating or washing machines
  - 8474.20 - Crushing or grinding machines
  - Ex 8474.90 - Parts
    - Of cast iron or cast steel
- Ex 84.79\* Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.<sup>131</sup>
  - Other machines and mechanical appliances:
  - Ex 8479.89 -- Other
    - Mobile hydraulic powered mine roof support
- Ex 84.81 Taps, cocks, valves and similar appliances for pipes, boiler shells, tanks, vats or the like, including pressure-reducing valves and thermostatically controlled valves.
  - 8481.10 - Pressure-reducing valves

\* Except products for use in civil aircraft.

131 Chapter 84.

- 8481.20 - Valves for oleohydraulic or pneumatic transmissions
  - 8481.40 - Safety or relief valves
  - 8481.80 - Other appliances
  - 8481.90 - Parts
- Ex 84.83 Transmission shafts (including cam shafts and crank shafts) and cranks; bearing housings and plain shaft bearings; gears and gearing; ball or roller screws; gear boxes and other speed changers, including torque converters; flywheels and pulleys, including pulley blocks; clutches and shaft couplings (including universal joints).
- Ex 8483.40 - Gears and gearing, other than toothed wheels, chain sprockets and other transmission elements presented separately; ball or roller screws; gear boxes and other speed changers, including torque converters
- Transmission elements exclusively for use in sucker rod pumping units in the oil and gas industry
- Ex 84.84\* Gaskets and similar joints of metal sheeting combined with other material or of two or more layers of metal; sets or assortments of gaskets and similar joints, dissimilar in composition, put up in pouches, envelopes or similar packings; mechanical seals.
- 8484.10 - Gaskets and similar joints of metal sheeting combined with other material or of two or more layers of metal
  - 8484.20 - Mechanical seals
- 85.01\* Electric motors and generators (excluding generating sets).
- 85.02\* Electric generating sets and rotary converters.
- 85.03\* Parts suitable for use solely or principally with the machines of heading 85.01 or 85.02.
- Ex 85.04\* Electrical transformers, static converters (for example, rectifiers) and inductors.
- Liquid dielectric transformers:

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\* Except products for use in civil aircraft.

- 8504.21 -- Having a power handling capacity not exceeding 650 kVA
  - 8504.22 -- Having a power handling capacity exceeding 650 kVA but not exceeding 10,000 kVA
  - 8504.23 -- Having a power handling capacity exceeding 10,000 kVA
    - Other transformers:
  - 8504.33 -- Having a power handling capacity exceeding 16 kVA but not exceeding 500 kVA
  - 8504.34 -- Having a power handling capacity exceeding 500 kVA
  - 8504.40 - Static converters
  - 8504.50 - Other inductors
  - 8504.90 - Parts
- Ex 85.07\* Electric accumulators, including separators therefor, whether or not rectangular (including square).
- Excluding the use for non-energy sectors
- 85.14<sup>132</sup> Industrial or laboratory electric furnaces and ovens (including those functioning by induction or dielectric loss); other industrial or laboratory equipment for the heat treatment of materials by induction or dielectric loss.
- Ex 85.17\*<sup>133</sup> Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.
- Ex 8517.62 -- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus

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\* Except products for use in civil aircraft.

132 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

133 Id.

- Ex 85.26\* Radar apparatus, radio navigational aid apparatus and radio remote control apparatus.
- 8526.10 - Radar apparatus
  - Other:
  - 8526.91 -- Radio navigational aid apparatus
- Ex 85.28\*<sup>134</sup> Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus.
- Cathode-ray tube monitors:
  - 8528.41 -- Of a kind solely or principally used in an automatic data processing system of heading 84.71
  - Other monitors:
  - 8528.51 -- Of a kind solely or principally used in an automatic data processing system of heading 84.71
  - Projectors:
  - 8528.61 -- Of a kind solely or principally used in an automatic data processing system of heading 84.71
- 85.31\* Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 85.12 or 85.30.
- Ex 85.32 Electrical capacitors, fixed, variable or adjustable (pre-set).
- 8532.10 - Fixed capacitors designed for use in 50/60 Hz circuits and having a reactive power handling capacity of not less than 0.5 kvar (power capacitors)
- 85.35 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, fuses, lightning arresters, voltage limiters, surge suppressors, plugs and other connectors, junction boxes), for a voltage exceeding 1,000 volts.

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\* Except products for use in civil aircraft.

<sup>134</sup> See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

- Ex 85.36<sup>135</sup> Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1,000 volts; connectors for optical fibres, optical fibre bundles or cables.
- Ex 8536.10 - Fuses
    - Exceeding 63 ampere
  - Ex 8536.20 - Automatic circuit breakers
    - Exceeding 63 ampere
  - Ex 8536.30 - Other apparatus for protecting electrical circuits
    - Exceeding 16 ampere
    - Relays:
      - 8536.41 -- For a voltage not exceeding 60 V
      - 8536.49 -- Other
  - Ex 8536.50 - Other switches
    - For a voltage exceeding 60 V
  - Ex 8536.70 - Connectors for optical fibre cables
- 85.37 Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 85.35 or 85.36, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of Chapter 90, and numerical control apparatus, other than switching apparatus of heading 85.17.
- 85.38 Parts suitable for use solely or principally with the apparatus of heading 85.35, 85.36 or 85.37.
- Ex 85.41 Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light emitting diodes; mounted piezo-electric crystals.
- Ex 8541.40 - Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in

<sup>135</sup> See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

modules or made up into panels; light emitting diodes

- Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels

Ex 85.44 Insulated (including enamelled or anodised) wire, cable (including co-axial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors.

8544.60 - Other electric conductors, for a voltage exceeding 1,000 V

8544.70 - Optical fibre cables

Ex 85.45 Carbon electrodes, carbon brushes, lamp carbons, battery carbons and other articles of graphite or other carbon, with or without metal, of a kind used for electrical purposes.

8545.20 - Brushes

85.46 Electrical insulators of any material.

85.47 Insulating fittings for electrical machines, appliances or equipment, being fittings wholly of insulating material apart from any minor components of metal (for example, threaded sockets) incorporated during moulding solely for purposes of assembly, other than insulators of heading 85.46; electrical conduit tubing and joints therefor, of base metal lined with insulating material.

Ex 87.04 Motor vehicles for the transport of goods.

- Other, with compression-ignition internal combustion piston engine (diesel or semi-diesel):

Ex 8704.21 -- g.v.w. not exceeding 5 tonnes

- Specially designed for the transport of highly radioactive materials

Ex 8704.22 -- g.v.w. exceeding 5 tonnes but not exceeding 20 tonnes



- Specially designed for the transport of highly radioactive materials
- Ex 8704.23 -- g.v.w. exceeding 20 tonnes
  - Specially designed for the transport of highly radioactive materials
  - Other, with spark-ignition internal combustion piston engine:
- Ex 8704.31 -- g.v.w. not exceeding 5 tonnes
  - Specially designed for the transport of highly radioactive materials
- Ex 8704.32 -- g.v.w. exceeding 5 tonnes
  - Specially designed for the transport of highly radioactive materials
- Ex 87.05 Special purpose motor vehicles, other than those principally designed for the transport of persons or goods (for example, breakdown lorries, crane lorries, fire fighting vehicles, concrete-mixer lorries, road sweeper lorries, spraying lorries, mobile workshops, mobile radiological units).
  - 8705.20 - Mobile drilling derricks
- Ex 87.09 Works trucks, self-propelled, not fitted with lifting or handling equipment, of the type used in factories, warehouses, dock areas or airports for short distance transport of goods; tractors of the type used on railway station platforms; parts of the foregoing vehicles.
  - Vehicles:
  - Ex 8709.11 -- Electrical
    - Specially designed for the transport of highly radioactive materials
  - Ex 8709.19 -- Other
    - Specially designed for the transport of highly radioactive materials
- Ex 89.05 Light-vessels, fire-floats, dredgers, floating cranes, and other vessels the navigability of which is subsidiary to their main function; floating docks; floating or submersible drilling or production platforms.

- 8905.20 - Floating or submersible drilling or production platforms
- Ex 90.15 Surveying (including photogrammetrical surveying), hydrographic, oceanographic, hydrological, meteorological or geophysical instruments and appliances, excluding compasses; rangefinders.
  - Ex 9015.80 - Other instruments and appliances
    - Geophysical instruments only
  - 9015.90 - Parts and accessories
- Ex 90.26\* Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 90.14, 90.15, 90.28 or 90.32.
  - Except for use in the water distribution industry
- 90.27 Instruments and apparatus for physical or chemical analysis (for example polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound or light (including exposure meters); microtomes.
- 90.28 Gas, liquid or electricity supply or production meters, including calibrating meters therefor.
- Ex 90.29\* Revolution counters, production counters, taximeters, mileometers, pedometers and the like; speed indicators and tachometers, other than those of heading 90.14 or 90.15; stroboscopes.
  - Ex 9029.10 - Revolution counters, production counters, taximeters, mileometers, pedometers and the like
    - Production counters
  - Ex 9029.90 - Parts and accessories
    - For production counters
- Ex 90.30<sup>\*136</sup> Oscilloscopes, spectrum analysers and other instruments and apparatus for measuring or checking electrical quantities,

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\* Except products for use in civil aircraft.

136 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

excluding meters of heading 90.28; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionising radiations.

Ex 9030.10 - Instruments and apparatus for measuring or detecting ionising radiations

-- For use in the energy sector

- Other instruments and apparatus, for measuring or checking voltage, current, resistance or power:

9030.31 -- Multimeters without a recording device

9030.33 -- Other, without a recording device

- Other instruments and apparatus:

Ex 9030.84 -- Other, with a recording device

-- For use in the energy sector

Ex 9030.89 -- Other

-- For use in the energy sector

Ex 9030.90 - Parts and accessories

-- For use in the energy sector

90.32\* Automatic regulating or controlling instruments and apparatus.

#### 4. **Annex EQ II: List of Energy-Related Equipment**<sup>137</sup>

(in accordance with article 1(4bis))

#### 5. **Annex NI: Non-Applicable Energy Materials and Products for Definitions of “Economic Activity in the Energy Sector”**

(in accordance with article 1(5))

27.07<sup>138</sup> Oils and other products of the distillation of high temperature coal tar; similar products in which the weight of the aromatic constituents exceeds that of the non-aromatic constituents.

\* Except products for use in civil aircraft.

137 Modification based on Art. 5 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

138 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

Ex 44.01<sup>139</sup> Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms.

4401.10 - Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms.

44.02<sup>140</sup> Wood charcoal (including shell or nut charcoal), whether or not agglomerated.

## 6. Annex TRM: Notification and Phase-Out (TRIMs)

(in accordance with Article 5(4))

(1) Each Contracting Party shall notify to the Secretariat all trade-related investment measures which it applies that are not in conformity with the provisions of Article 5, within:

(a) 90 days after the entry into force of this Treaty if the Contracting Party is a member of the WTO;<sup>141</sup> or

(b) 12 months after the entry into force of this Treaty if the Contracting Party is not a member of the WTO.<sup>142</sup>

Such trade-related investment measures of general or specific application shall be notified along with their principal features.

(2) In the case of trade-related investment measures applied under discretionary authority, each specific application shall be notified. Information that would prejudice the legitimate commercial interests of particular enterprises need not be disclosed.

(3) Each Contracting Party shall eliminate all trade-related investment measures which are notified under paragraph (1) within:

(a) two years from the date of entry into force of this Treaty if the Contracting Party is a member of the WTO;<sup>143</sup> or

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139 See CCDEC 2013 (17) TTG, of 6.12.2013 and correspondence table.

140 Id.

141 Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

142 Id.

143 Id.

- (b) three years from the date of entry into force of this Treaty if the Contracting Party is not a member of the WTO.<sup>144</sup>
- (4) During the applicable period referred to in paragraph (3) a Contracting Party shall not modify the terms of any trade-related investment measure which it notifies under paragraph (1) from those prevailing at the date of entry into force of this Treaty so as to increase the degree of inconsistency with the provisions of Article 5 of this Treaty.
- (5) Notwithstanding the provisions of paragraph (4), a Contracting Party, in order not to disadvantage established enterprises which are subject to a trade-related investment measure notified under paragraph (1), may apply during the phase-out period the same trade-related investment measure to a new Investment where:
  - (a) the products of such Investment are like products to those of the established enterprises; and
  - (b) such application is necessary to avoid distorting the conditions of competition between the new Investment and the established enterprises.

Any trade-related investment measure so applied to a new Investment shall be notified to the Secretariat. The terms of such a trade-related investment measure shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

- (6) Where a state or Regional Economic Integration Organisation accedes to this Treaty after the Treaty has entered into force:
  - (a) the notification referred to in paragraphs (1) and (2) shall be made by the later of the applicable date in paragraph (1) or the date of deposit of the instrument of accession; and
  - (b) the end of the phase-out period shall be the later of the applicable date in paragraph (3) or the date on which the Treaty enters into force for that state or Regional Economic Integration Organisation.

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<sup>144</sup> Modification based on Art. 2 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

**7. Annex N: List of Contracting Parties Requiring at least 3 Separate Areas to be Involved in a Transit**

(in accordance with Article 7(10)(a))

1. Canada and United States of America

**8. Annex VC: List of Contracting Parties which Have Made Voluntary Binding Commitments in respect of Article 10(3)**

(in accordance with Article 10(6))

**9. Annex ID: List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26**

(in accordance with Article 26(3)(b)(i))

1. Australia
2. Azerbaijan
3. Bulgaria
4. Canada
5. Croatia
6. Cyprus
7. The Czech Republic
8. European Union and EURATOM<sup>145</sup>
9. Finland
10. Greece
11. Hungary
12. Ireland
13. Italy
14. Japan
15. Kazakhstan
16. Norway
17. Poland

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<sup>145</sup> Editor's note: originally, the European Communities.

18. Portugal
19. Romania
20. The Russian Federation
21. Slovenia
22. Spain
23. Sweden
24. United States of America

**10. Annex IA: List of Contracting Parties Not Allowing an Investor or Contracting Party to Submit a Dispute concerning the Last Sentence of Article 10(1) to International Arbitration**

(in accordance with Articles 26(3)(c) and 27(2))

1. Australia
2. Canada
3. Hungary
4. Norway

**11. Annex P: Special Sub-National Dispute Procedure**

(in accordance with Article 27(3)(i))

**PART I**

1. Canada
2. Australia

**PART II**

- (1) Where, in making an award, the tribunal finds that a measure of a regional or local government or authority of a Contracting Party (hereinafter referred to as the “Responsible Party”) is not in conformity with a provision of this Treaty, the Responsible Party shall take such reasonable measures as may be available to it to ensure observance of the Treaty in respect of the measure.
- (2) The Responsible Party shall, within 30 days from the date the award is made, provide to the Secretariat written notice of its intentions as to ensuring observance of the Treaty in respect of the measure. The

Secretariat shall present the notification to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the notice. If it is impracticable to ensure observance immediately, the Responsible Party shall have a reasonable period of time in which to do so. The reasonable period of time shall be agreed by both parties to the dispute. In the event that such agreement is not reached, the Responsible Party shall propose a reasonable period for approval by the Charter Conference.

- (3) Where the Responsible Party fails, within the reasonable period of time, to ensure observance in respect of the measure, it shall at the request of the other Contracting Party party to the dispute (hereinafter referred to as the "Injured Party") endeavour to agree with the Injured Party on appropriate compensation as a mutually satisfactory resolution of the dispute.
- (4) If no satisfactory compensation has been agreed within 20 days of the request of the Injured Party, the Injured Party may with the authorisation of the Charter Conference suspend such of its obligations to the Responsible Party under the Treaty as it considers equivalent to those denied by the measure in question, until such time as the Contracting Parties have reached agreement on a resolution of their dispute or the non-conforming measure has been brought into conformity with the Treaty.
- (5) In considering what obligations to suspend, the Injured Party shall apply the following principles and procedures:
  - (a) The Injured Party should first seek to suspend obligations with respect to the same Part of the Treaty as that in which the tribunal has found a violation.
  - (b) If the Injured Party considers that it is not practicable or effective to suspend obligations with respect to the same Part of the Treaty, it may seek to suspend obligations in other Parts of the Treaty. If the Injured Party decides to request authorisation to suspend obligations under this subparagraph, it shall state the reasons therefor in its request to the Charter Conference for authorisation.
- (6) On written request of the Responsible Party, delivered to the Injured Party and to the President of the tribunal that rendered the award, the tribunal shall determine whether the level of obligations suspended by the Injured Party is excessive, and if so, to what extent. If the tribunal cannot be reconstituted, such determination shall be made by one or more arbitrators appointed by



the Secretary General. Determinations pursuant to this paragraph shall be completed within 60 days of the request to the tribunal or the appointment by the Secretary General. Obligations shall not be suspended pending the determination, which shall be final and binding.

- (7) In suspending any obligations to a Responsible Party, an Injured Party shall make every effort not to affect adversely the rights under the Treaty of any other Contracting Party.

## 12. **Annex W: Applicable Provisions and Rules Governing the Application of the Provisions of the WTO Agreement**<sup>146</sup>

(in accordance with article 29(2)(A))

*[UNDERSTANDING with respect to Article 29(2)(a) and Annex W:*

*Notwithstanding the listing of paragraph 6 of article XXIV of the GATT 1994 in Annex W (A)(1)(a)(i),<sup>147</sup> any signatory affected by an increase in customs duties or other charges of any kind imposed on or in connection with importation or exportation referred to in the first sentence of that paragraph, is entitled to seek consultations in the Charter Conference.]<sup>148</sup>*

### **(A) Provisions of the WTO Agreement applicable to the ECT under Article 29(2)(a)**

The following provisions of the WTO Agreement shall be applicable under Article 29(2)(a):

#### **(1) Marrakesh Agreement Establishing the World Trade Organization**

##### **Article IX: Decision-Making**

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided

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146 Modification based on Art. 4 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

147 Editor's note: in this transparency document Annex W lists the applicable WTO provisions, whereas the original Annex W lists exceptions to the applicable WTO provisions.

148 Final Act in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, Understanding 1.

that any such decision shall be taken by three fourths<sup>149</sup> of the Members unless otherwise provided for in this paragraph.

- (a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths<sup>150</sup> of the Members.
  - (b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.
4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

#### **Article XVI: Miscellaneous Provisions**

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the

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149 A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

150 *Idem*.

CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

3. In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.
4. Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

**(a) Annex 1A to the WTO Agreement:  
Multilateral Agreements on Trade in Goods:**

*[General interpretative note to Annex 1A:*

*In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO Agreement"), the provision of the other agreement shall prevail to the extent of the conflict.]*

**(i) General Agreement on Tariffs and Trade 1994**

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
  - (a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
  - (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
    - (i) protocols and certifications relating to tariff concessions;

- (ii) protocols of accession (excluding the provisions (a) concerning provisional application and withdrawal of provisional application and (b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
  - (iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;<sup>151</sup>
  - (iv) other decisions of the CONTRACTING PARTIES to GATT 1947;
- (c) the Understandings set forth below:
- (i) Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994;
  - (ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
  - (iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
  - (iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
  - (v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;

## 2. Explanatory Notes

- (a) The references to “contracting party” in the provisions of GATT 1994 shall be deemed to read “Member”. The references to “less-developed contracting party” and “developed contracting party” shall be deemed to read “developing country Member” and “developed country Member”. The references to “Executive Secretary” shall be deemed to read “Director-General of the WTO”.

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151 The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994. The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.

- (b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes Ad Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.
  - (c)
    - (i) The text of GATT 1994 shall be authentic in English, French and Spanish.
    - (ii) The text of GATT 1994 in the French language shall be subject to the rectifications of terms indicated in Annex A to document MTN.TNC/41.
    - (iii) The authentic text of GATT 1994 in the Spanish language shall be the text in Volume IV of the Basic Instruments and Selected Documents series, subject to the rectifications of terms indicated in Annex B to document MTN.TNC/41.
3. (a) The provisions of Part II of GATT 1994 shall not apply to measures taken by a Member under specific mandatory legislation, enacted by that Member before it became a contracting party to GATT 1947, that prohibits the use, sale or lease of foreign-built or foreign-reconstructed vessels in commercial applications between points in national waters or the waters of an exclusive economic zone. This exemption applies to: (a) the continuation or prompt renewal of a non-conforming provision of such legislation; and (b) the amendment to a non-conforming provision of such legislation to the extent that the amendment does not decrease the conformity of the provision with Part II of GATT 1947. This exemption is limited to measures taken under legislation described above that is notified and specified prior to the date of entry into force of the WTO Agreement. If such legislation is subsequently modified to decrease its conformity with Part II of GATT 1994, it will no longer qualify for coverage under this paragraph.
- (b) The Ministerial Conference shall review this exemption not later than five years after the date of entry into force of the WTO Agreement and thereafter every two years

for as long as the exemption is in force for the purpose of examining whether the conditions which created the need for the exemption still prevail.

- (c) A Member whose measures are covered by this exemption shall annually submit a detailed statistical notification consisting of a five-year moving average of actual and expected deliveries of relevant vessels as well as additional information on the use, sale, lease or repair of relevant vessels covered by this exemption.
- (d) A Member that considers that this exemption operates in such a manner as to justify a reciprocal and proportionate limitation on the use, sale, lease or repair of vessels constructed in the territory of the Member invoking the exemption shall be free to introduce such a limitation subject to prior notification to the Ministerial Conference.
- (e) This exemption is without prejudice to solutions concerning specific aspects of the legislation covered by this exemption negotiated in sectoral agreements or in other fora.

**(i) bis The General Agreement on Tariffs and Trade (GATT 1947)<sup>152</sup>**

*[The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:*

*Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,*

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152 Editor's note: General Agreement on Tariffs and Trade 1994 consists of and must be read with GATT 1947.

*Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,*

*Have through their Representatives agreed as follows:]*

## PART I

### Article I: General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

*[Ad Article I*

*Paragraph 1*

*The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2 (b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.*

*The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.]<sup>153</sup>*

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153 This Protocol entered into force on 14 December 1948.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:
  - (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
  - (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
  - (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
  - (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.
3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5,<sup>154</sup> of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.
4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:
  - (a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

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<sup>154</sup> The authentic text erroneously reads "subparagraph 5 (a)".



- (b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in subparagraph (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

*[Paragraph 4*

*The term "margin of preference" means the absolute difference between the most-favoured-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:*

- (1) *If the most-favoured-nation rate were 36 percent ad valorem and the preferential rate were 24 percent ad valorem, the margin of preference would be 12 percent ad valorem, and not one-third of the most-favoured-nation rate;*
- (2) *If the most-favoured-nation rate were 36 percent ad valorem and the preferential rate were expressed as two-thirds of the most-favoured-nation rate, the margin of preference would be 12 percent ad valorem;*
- (3) *If the most-favoured-nation rate were 2 francs per kilogramme and the preferential rate were 1.50 francs per kilogramme, the margin of preference would be 0.50 franc per kilogramme.*

*The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:*

- (i) *The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and*
- (ii) *The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly*

*contemplates that such product may be classified under more than one tariff item.]*

## **Article II: Schedules of Concessions**

1. (b) ... Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

*[Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*

*Members hereby agree as follows:*

1. *In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".*
3. *"Other duties or charges" shall be recorded in respect of all tariff bindings.*
4. *.... It will be open to any Member to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.*
5. *The recording of "other duties or charges" in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.*

7. *“Other duties or charges” omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any “other duty or charge” recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.]*
2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

*[Ad Article II*

*Paragraph 2 (a)*

*The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.]<sup>155</sup>*

- (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;

*[Paragraph 2 (b)*

*See the note relating to paragraph 1 of Article I.]*

- (c) fees or other charges commensurate with the cost of services rendered.
3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

<sup>155</sup> This Protocol entered into force on 14 December 1948.

4. If any contracting party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.

*[Paragraph 4*

*Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.]*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.
6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognised by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty percentum,

such specific duties and charges and margins of preference may be adjusted to take account of such reduction; provided that the CONTRACTING PARTIES (i.e., the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

- (b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

## PART II

### Article III: National Treatment on Internal Taxation and Regulation

*[Ad Article III]*

*Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.]*

1. The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

*[Paragraph 1]*

*The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The*

*term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorising local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.]*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

*[Paragraph 2*

*A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.]*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorised under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be

accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.

*[Paragraph 5*

*Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.]*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; Provided that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.
7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.



8.
  - (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
  - (b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.
9. The contracting parties recognise that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.
10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

#### **Article V: Freedom of Transit**

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.



3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.
5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

*[Ad Article V*

*Paragraph 5*

*With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.]*

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

#### **Article VI: Anti-dumping and Countervailing Duties**

1. The contracting parties recognise that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
  - (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
  - (b) in the absence of such domestic price, is less than either
    - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
    - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

*[Ad Article VI]*

#### *Paragraph 1*

1. *Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may*

*be calculated on the basis of the price at which the goods are resold by the importer.*

2. *It is recognised that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.]*
2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.
3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

*[Paragraphs 2 and 3*

1. *As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidisation.*
2. *Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met*

*by action under paragraph 2. By "multiple currency practices" is meant practices by governments or sanctioned by governments.]*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.
5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.
6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.  
  
(b) The CONTRACTING PARTIES may waive the requirement of subparagraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting dumping or subsidisation which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of subparagraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.

*[Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*

*Members hereby agree as follows:*

1. *A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.*
2. *Any waiver in effect on the date of entry into force of the WTO Agreement shall terminate, unless extended in accordance with the procedures above and those of Article IX of the WTO Agreement, on the date of its expiry or two years from the date of entry into force of the WTO Agreement, whichever is earlier.]*

*[Paragraph 6 (b)*

*Waivers under the provisions of this subparagraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.]*

- (c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in subparagraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.
7. A system for the stabilisation of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:
- (a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and
  - (b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate

exports unduly or otherwise seriously prejudice the interests of other contracting parties.

### **Article VII: Valuation for Customs Purposes**

1. The contracting parties recognise the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

*[Ad Article VII*

#### *Paragraph 1*

*The expression "or other charges" is not to be regarded as including internal taxes or equivalent charges imposed on or in connection with imported products.]*

2.
  - (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.
  - (b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

- (c) When the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

*[Paragraph 2*

- 1. It would be in conformity with Article VII to presume that "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of "actual value" and plus any abnormal discount or other reduction from the ordinary competitive price.*
- 2. It would be in conformity with Article VII, paragraph 2 (b), for a contracting party to construe the phrase "in the ordinary course of trade ... under fully competitive conditions", as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.*
- 3. The standard of "fully competitive conditions" permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.*
- 4. The wording of subparagraphs (a) and (b) permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.]*
3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.
4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognised by the Fund, or on the

par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

- (b) Where no such established par value and no such recognised rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.
  - (c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the Contracting Parties, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.
  - (d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.
5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

### **Article VIII: Fees and Formalities connected with Importation and Exportation**

*[Ad Article VIII]*

1. *While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if,*



*however, a contracting party is using multiple currency exchange fees for balance of payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9 (a) of Article XV fully safeguard its position.*

2. *It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.]*
1.
  - (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
  - (b) The contracting parties recognise the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).
  - (c) The contracting parties also recognise the need for minimising the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.
2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.
3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:
  - (a) consular transactions, such as consular invoices and certificates;

- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

### **Article IX: Marks of Origin**

1. Each contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.
2. The contracting parties recognise that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.
3. Whenever it is administratively practicable to do so, contracting parties should permit required marks of origin to be affixed at the time of importation.
4. The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.
5. As a general rule, no special duty or penalty should be imposed by any contracting party for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.
6. The contracting parties shall cooperate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a contracting party as are protected by its legislation.

Each contracting party shall accord full and sympathetic consideration to such requests or representations as may be made by any other contracting party regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other contracting party.

## **Article X: Publication and Administration of Trade Regulations**

1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.
2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.
3.
  - (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.
  - (b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review

and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; Provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

- (c) The provisions of subparagraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this subparagraph.

## **Article XI: General Elimination of Quantitative Restrictions**

*[Ad Articles XI, XII, XIII, XIV and XVIII]*

*Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.]<sup>156</sup>*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

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<sup>156</sup> Editor's note: this provision applies to the ECT insofar as it refers to Articles XI, XII, XIII and XIV.

2. The provisions of paragraph 1 of this Article shall not extend to the following:
- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
  - (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
  - (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
    - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
    - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
    - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

*[Ad Article XI*

*Paragraph 2 (c)*

*The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.]*

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall

give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

*[Paragraph 2, last subparagraph*

*The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.]*

## **Article XII: Restrictions to Safeguard the Balance of Payments**

*[Ad Article XII*

*The CONTRACTING PARTIES shall make provision for the utmost secrecy in the conduct of any consultation under the provisions of this Article.]*

1. Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.
2. (a) Import restrictions instituted, maintained or intensified by a contracting party under this Article shall not exceed those necessary:
  - (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves; or
  - (ii) in the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.

Due regard shall be paid in either case to any special factors which may be affecting the reserves of such contracting party or its need for reserves, including, where special external credits or other resources are available to it, the need to provide for the appropriate use of such credits or resources.

- (b) Contracting parties applying restrictions under sub-paragraph (a) of this paragraph shall progressively relax them as such conditions improve, maintaining them only to the extent that the conditions specified in that sub-paragraph still justify their application. They shall eliminate the restrictions when conditions would no longer justify their institution or maintenance under that subparagraph.
3. (a) Contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability of avoiding an uneconomic employment of productive resources. They recognise that, in order to achieve these ends, it is desirable so far as possible to adopt measures which expand rather than contract international trade.
- (b) Contracting parties applying restrictions under this Article may determine the incidence of the restrictions on imports of different products or classes of products in such a way as to give priority to the importation of those products which are more essential.
  - (c) Contracting parties applying restrictions under this Article undertake:
    - (i) to avoid unnecessary damage to the commercial or economic interests of any other contracting party;

*[Paragraph 3 (c)(i)*

*Contracting parties applying restrictions shall endeavour to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent.]*

- (ii) not to apply restrictions so as to prevent unreasonably the importation of any description of goods in minimum commercial quantities the exclusion of which would impair regular channels of trade; and

- (iii) not to apply restrictions which would prevent the importations of commercial samples or prevent compliance with patent, trade mark, copyright, or similar procedures.
  - (d) The contracting parties recognise that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources, a contracting party may experience a high level of demand for imports involving a threat to its monetary reserves of the sort referred to in paragraph 2 (a) of this Article. Accordingly, a contracting party otherwise complying with the provisions of this Article shall not be required to withdraw or modify restrictions on the ground that a change in those policies would render unnecessary restrictions which it is applying under this Article.
- 4.
  - (a) Any contracting party applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures applied under this Article shall immediately after instituting or intensifying such restrictions (or, in circumstances in which prior consultation is practicable, before doing so) consult with the CONTRACTING PARTIES as to the nature of its balance of payments difficulties, alternative corrective measures which may be available, and the possible effect of the restrictions on the economies of other contracting parties.
  - (b) On a date to be determined by them, the CONTRACTING PARTIES shall review all restrictions still applied under this Article on that date. Beginning one year after that date, contracting parties applying import restrictions under this Article shall enter into consultations of the type provided for in subparagraph (a) of this paragraph with the CONTRACTING PARTIES annually.

*[Paragraph 4 (b)]*

*It is agreed that the date shall be within ninety days after the entry into force of the amendments of this Article effected by the Protocol Amending the Preamble and Parts II and III of this Agreement. However, should the CONTRACTING PARTIES find that conditions were not suitable for the application of the provisions of this subparagraph*



*at the time envisaged, they may determine a later date; Provided that such date is not more than thirty days after such time as the obligations of Article VIII, Sections 2, 3 and 4, of the Articles of Agreement of the International Monetary Fund become applicable to contracting parties, members of the Fund, the combined foreign trade of which constitutes at least fifty per centum of the aggregate foreign trade of all contracting parties.]*

- (c) (i) If, in the course of consultations with a contracting party under subparagraph (a) or (b) above, the CONTRACTING PARTIES find that the restrictions are not consistent with provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV), they shall indicate the nature of the inconsistency and may advise that the restrictions be suitably modified.
  - (ii) If, however, as a result of the consultations, the CONTRACTING PARTIES determine that the restrictions are being applied in a manner involving an inconsistency of a serious nature with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that damage to the trade of any contracting party is caused or threatened thereby, they shall so inform the contracting party applying the restrictions and shall make appropriate recommendations for securing conformity with such provisions within the specified period of time. If such contracting party does not comply with these recommendations within the specified period, the CONTRACTING PARTIES may release any contracting party the trade of which is adversely affected by the restrictions from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.
- (d) The CONTRACTING PARTIES shall invite any contracting party which is applying restrictions under this Article to enter into consultations with them at the request of any contracting party which can establish a prima facie case that the restrictions are inconsistent with the provisions of this Article or with those of Article XIII (subject to the provisions of Article XIV) and that its trade is adversely affected thereby. However, no such invitation shall be issued unless the CONTRACTING PARTIES have ascertained that direct discussions between

the contracting parties concerned have not been successful. If, as a result of the consultations with the CONTRACTING PARTIES, no agreement is reached and they determine that the restrictions are being applied inconsistently with such provisions, and that damage to the trade of the contracting party initiating the procedure is caused or threatened thereby, they shall recommend the withdrawal or modification of the restrictions. If the restrictions are not withdrawn or modified within such time as the CONTRACTING PARTIES may prescribe, they may release the contracting party initiating the procedure from such obligations under this Agreement towards the contracting party applying the restrictions as they determine to be appropriate in the circumstances.

- (e) In proceeding under this paragraph, the CONTRACTING PARTIES shall have due regard to any special external factors adversely affecting the export trade of the contracting party applying the restrictions.

*[Paragraph 4 (e)*

*It is agreed that paragraph 4 (e) does not add any new criteria for the imposition or maintenance of quantitative restrictions for balance of payments reasons. It is solely intended to ensure that all external factors such as changes in the terms of trade, quantitative restrictions, excessive tariffs and subsidies, which may be contributing to the balance of payments difficulties of the contracting party applying restrictions, will be fully taken into account.]*

- (f) Determinations under this paragraph shall be rendered expeditiously and, if possible, within sixty days of the initiation of the consultations.
5. If there is a persistent and widespread application of import restrictions under this Article, indicating the existence of a general disequilibrium which is restricting international trade, the CONTRACTING PARTIES shall initiate discussions to consider whether other measures might be taken, either by those contracting parties the balance of payments of which are under pressure or by those the balance of payments of which are tending to be exceptionally favourable, or by any appropriate intergovernmental organisation, to remove the underlying causes

of the disequilibrium. On the invitation of the CONTRACTING PARTIES, contracting parties shall participate in such discussions.

*[Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*

*Members,*

*Recognising the provisions of Articles XII and XVIII:B of GATT 1994 and of the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209, referred to in this Understanding as the "1979 Declaration") and in order to clarify such provisions;<sup>157</sup>*

*Hereby agree as follows:*

#### *Application of Measures*

- 1. Members confirm their commitment to announce publicly, as soon as possible, time-schedules for the removal of restrictive import measures taken for balance-of-payments purposes. It is understood that such time-schedules may be modified as appropriate to take into account changes in the balance-of-payments situation. Whenever a time-schedule is not publicly announced by a Member, that Member shall provide justification as to the reasons therefor.*
- 2. Members confirm their commitment to give preference to those measures which have the least disruptive effect on trade. Such measures (referred to in this Understanding as "price-based measures") shall be understood to include import surcharges, import deposit requirements or other equivalent trade measures with an impact on the price of imported goods. It is understood that, notwithstanding the provisions of Article II, price-based measures taken for balance-of-payments purposes may be applied by a Member in excess of the duties inscribed in the Schedule of that Member. Furthermore, that Member shall indicate the amount by which the price-based measure exceeds the bound*

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157 Nothing in this Understanding is intended to modify the rights and obligations of Members under Articles XII or XVIII:B of GATT 1994. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to any matters arising from the application of restrictive import measures taken for balance-of-payments purposes.

*duty clearly and separately under the notification procedures of this Understanding.*

- 3. Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes unless, because of a critical balance-of-payments situation, price-based measures cannot arrest a sharp deterioration in the external payments position. In those cases in which a Member applies quantitative restrictions, it shall provide justification as to the reasons why price-based measures are not an adequate instrument to deal with the balance-of-payments situation. A Member maintaining quantitative restrictions shall indicate in successive consultations the progress made in significantly reducing the incidence and restrictive effect of such measures. It is understood that not more than one type of restrictive import measure taken for balance-of-payments purposes may be applied on the same product.*
- 4. Members confirm that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports and may not exceed what is necessary to address the balance-of-payments situation. In order to minimise any incidental protective effects, a Member shall administer restrictions in a transparent manner. The authorities of the importing Member shall provide adequate justification as to the criteria used to determine which products are subject to restriction. As provided in paragraph 3 of Article XII and paragraph 10 of Article XVIII, Members may, in the case of certain essential products, exclude or limit the application of surcharges applied across the board or other measures applied for balance-of-payments purposes. The term "essential products" shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production. In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values.*

### *Procedures for Balance-of-Payments Consultations*

5. *... The Committee shall follow the procedures for consultations on balance-of-payments restrictions approved on 28 April 1970 (BISD 18S/48-53, referred to in this Understanding as "full consultation procedures"), subject to the provisions set out below.]*
6. *A Member applying new restrictions or raising the general level of its existing restrictions by a substantial intensification of the measures shall enter into consultations with the Committee within four months of the adoption of such measures. The Member adopting such measures may request that a consultation be held under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII as appropriate. If no such request has been made, the Chairman of the Committee shall invite the Member to hold such a consultation. Factors that may be examined in the consultation would include, inter alia, the introduction of new types of restrictive measures for balance-of-payments purposes, or an increase in the level or product coverage of restrictions.*
7. *All restrictions applied for balance-of-payments purposes shall be subject to periodic review in the Committee under paragraph 4(b) of Article XII ..., subject to the possibility of altering the periodicity of consultations in agreement with the consulting Member or pursuant to any specific review procedure that may be recommended by the General Council.*

### *Notification and Documentation*

9. *A Member shall notify to the General Council the introduction of or any changes in the application of restrictive import measures taken for balance-of-payments purposes, as well as any modifications in time-schedules for the removal of such measures as announced under paragraph 1. Significant changes shall be notified to the General Council prior to or not later than 30 days after their announcement. On a yearly basis, each Member shall make available to the Secretariat a consolidated notification, including all changes in laws, regulations, policy statements or public notices, for examination by Members. Notifications shall include full information, as far as possible, at the tariff-line level, on the type of measures applied, the criteria used for their administration, product coverage and trade flows affected.*

10. *At the request of any Member, notifications may be reviewed by the Committee. Such reviews would be limited to the clarification of specific issues raised by a notification or examination of whether a consultation under paragraph 4(a) of Article XII or paragraph 12(a) of Article XVIII is required. Members which have reasons to believe that a restrictive import measure applied by another Member was taken for balance-of-payments purposes may bring the matter to the attention of the Committee. The Chairman of the Committee shall request information on the measure and make it available to all Members. Without prejudice to the right of any member of the Committee to seek appropriate clarifications in the course of consultations, questions may be submitted in advance for consideration by the consulting Member.*
11. *The consulting Member shall prepare a Basic Document for the consultations which, in addition to any other information considered to be relevant, should include: (a) an overview of the balance-of-payments situation and prospects, including a consideration of the internal and external factors having a bearing on the balance-of-payments situation and the domestic policy measures taken in order to restore equilibrium on a sound and lasting basis; (b) a full description of the restrictions applied for balance-of-payments purposes, their legal basis and steps taken to reduce incidental protective effects; (c) measures taken since the last consultation to liberalise import restrictions, in the light of the conclusions of the Committee; (d) a plan for the elimination and progressive relaxation of remaining restrictions. References may be made, when relevant, to the information provided in other notifications or reports made to the WTO. Under simplified consultation procedures, the consulting Member shall submit a written statement containing essential information on the elements covered by the Basic Document.*
12. *The Secretariat shall, with a view to facilitating the consultations in the Committee, prepare a factual background paper dealing with the different aspects of the plan for consultations. In the case of developing country Members, the Secretariat document shall include relevant background and analytical material on the incidence of the external trading environment on the balance-of-payments situation and prospects of the consulting Member. The technical assistance services of the Secretariat shall, at the*

*request of a developing country Member, assist in preparing the documentation for the consultations.*

#### *Conclusions of Balance-of-Payments Consultations*

13. ... . *When full consultation procedures have been used, the report should indicate the Committee's conclusions on the different elements of the plan for consultations, as well as the facts and reasons on which they are based. The Committee shall endeavour to include in its conclusions proposals for recommendations aimed at promoting the implementation of Articles XII ... and this Understanding. In those cases in which a time-schedule has been presented for the removal of restrictive measures taken for balance-of-payments purposes, the General Council may recommend that, in adhering to such a time-schedule, a Member shall be deemed to be in compliance with its GATT 1994 obligations. Whenever the General Council has made specific recommendations, the rights and obligations of Members shall be assessed in the light of such recommendations. In the absence of specific proposals for recommendations by the General Council, the Committee's conclusions should record the different views expressed in the Committee. ... .]*

#### **Article XIII: Non-discriminatory Administration of Quantitative Restrictions**

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:
  - (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying



countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;

- (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences or permits be utilised for the importation of the product concerned from a particular country or source;
- (d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilising fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

*[Ad Article XIII*

*Paragraph 2 (d)*

*No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.]*



3.
  - (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; Provided that there shall be no obligation to supply information as to the names of importing or supplying enterprises.
  - (b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were en route at the time at which public notice was given shall not be excluded from entry; Provided that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and Provided further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.
  - (c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.
4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the contracting party applying the restriction; Provided that such contracting party shall, upon the request of any other contracting party having a substantial interest in

supplying that product or upon the request of the CONTRACTING PARTIES, consult promptly with the other contracting party or the CONTRACTING PARTIES regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilisation.

*[Paragraph 4*

*See note relating to "special factors" in connection with the last subparagraph of paragraph 2 of Article XI.]*

5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions.

#### **Article XIV: Exceptions to the Rule of Non-discrimination**

1. A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may, in the application of such restrictions, deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund, or under analogous provisions of a special exchange agreement entered into pursuant to paragraph 6 of Article XV.

*[Ad Article XIV*

*Paragraph 1*

*The provisions of this paragraph shall not be so construed as to preclude full consideration by the CONTRACTING PARTIES, in the consultations provided for in paragraph 4 of Article XII and in paragraph 12 of Article XVIII, of the nature, effects and reasons for discrimination in the field of import restrictions.]*

2. A contracting party which is applying import restrictions under Article XII or under Section B of Article XVIII may, with the consent of the CONTRACTING PARTIES, temporarily deviate from the

provisions of Article XIII in respect of a small part of its external trade where the benefits to the contracting party or contracting parties concerned substantially outweigh any injury which may result to the trade of other contracting parties.

*[Paragraph 2*

*One of the situations contemplated in paragraph 2 is that of a contracting party holding balances acquired as a result of current transactions which it finds itself unable to use without a measure of discrimination.]*

3. The provisions of Article XIII shall not preclude a group of territories having a common quota in the International Monetary Fund from applying against imports from other countries, but not among themselves, restrictions in accordance with the provisions of Article XII or of Section B of Article XVIII on condition that such restrictions are in all other respects consistent with the provisions of Article XIII.
4. A contracting party applying import restrictions under Article XII or under Section B of Article XVIII shall not be precluded by Articles XI to XV or Section B of Article XVIII of this Agreement from applying measures to direct its exports in such a manner as to increase its earnings of currencies which it can use without deviation from the provisions of Article XIII.
5. A contracting party shall not be precluded by Articles XI to XV, inclusive, or by Section B of Article XVIII, of this Agreement from applying quantitative restrictions:
  - (a) having equivalent effect to exchange restrictions authorised under Section 3 (b) of Article VII of the Articles of Agreement of the International Monetary Fund, or
  - (b) under the preferential arrangements provided for in Annex A of this Agreement, pending the outcome of the negotiations referred to therein.

### **Article XVI: Subsidies**

*[Ad Article XVI*

*The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the*

*remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.]*

## **Section A - Subsidies in General**

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidisation, of the estimated effect of the subsidisation on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidisation necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidisation, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidisation.

## **Section B - Additional Provisions on Export Subsidies**

*[Section B*

1. *Nothing in Section B shall preclude the use by a contracting party of multiple rates of exchange in accordance with the Articles of Agreement of the International Monetary Fund.*
2. *For the purposes of Section B, a "primary product" is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.]*
2. The contracting parties recognise that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
3. Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy

which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

*[Paragraph 3*

1. *The fact that a contracting party has not exported the product in question during the previous representative period would not in itself preclude that contracting party from establishing its right to obtain a share of the trade in the product concerned.*
2. *A system for the stabilisation of the domestic price or of the return to domestic producers of a primary product independently of the movements of export prices, which results at times in the sale of the product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market, shall be considered not to involve a subsidy on exports within the meaning of paragraph 3 if the CONTRACTING PARTIES determine that:*
  - (a) *the system has also resulted, or is so designed as to result, in the sale of the product for export at a price higher than the comparable price charged for the like product to buyers in the domestic market; and*
  - (b) *the system is so operated, or is designed so to operate, either because of the effective regulation of production or otherwise, as not to stimulate exports unduly or otherwise seriously to prejudice the interests of other contracting parties.*

*Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned.]*

4. Further, as from 1 January 1958 or the earliest practicable date thereafter, contracting parties shall cease to grant either directly

or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market. Until 31 December 1957 no contracting party shall extend the scope of any such subsidisation beyond that existing on 1 January 1955 by the introduction of new, or the extension of existing, subsidies.

*[Paragraph 4*

*The intention of paragraph 4 is that the contracting parties should seek before the end of 1957 to reach agreement to abolish all remaining subsidies as from 1 January 1958; or, failing this, to reach agreement to extend the application of the standstill until the earliest date thereafter by which they can expect to reach such agreement.]*

5. The CONTRACTING PARTIES shall review the operation of the provisions of this Article from time to time with a view to examining its effectiveness, in the light of actual experience, in promoting the objectives of this Agreement and avoiding subsidisation seriously prejudicial to the trade or interests of contracting parties.

**Article XVII: State Trading Enterprises**

1. (a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

*[Ad Article XVII*

*Paragraph 1*

*The operations of Marketing Boards, which are established by contracting parties and are engaged in purchasing or selling, are subject to the provisions of subparagraphs (a) and (b).*

*The activities of Marketing Boards which are established by contracting parties and which do not purchase or sell but lay down*

*regulations covering private trade are governed by the relevant Articles of this Agreement.*

*The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.*

*Paragraph 1 (a)*

*Governmental measures imposed to insure standards of quality and efficiency in the operation of external trade, or privileges granted for the exploitation of national natural resources but which do not empower the government to exercise control over the trading activities of the enterprise in question, do not constitute "exclusive or special privileges".]*

- (b) The provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

*[Paragraph 1 (b)*

*A country receiving a "tied loan" is free to take this loan into account as a "commercial consideration" when purchasing requirements abroad.]*

- (c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.
2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the

production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

*[Paragraph 2*

*The term "goods" is limited to products as understood in commercial practice, and is not intended to include the purchase or sale of services.]*

3. The contracting parties recognise that enterprises of the kind described in paragraph 1 (a) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.

*[Paragraph 3*

*Negotiations which contracting parties agree to conduct under this paragraph may be directed towards the reduction of duties and other charges on imports and exports or towards the conclusion of any other mutually satisfactory arrangement consistent with the provisions of this Agreement. (See paragraph 4 of Article II and the note to that paragraph.)]*

4.
  - (a) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (a) of this Article.
  - (b) A contracting party establishing, maintaining or authorising an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

*[Paragraph 4 (b)*

*The term "import mark-up" in this paragraph shall represent the margin by which the price charged by the import monopoly for the*



*imported product (exclusive of internal taxes within the purview of Article III, transportation, distribution, and other expenses incident to the purchase, sale or further processing, and a reasonable margin of profit) exceeds the landed cost.]*

- (c) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (a), request the contracting party establishing, maintaining or authorising such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.
- (d) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

*[Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*

*Members,*

*Noting that Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which are required to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders;*

*Noting further that Members are subject to their GATT 1994 obligations in respect of those governmental measures affecting state trading enterprises;*

*Recognising that this Understanding is without prejudice to the substantive disciplines prescribed in Article XVII;*

*Hereby agree as follows:*

1. *In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council*

*for Trade in Goods, ... , in accordance with the following working definition:*

*“Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”*

*This notification requirement does not apply to imports of products for immediate or ultimate consumption in governmental use or in use by an enterprise as specified above and not otherwise for resale or use in the production of goods for sale.*

- 2. Each Member shall conduct a review of its policy with regard to the submission of notifications on state trading enterprises to the Council for Trade in Goods, taking account of the provisions of this Understanding. In carrying out such a review, each Member should have regard to the need to ensure the maximum transparency possible in its notifications so as to permit a clear appreciation of the manner of operation of the enterprises notified and the effect of their operations on international trade.*
- 3. Notifications shall be made in accordance with the questionnaire on state trading adopted on 24 May 1960 (BISD 9S/184-185), it being understood that Members shall notify the enterprises referred to in paragraph 1 whether or not imports or exports have in fact taken place.*
- 4. Any Member which has reason to believe that another Member has not adequately met its notification obligation may raise the matter with the Member concerned. If the matter is not satisfactorily resolved it may make a counter-notification to the Council for Trade in Goods, for consideration by the working party set up under paragraph 5, simultaneously informing the Member concerned.]*

## **Article XIX: Emergency Action on Imports of Particular Products**

1.
  - (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this

- Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
- (b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.
2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.
- 3.
- (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than

ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

- (b) Notwithstanding the provisions of subparagraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

### **Article XX: General Exceptions**

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;

- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

*[Ad Article XX*

*Subparagraph (h)*

*The exception provided for in this subparagraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947.]*

- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilisation plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

## **Article XXI: Security Exceptions**

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

## **PART III**

### **Article XXIV: Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas**

1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; Provided that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.
3. The provisions of this Agreement shall not be construed to prevent:
  - (a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;
  - (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.
4. The contracting parties recognise the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.
5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:
  - (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
  - (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and

other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

- (c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

7.

- (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
- (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.
- (c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardise



or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:
- (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
    - (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
    - (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;
  - (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.
9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected. This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

*[Ad Article XXIV*

*Paragraph 9*

*It is understood that the provisions of Article I would require that, when a product which has been imported into the territory of a member of a customs union or free-trade area at a preferential rate of duty is re-*

*exported to the territory of another member of such union or area, the latter member should collect a duty equal to the difference between the duty already paid and any higher duty that would be payable if the product were being imported directly into its territory.]*

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.
11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognising the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.

*[Paragraph 11*

*Measures adopted by India and Pakistan in order to carry out definitive trade arrangements between them, once they have been agreed upon, might depart from particular provisions of this Agreement, but these measures would in general be consistent with the objectives of the Agreement.]*

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

*[Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*

*Article XXIV:12*

13. *Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory.]*

## Article XXXIV: Annexes

The annexes to this Agreement are hereby made an integral part of this Agreement.

### ANNEX A: LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (a) OF ARTICLE I

United Kingdom of Great Britain and Northern Ireland

Dependent territories of the United Kingdom of Great Britain and Northern Ireland

Canada

Commonwealth of Australia

Dependent territories of the Commonwealth of Australia

New Zealand

Dependent territories of New Zealand

Union of South Africa including South West Africa

Ireland

India (as on April 10, 1947)

Newfoundland

Southern Rhodesia

Burma

Ceylon

Certain of the territories listed above have two or more preferential rates in force for certain products. Any such territory may, by agreement with the other contracting parties which are principal suppliers of such products at the most-favoured-nation rate, substitute for such preferential rates a single preferential rate which shall not on the whole be less favourable to suppliers at the most-favoured-nation rate than the preferences in force prior to such substitution.

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on April 10, 1947 exclusively between two or more of the territories listed in this Annex or to replace the preferential quantitative arrangements described in the following paragraph, shall not be deemed to constitute an increase in a margin of tariff preference.

The preferential arrangements referred to in paragraph 5 (b) of Article XIV are those existing in the United Kingdom on 10 April 1947, under contractual agreements with the Governments of Canada, Australia and New Zealand, in respect of chilled and frozen beef and veal, frozen mutton and lamb, chilled and frozen pork and bacon. It is the intention, without prejudice to any action taken under subparagraph (h)<sup>158</sup> of Article XX, that these arrangements shall be eliminated or replaced by tariff preferences, and that negotiations to this end shall take place as soon as practicable among the countries substantially concerned or involved.

The film hire tax in force in New Zealand on 10 April 1947, shall, for the purposes of this Agreement, be treated as a customs duty under Article I. The renters' film quota in force in New Zealand on April 10, 1947, shall, for the purposes of this Agreement, be treated as a screen quota under Article IV.

The Dominions of India and Pakistan have not been mentioned separately in the above list since they had not come into existence as such on the base date of April 10, 1947.

## **ANNEX B: LIST OF TERRITORIES OF THE FRENCH UNION REFERRED TO IN PARAGRAPH 2 (b) OF ARTICLE I**

France

French Equatorial Africa (Treaty Basin of the Congo<sup>159</sup> and other territories)

French West Africa

Cameroons under French Trusteeship<sup>8</sup>

French Somali Coast and Dependencies

French Establishments in Oceania

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<sup>158</sup> The authentic text erroneously reads "part I (h)".

<sup>159</sup> For imports into Metropolitan France and Territories of the French Union.

French Establishments in the Condominium of the New Hebrides<sup>8</sup>

Indo-China

Madagascar and Dependencies

Morocco (French zone)<sup>8</sup>

New Caledonia and Dependencies

Saint-Pierre and Miquelon

Togo under French Trusteeship<sup>8</sup>

Tunisia

**ANNEX C: LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (b)  
OF ARTICLE I AS RESPECTS THE CUSTOMS UNION OF BELGIUM,  
LUXEMBURG AND THE NETHERLANDS**

The Economic Union of Belgium and Luxemburg

Belgian Congo

Ruanda Urundi

Netherlands

New Guinea

Surinam

Netherlands Antilles

Republic of Indonesia

For imports into the territories constituting the Customs Union only.

**ANNEX D: LIST OF TERRITORIES REFERRED TO IN PARAGRAPH 2 (b)  
OF ARTICLE I AS RESPECTS THE UNITED STATES OF AMERICA**

United States of America (customs territory)

Dependent territories of the United States of America

Republic of the Philippines

The imposition of an equivalent margin of tariff preference to replace a margin of preference in an internal tax existing on 10 April, 1947, exclusively between two or more of the territories listed in this Annex shall not be deemed to constitute an increase in a margin of tariff preference.

**ANNEX E: LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN CHILE AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (d) OF ARTICLE I**

Preferences in force exclusively between Chile on the one hand, and

1. Argentina
2. Bolivia
3. Peru

on the other hand.

**ANNEX F: LIST OF TERRITORIES COVERED BY PREFERENTIAL ARRANGEMENTS BETWEEN LEBANON AND SYRIA AND NEIGHBOURING COUNTRIES REFERRED TO IN PARAGRAPH 2 (d) OF ARTICLE I**

Preferences in force exclusively between the Lebano-Syrian Customs Union, on the one hand, and

1. Palestine
2. Transjordan

on the other hand.

**ANNEX G: DATES ESTABLISHING MAXIMUM MARGINS OF PREFERENCE REFERRED TO IN PARAGRAPH 4<sup>160</sup> OF ARTICLE I**

Australia..... October 15, 1946

Canada ..... July 1, 1939

France.....January 1, 1939

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160 The authentic text erroneously reads "Paragraph 3".

Lebano-Syrian Customs Union .....	November 30, 1938
Union of South Africa.....	July 1, 1938
Southern Rhodesia .....	May 1, 1941

## ANNEX I: NOTES AND SUPPLEMENTARY PROVISIONS<sup>161</sup>

### (ii) Agreement on Technical Barriers to Trade

*[Members,*

*... ;*

*Desiring to further the objectives of GATT 1994;*

*Recognising the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;*

*Desiring therefore to encourage the development of such international standards and conformity assessment systems;*

*Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;*

*Recognising that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;*

161 Editor's note: Annex I applies insofar as it refers to the WTO provisions applicable to the ECT. Text of Annex I is inserted in italics in square brackets after articles, to which the Notes and Supplementary Provisions of Annex I relate.

*Recognising that no country should be prevented from taking measures necessary for the protection of its essential security interest;*

*...;*

*...;*

*Hereby agree as follows:]*

### **Article 1: General Provisions**

- 1.1 General terms for standardisation and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardising bodies taking into account their context and in the light of the object and purpose of this Agreement.
- 1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.
- 1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.
- 1.5 The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.
- 1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

### **TECHNICAL REGULATIONS AND STANDARDS**

#### **Article 2: Preparation, Adoption and Application of Technical Regulations by Central Government Bodies**

With respect to their central government bodies:



- 2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.
- 2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.
- 2.3 Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.
- 2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
- 2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

- 2.6 With a view to harmonising technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardising bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.
- 2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.
- 2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.
- 2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:
- 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
  - 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
  - 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
  - 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

- 2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:
- 2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;
  - 2.10.2 upon request, provide other Members with copies of the technical regulation;
  - 2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
- 2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.
- 2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

### **Article 3: Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies**

With respect to their local government and non-governmental bodies within their territories:

- 3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

- 3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.
- 3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.
- 3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.
- 3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

#### **Article 4: Preparation, Adoption and Application of Standards**

- 4.1 Members shall ensure that their central government standardising bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardising bodies within their territories, as well as regional standardising bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardising bodies with the provisions of the Code of Good Practice shall apply

irrespective of whether or not a standardising body has accepted the Code of Good Practice.

- 4.2 Standardising bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

## CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

### Article 5: Procedures for Assessment of Conformity by Central Government Bodies

- 5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:

- 5.1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;

- 5.1.2 conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, inter alia, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

- 5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

- 5.2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less

- favourable order for products originating in the territories of other Members than for like domestic products;
- 5.2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
- 5.2.3 information requirements are limited to what is necessary to assess conformity and determine fees;
- 5.2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;
- 5.2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;
- 5.2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;
- 5.2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to

the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;

- 5.2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.
- 5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.
- 5.4 In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardising bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.
- 5.5 With a view to harmonising conformity assessment procedures on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardising bodies of guides and recommendations for conformity assessment procedures.
- 5.6 Whenever a relevant guide or recommendation issued by an international standardising body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardising bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:
  - 5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they

- propose to introduce a particular conformity assessment procedure;
- 5.6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- 5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardising bodies;
- 5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
- 5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:
- 5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;
- 5.7.2 upon request, provide other Members with copies of the rules of the procedure;
- 5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
- 5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.



- 5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

## **Article 6: Recognition of Conformity Assessment by Central Government Bodies**

With respect to their central government bodies:

- 6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognised that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:
- 6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardising bodies shall be taken into account as an indication of adequate technical competence;
  - 6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.
- 6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.
- 6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's

conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

- 6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

### **Article 7: Procedures for Assessment of Conformity by Local Government Bodies**

With respect to their local government bodies within their territories:

- 7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.
- 7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.
- 7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.
- 7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.
- 7.5 Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

## **Article 8: Procedures for Assessment of Conformity by Non-Governmental Bodies**

- 8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.
- 8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

## **Article 9: International and Regional Systems**

- 9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.
- 9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.
- 9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

## INFORMATION AND ASSISTANCE

### Article 10: Information About Technical Regulations, Standards and Conformity Assessment Procedures

- 10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:
  - 10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardising bodies of which such bodies are members or participants;
  - 10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardising bodies of which such bodies are members or participants;
  - 10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;
  - 10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardising bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;
  - 10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and
  - 10.1.6 the location of the enquiry points mentioned in paragraph 3.
- 10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous

information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

- 10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:
- 10.3.1 any standards adopted or proposed within its territory by non-governmental standardising bodies, or by regional standardising bodies of which such bodies are members or participants; and
  - 10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;
  - 10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardising bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.
- 10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals<sup>162</sup> of the Member concerned or of any other Member.
- 10.5 ... Members shall, if requested by other Members, provide, in English or<sup>163</sup> Russian translations of the documents covered by

162 "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

163 Editor's note: "or" added; TBT Agreement states: "English, French or Spanish".

a specific notification or, in case of voluminous documents, of summaries of such documents.

- 10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardising and conformity assessment bodies, ... .
- 10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.
- 10.8 Nothing in this Agreement shall be construed as requiring:
  - 10.8.1 the publication of texts other than in the language of the Member;
  - 10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or
  - 10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.
- 10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.
- 10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

## FINAL PROVISIONS

### Article 15: Final Provisions

#### Review

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

#### Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

### ANNEX 1: TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardisation and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

*Explanatory note*

The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called “building block” system.

2. Standard

Document approved by a recognised body, that provides, for common and repeated use, rules, guidelines or characteristics for products or

related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

*Explanatory note*

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardisation community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. Conformity assessment procedures

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

*Explanatory note*

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. International body or system

Body or system whose membership is open to the relevant bodies of at least all Members.

5. Regional body or system

Body or system whose membership is open to the relevant bodies of only some of the Members.

6. Central government body

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.



### *Explanatory note*

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

#### 7. Local government body

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

#### 8. Non-governmental body

Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

## **ANNEX 3: CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS**

### **General Provisions**

- A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.
- B. This Code is open to acceptance by any standardising body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardising body one or more members of which are Members of the WTO; and to any non-governmental regional standardising body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as “standardising bodies” and individually as “the standardising body”).
- C. Standardising bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardisation activities. The notification may be sent either

directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

## **SUBSTANTIVE PROVISIONS**

- D. In respect of standards, the standardising body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.
- E. The standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.
- F. Where international standards exist or their completion is imminent, the standardising body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.
- G. With a view to harmonising standards on as wide a basis as possible, the standardising body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardising bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardising bodies within the territory of a Member, participation in a particular international standardisation activity shall, whenever possible, take place through one delegation representing all standardising bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardisation activity relates.
- H. The standardising body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardising bodies in the national territory or with the work of relevant international or regional standardising bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardising body shall make every effort to avoid duplication of,

or overlap with, the work of relevant international standardising bodies.

- I. Wherever appropriate, the standardising body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.
- J. At least once every six months, the standardising body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardisation activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardising body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardising body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

- K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardising bodies shall make every effort to associate themselves with the ISONET member.
- L. Before adopting a standard, the standardising body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a

Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardising body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

- M. On the request of any interested party within the territory of a Member of the WTO, the standardising body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.
- N. The standardising body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardising bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.
- O. Once the standard has been adopted, it shall be promptly published.
- P. On the request of any interested party within the territory of a Member of the WTO, the standardising body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.
- Q. The standardising body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardising bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

**(iii) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994**

*[Members hereby agree as follows:]*

## PART I

### Article 1: Principles

An anti dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated<sup>164</sup> and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti dumping legislation or regulations.

### Article 2: Determination of Dumping

- 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
- 2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country,<sup>165</sup> such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
- 2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus

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164 The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

165 Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 percent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities<sup>166</sup> determine that such sales are made within an extended period of time<sup>167</sup> in substantial quantities<sup>168</sup> and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilised by the exporter or producer, in particular in relation to establishing appropriate amortisation and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub paragraph, costs shall be adjusted appropriately for those non recurring items of cost which benefit future and/or current production, or for circumstances in which costs

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166 When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

167 The extended period of time should normally be one year but shall in no case be less than six months.

168 Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 percent of the volume sold in transactions under consideration for the determination of the normal value.

during the period of investigation are affected by start up operations.<sup>169</sup>

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

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169 The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.<sup>170</sup> In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale,<sup>171</sup> provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A

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170 It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

171 Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.



normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.

- 2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.
- 2.6 Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.
- 2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

### **Article 3: Determination of Injury<sup>172</sup>**

- 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

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172 Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

- 3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
- 3.3 Where imports of a product from more than one country are simultaneously subject to anti dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.
- 3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
- 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination

of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

- 3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.
- 3.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.<sup>173</sup> In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:
- (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
  - (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

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173 One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

3.8 With respect to cases where injury is threatened by dumped imports, the application of anti dumping measures shall be considered and decided with special care.

#### **Article 4: Definition of Domestic Industry**

4.1 For the purposes of this Agreement, the term “domestic industry” shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

- (i) when producers are related<sup>174</sup> to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the

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174 For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

- 4.2 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti dumping duties shall be levied<sup>175</sup> only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of anti dumping duties on such a basis, the importing Member may levy the anti dumping duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.
- 4.3 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraph 1.
- 4.4 The provisions of paragraph 6 of Article 3 shall be applicable to this Article.

### **Article 5: Initiation and Subsequent Investigation**

- 5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.
- 5.2 An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered

<sup>175</sup> As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;
- (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an

examination of the degree of support for, or opposition to, the application expressed<sup>176</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>177</sup> The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry.

- 5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.
- 5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.
- 5.7 The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.
- 5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient

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176 In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

177 Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be de minimis if this margin is less than 2 percent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 percent of imports of the like product in the importing Member, unless countries which individually account for less than 3 percent of the imports of the like product in the importing Member collectively account for more than 7 percent of imports of the like product in the importing Member.

- 5.9 An anti dumping proceeding shall not hinder the procedures of customs clearance.
- 5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

### **Article 6: Evidence**

- 6.1 All interested parties in an anti dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
  - 6.1.1 Exporters or foreign producers receiving questionnaires used in an anti dumping investigation shall be given at least 30 days for reply.<sup>178</sup> Due consideration should be given to any request for an extension of the 30 day period and, upon cause shown, such an extension should be granted whenever practicable.
  - 6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one

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<sup>178</sup> As a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.



interested party shall be made available promptly to other interested parties participating in the investigation.

- 6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters<sup>179</sup> and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.
- 6.2 Throughout the anti dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.
- 6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.
- 6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti dumping investigation, and to prepare presentations on the basis of this information.
- 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

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179 It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

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.<sup>180</sup>

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 summarisation 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 authorise its disclosure in generalised 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.<sup>181</sup>

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph

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180 Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

181 Members agree that requests for confidentiality should not be arbitrarily rejected.

- 9, to the firms to which they pertain and may make such results available to the applicants.
- 6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.
- 6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.
- 6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
- 6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.
- 6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

- 6.11 For the purposes of this Agreement, “interested parties” shall include:
- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
  - (ii) the government of the exporting Member; and
  - (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

- 6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organisations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.
- 6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.
- 6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

### **Article 7: Provisional Measures**

- 7.1 Provisional measures may be applied only if:
- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
  - (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.
- 7.2 Provisional measures may take the form of a provisional duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.
- 7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.
- 7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.
- 7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

### **Article 8: Price Undertakings**

- 8.1 Proceedings may<sup>182</sup> be suspended or terminated without the imposition of provisional measures or anti dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less

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182 The word “may” shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

- 8.2 Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping.
- 8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.
- 8.4 If an undertaking is accepted, the investigation of dumping and injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a negative determination of dumping or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of a price undertaking. In such cases, the authorities may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of dumping and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.
- 8.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realised if the dumped imports continue.
- 8.6 Authorities of an importing Member may require any exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application

of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

## **Article 9: Imposition and Collection of Anti Dumping Duties**

- 9.1 The decision whether or not to impose an anti dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.
- 9.2 When an anti dumping duty is imposed in respect of any product, such anti dumping duty shall be collected in the appropriate amounts in each case, on a non discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.
- 9.3 The amount of the anti dumping duty shall not exceed the margin of dumping as established under Article 2.
- 9.3.1 When the amount of the anti dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti

dumping duty has been made.<sup>183</sup> Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

9.3.2 When the amount of the anti dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti dumping duty. The refund authorised should normally be made within 90 days of the above noted decision.

9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti dumping duties paid when conclusive evidence of the above is provided.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of

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<sup>183</sup> It is understood that the observance of the time limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.



the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and de minimis margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

- 9.5 If a product is subject to anti dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti dumping duties can be levied retroactively to the date of the initiation of the review.

### **Article 10: Retroactivity**

- 10.1 Provisional measures and anti dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.
- 10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury,

anti dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

- 10.3 If the definitive anti dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.
- 10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.
- 10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.
- 10.6 A definitive anti dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:
- (i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and
  - (ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.
- 10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti dumping duties retroactively, as

provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

- 10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

### **Article 11: Duration and Review of Anti Dumping Duties and Price Undertakings**

- 11.1 An anti dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.
- 11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.<sup>184</sup> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti dumping duty is no longer warranted, it shall be terminated immediately.
- 11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>185</sup> The duty may remain in force pending the outcome of such a review.

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184 A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

185 When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article

- 11.4 The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.
- 11.5 The provisions of this Article shall apply mutatis mutandis to price undertakings accepted under Article 8.

## **Article 12: Public Notice and Explanation of Determinations**

- 12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.
- 12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report,<sup>186</sup> adequate information on the following:
- (i) the name of the exporting country or countries and the product involved;
  - (ii) the date of initiation of the investigation;
  - (iii) the basis on which dumping is alleged in the application;
  - (iv) a summary of the factors on which the allegation of injury is based;
  - (v) the address to which representations by interested parties should be directed;
  - (vi) the time limits allowed to interested parties for making their views known.
- 12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive

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9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

186 Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public.

anti dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
- (ii) a description of the product which is sufficient for customs purposes;
- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
- (iv) considerations relevant to the injury determination as set out in Article 3;
- (v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain

the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non confidential part of this undertaking.

12.3 The provisions of this Article shall apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

### **Article 13: Judicial Review**

Each Member whose national legislation contains provisions on anti dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

### **Article 14: Anti-Dumping Action on Behalf of a Third Country**

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of

the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

- 14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

### PART III

#### Article 18: Final Provisions

- 18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>187</sup>
- 18.3 Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.
- 18.3.1 With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.
- 18.3.2 For the purposes of paragraph 3 of Article 11, existing anti dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.
- 18.4 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

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<sup>187</sup> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

- 18.5 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.
- 18.7 The Annexes to this Agreement constitute an integral part thereof.

**ANNEX I: PROCEDURES FOR ON THE SPOT INVESTIGATIONS  
PURSUANT TO PARAGRAPH 7 OF ARTICLE 6**

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on the spot investigations.
2. If in exceptional circumstances it is intended to include non governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.
4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
5. Sufficient advance notice should be given to the firms in question before the visit is made.
6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the Member in question and (b) the latter do not object to the visit.
7. As the main purpose of the on the spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this



should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on the spot investigation should, whenever possible, be answered before the visit is made.

## **ANNEX II: BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6**

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.
2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerised response if the interested party does not maintain computerised accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerised accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.
3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where

applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.
5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.
6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.
7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

**(iv) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994**

[GENERAL INTRODUCTORY COMMENTARY

1. *The primary basis for customs value under this Agreement is “transaction value” as defined in Article 1. Article 1 is to be read together with Article 8 which provides, inter alia, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money. Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1.*
2. *Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.*
3. *Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because*

*of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.*

- 4. Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.]*

*[Members,*

*Having regard to the Multilateral Trade Negotiations;*

*Desiring to further the objectives of GATT ...;*

*Recognising the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;*

*Recognising the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values;*

*Recognising that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued;*

*Recognising that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply;*

*Recognising that valuation procedures should not be used to combat dumping;*

*Hereby agree as follows:]*

## **PART I: RULES ON CUSTOMS VALUATION**

### **Article 1**

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

- (a) that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:
    - (i) are imposed or required by law or by the public authorities in the country of importation;
    - (ii) limit the geographical area in which the goods may be resold; or
    - (iii) do not substantially affect the value of the goods;
  - (b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;
  - (c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and
  - (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.
2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.
- (b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

- (i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;
- (ii) the customs value of identical or similar goods as determined under the provisions of Article 5;
- (iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

- (c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

## **Article 2**

1.
  - (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.
  - (b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.
2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and

charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

### **Article 3**

1.
  - (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.
  - (b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.
2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.
3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

#### **Article 4**

If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3, the customs value shall be determined under the provisions of Article 5 or, when the customs value cannot be determined under that Article, under the provisions of Article 6 except that, at the request of the importer, the order of application of Articles 5 and 6 shall be reversed.

#### **Article 5**

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:
  - (i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;
  - (ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;
  - (iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and
  - (iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.
- (b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.



2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

### **Article 6**

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:
  - (a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;
  - (b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;
  - (c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.
2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

### **Article 7**

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs

value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:
  - (a) the selling price in the country of importation of goods produced in such country;
  - (b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;
  - (c) the price of goods on the domestic market of the country of exportation;
  - (d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;
  - (e) the price of the goods for export to a country other than the country of importation;
  - (f) minimum customs values; or
  - (g) arbitrary or fictitious values.
3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

### **Article 8**

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:
  - (a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:
    - (i) commissions and brokerage, except buying commissions;
    - (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
    - (iii) the cost of packing whether for labour or materials;

- (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
    - (i) materials, components, parts and similar items incorporated in the imported goods;
    - (ii) tools, dies, moulds and similar items used in the production of the imported goods;
    - (iii) materials consumed in the production of the imported goods;
    - (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;
  - (c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
  - (d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.
2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:
- (a) the cost of transport of the imported goods to the port or place of importation;
  - (b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and
  - (c) the cost of insurance.
3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

### **Article 9**

1. Where the conversion of currency is necessary for the determination of the customs value, the rate of exchange to be used shall be that duly published by the competent authorities of the country of importation concerned and shall reflect as effectively as possible, in respect of the period covered by each such document of publication, the current value of such currency in commercial transactions in terms of the currency of the country of importation.
2. The conversion rate to be used shall be that in effect at the time of exportation or the time of importation, as provided by each Member.

### **Article 10**

All information which is by nature confidential or which is provided on a confidential basis for the purposes of customs valuation shall be treated as strictly confidential by the authorities concerned who shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

### **Article 11**

1. The legislation of each Member shall provide in regard to a determination of customs value for the right of appeal, without penalty, by the importer or any other person liable for the payment of the duty.
2. An initial right of appeal without penalty may be to an authority within the customs administration or to an independent body, but the legislation of each Member shall provide for the right of appeal without penalty to a judicial authority.
3. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any rights of further appeal.

## Article 12

Laws, regulations, judicial decisions and administrative rulings of general application giving effect to this Agreement shall be published in conformity with Article X of GATT 1994 by the country of importation concerned.

## Article 13

If, in the course of determining the customs value of imported goods, it becomes necessary to delay the final determination of such customs value, the importer of the goods shall nevertheless be able to withdraw them from customs if, where so required, the importer provides sufficient guarantee in the form of a surety, a deposit or some other appropriate instrument, covering the ultimate payment of customs duties for which the goods may be liable. The legislation of each Member shall make provisions for such circumstances.

## Article 14

The notes at Annex I to this Agreement form an integral part of this Agreement and the Articles of this Agreement are to be read and applied in conjunction with their respective notes. Annex III paragraphs 6 and 7<sup>188</sup> also form an integral part of this Agreement.

## Article 15

1. In this Agreement:
  - (a) "customs value of imported goods" means the value of goods for the purposes of levying ad valorem duties of customs on imported goods;
  - (b) "country of importation" means country or customs territory of importation; and
  - (c) "produced" includes grown, manufactured and mined.
2. In this Agreement:
  - (a) "identical goods" means goods which are the same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance would not

<sup>188</sup> Editor's note: Original text states "second sentence except as far as it refers to Annex III paragraphs 6 and 7" as not applicable.

preclude goods otherwise conforming to the definition from being regarded as identical;

- (b) "similar goods" means goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable. The quality of the goods, their reputation and the existence of a trademark are among the factors to be considered in determining whether goods are similar;
  - (c) the terms "identical goods" and "similar goods" do not include, as the case may be, goods which incorporate or reflect engineering, development, artwork, design work, and plans and sketches for which no adjustment has been made under paragraph 1(b)(iv) of Article 8 because such elements were undertaken in the country of importation;
  - (d) goods shall not be regarded as "identical goods" or "similar goods" unless they were produced in the same country as the goods being valued;
  - (e) goods produced by a different person shall be taken into account only when there are no identical goods or similar goods, as the case may be, produced by the same person as the goods being valued.
3. In this Agreement "goods of the same class or kind" means goods which fall within a group or range of goods produced by a particular industry or industry sector, and includes identical or similar goods.
4. For the purposes of this Agreement, persons shall be deemed to be related only if:
- (a) they are officers or directors of one another's businesses;
  - (b) they are legally recognised partners in business;
  - (c) they are employer and employee;
  - (d) any person directly or indirectly owns, controls or holds 5 percent or more of the outstanding voting stock or shares of both of them;
  - (e) one of them directly or indirectly controls the other;

- (f) both of them are directly or indirectly controlled by a third person;
  - (g) together they directly or indirectly control a third person; or
  - (h) they are members of the same family.
5. Persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related for the purposes of this Agreement if they fall within the criteria of paragraph 4.

### **Article 16**

Upon written request, the importer shall have the right to an explanation in writing from the customs administration of the country of importation as to how the customs value of the importer's goods was determined.

### **Article 17**

Nothing in this Agreement shall be construed as restricting or calling into question the rights of customs administrations to satisfy themselves as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.

### **Article 22**

#### **National Legislation**

1. Each Member shall ensure, not later than the date of application of the provisions of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.
2. Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

## **ANNEX I: INTERPRETATIVE NOTES**

### **General Note**

#### **Sequential Application of Valuation Methods**

1. Articles 1 through 7 define how the customs value of imported goods is to be determined under the provisions of this Agreement.

The methods of valuation are set out in a sequential order of application. The primary method for customs valuation is defined in Article 1 and imported goods are to be valued in accordance with the provisions of this Article whenever the conditions prescribed therein are fulfilled.

2. Where the customs value cannot be determined under the provisions of Article 1, it is to be determined by proceeding sequentially through the succeeding Articles to the first such Article under which the customs value can be determined. Except as provided in Article 4, it is only when the customs value cannot be determined under the provisions of a particular Article that the provisions of the next Article in the sequence can be used.
3. If the importer does not request that the order of Articles 5 and 6 be reversed, the normal order of the sequence is to be followed. If the importer does so request but it then proves impossible to determine the customs value under the provisions of Article 6, the customs value is to be determined under the provisions of Article 5, if it can be so determined.
4. Where the customs value cannot be determined under the provisions of Articles 1 through 6 it is to be determined under the provisions of Article 7.

### **Use of Generally Accepted Accounting Principles**

1. "Generally accepted accounting principles" refers to the recognised consensus or substantial authoritative support within a country at a particular time as to which economic resources and obligations should be recorded as assets and liabilities, which changes in assets and liabilities should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed and how it should be disclosed, and which financial statements should be prepared. These standards may be broad guidelines of general application as well as detailed practices and procedures.
2. For the purposes of this Agreement, the customs administration of each Member shall utilise information prepared in a manner consistent with generally accepted accounting principles in the country which is appropriate for the Article in question. For example, the determination of usual profit and general expenses under the provisions of Article 5 would be carried out utilising information prepared in a manner consistent with generally



accepted accounting principles of the country of importation. On the other hand, the determination of usual profit and general expenses under the provisions of Article 6 would be carried out utilising information prepared in a manner consistent with generally accepted accounting principles of the country of production. As a further example, the determination of an element provided for in paragraph 1(b)(ii) of Article 8 undertaken in the country of importation would be carried out utilising information in a manner consistent with the generally accepted accounting principles of that country.

## **Note to Article 1**

### **Price Actually Paid or Payable**

1. The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instruments. Payment may be made directly or indirectly. An example of an indirect payment would be the settlement by the buyer, whether in whole or in part, of a debt owed by the seller.
2. Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in Article 8, are not considered to be an indirect payment to the seller, even though they might be regarded as of benefit to the seller. The costs of such activities shall not, therefore, be added to the price actually paid or payable in determining the customs value.
3. The customs value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:
  - (a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment;
  - (b) the cost of transport after importation;
  - (c) duties and taxes of the country of importation.
4. The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments

from the buyer to the seller that do not relate to the imported goods are not part of the customs value.

**Paragraph 1(a)(iii)**

Among restrictions which would not render a price actually paid or payable unacceptable are restrictions which do not substantially affect the value of the goods. An example of such restrictions would be the case where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year.

**Paragraph 1(b)**

1. If the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued, the transaction value shall not be acceptable for customs purposes. Some examples of this include:
  - (a) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities;
  - (b) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods;
  - (c) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that the seller will receive a specified quantity of the finished goods.
2. However, conditions or considerations relating to the production or marketing of the imported goods shall not result in rejection of the transaction value. For example, the fact that the buyer furnishes the seller with engineering and plans undertaken in the country of importation shall not result in rejection of the transaction value for the purposes of Article 1. Likewise, if the buyer undertakes on the buyer's own account, even though by agreement with the seller, activities relating to the marketing of the imported goods, the value of these activities is not part of the customs value nor shall such activities result in rejection of the transaction value.

**Paragraph 2**

1. Paragraphs 2(a) and 2(b) provide different means of establishing the acceptability of a transaction value.

2. Paragraph 2(a) provides that where the buyer and the seller are related, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the customs value provided that the relationship did not influence the price. It is not intended that there should be an examination of the circumstances in all cases where the buyer and the seller are related. Such examination will only be required where there are doubts about the acceptability of the price. Where the customs administration have no doubts about the acceptability of the price, it should be accepted without requesting further information from the importer. For example, the customs administration may have previously examined the relationship, or it may already have detailed information concerning the buyer and the seller, and may already be satisfied from such examination or information that the relationship did not influence the price.
3. Where the customs administration is unable to accept the transaction value without further inquiry, it should give the importer an opportunity to supply such further detailed information as may be necessary to enable it to examine the circumstances surrounding the sale. In this context, the customs administration should be prepared to examine relevant aspects of the transaction, including the way in which the buyer and seller organise their commercial relations and the way in which the price in question was arrived at, in order to determine whether the relationship influenced the price. Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship. As a further example, where it is shown that the price is adequate to ensure recovery of all costs plus a profit which is representative of the firm's overall profit realised over a representative period of time (e.g. on an annual basis) in sales of goods of the same class or kind, this would demonstrate that the price had not been influenced.

4. Paragraph 2(b) provides an opportunity for the importer to demonstrate that the transaction value closely approximates to a “test” value previously accepted by the customs administration and is therefore acceptable under the provisions of Article 1. Where a test under paragraph 2(b) is met, it is not necessary to examine the question of influence under paragraph 2(a). If the customs administration has already sufficient information to be satisfied, without further detailed inquiries, that one of the tests provided in paragraph 2(b) has been met, there is no reason for it to require the importer to demonstrate that the test can be met. In paragraph 2(b) the term “unrelated buyers” means buyers who are not related to the seller in any particular case.

### **Paragraph 2(b)**

A number of factors must be taken into consideration in determining whether one value “closely approximates” to another value. These factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported, and, whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply a uniform standard such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a large difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates to the “test” values set forth in paragraph 2(b) of Article 1.

### **Note to Article 2**

1. In applying Article 2, the customs administration shall, wherever possible, use a sale of identical goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of identical goods that takes place under any one of the following three conditions may be used:
  - (a) a sale at the same commercial level but in different quantities;
  - (b) a sale at a different commercial level but in substantially the same quantities; or
  - (c) a sale at a different commercial level and in different quantities.

2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:
  - (a) quantity factors only;
  - (b) commercial level factors only; or
  - (c) both commercial level and quantity factors.
3. The expression “and/or” allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.
4. For the purposes of Article 2, the transaction value of identical imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.
5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only identical imported goods for which a transaction value exists involved a sale of 500 units, and it is recognised that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller’s price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 2 is not appropriate.

### **Note to Article 3**

1. In applying Article 3, the customs administration shall, wherever possible, use a sale of similar goods at the same commercial level and in substantially the same quantities as the goods being valued. Where no such sale is found, a sale of similar goods that takes place under any one of the following three conditions may be used:
  - (a) a sale at the same commercial level but in different quantities;

- (b) a sale at a different commercial level but in substantially the same quantities; or
  - (c) a sale at a different commercial level and in different quantities.
- 2. Having found a sale under any one of these three conditions adjustments will then be made, as the case may be, for:
  - (a) quantity factors only;
  - (b) commercial level factors only; or
  - (c) both commercial level and quantity factors.
- 3. The expression “and/or” allows the flexibility to use the sales and make the necessary adjustments in any one of the three conditions described above.
- 4. For the purpose of Article 3, the transaction value of similar imported goods means a customs value, adjusted as provided for in paragraphs 1(b) and 2, which has already been accepted under Article 1.
- 5. A condition for adjustment because of different commercial levels or different quantities is that such adjustment, whether it leads to an increase or a decrease in the value, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustment, e.g. valid price lists containing prices referring to different levels or different quantities. As an example of this, if the imported goods being valued consist of a shipment of 10 units and the only similar imported goods for which a transaction value exists involved a sale of 500 units, and it is recognised that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller’s price list and using that price applicable to a sale of 10 units. This does not require that a sale had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a customs value under the provisions of Article 3 is not appropriate.

**Note to Article 5**

- 1. The term “unit price at which ... goods are sold in the greatest aggregate quantity” means the price at which the greatest number of units is sold in sales to persons who are not related to the

persons from whom they buy such goods at the first commercial level after importation at which such sales take place.

2. As an example of this, goods are sold from a price list which grants favourable unit prices for purchases made in larger quantities.

<i>Sale quantity</i>	<i>Unit price</i>	<i>Number of sales</i>	<i>Total quantity sold at each price</i>
1-10 units	100	10 sales of 5 units 5 sales of 3 units	65
11-25 units	95	5 sales of 11 units	55
over 25 units	90	1 sale of 30 units 1 sale of 50 units	80

The greatest number of units sold at a price is 80; therefore, the unit price in the greatest aggregate quantity is 90.

3. As another example of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this example, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is 95.
4. A third example would be the following situation where various quantities are sold at various prices.

*(a) Sales*

<i>Sale quantity</i>	<i>Unit price</i>
40 units	100
30 units	90
15 units	100
50 units	95
25 units	105
35 units	90
5 units	100

*(b) Totals*

<i>Total quantity sold</i>	<i>Unit price</i>
65	90
50	95
60	100
25	105

In this example, the greatest number of units sold at a particular price is 65; therefore, the unit price in the greatest aggregate quantity is 90.

5. Any sale in the importing country, as described in paragraph 1 above, to a person who supplies directly or indirectly free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods any of the elements specified in paragraph 1(b) of Article 8, should not be taken into account in establishing the unit price for the purposes of Article 5.
6. It should be noted that “profit and general expenses” referred to in paragraph 1 of Article 5 should be taken as a whole. The figure for the purposes of this deduction should be determined on the basis of information supplied by or on behalf of the importer unless the importer’s figures are inconsistent with those obtained in sales in the country of importation of imported goods of the same class or kind. Where the importer’s figures are inconsistent with such figures, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the importer.
7. The “general expenses” include the direct and indirect costs of marketing the goods in question.
8. Local taxes payable by reason of the sale of the goods for which a deduction is not made under the provisions of paragraph 1(a)(iv) of Article 5 shall be deducted under the provisions of paragraph 1(a)(i) of Article 5.
9. In determining either the commissions or the usual profits and general expenses under the provisions of paragraph 1 of Article 5, the question whether certain goods are “of the same class or kind” as other goods must be determined on a case-by-case basis by reference to the circumstances involved. Sales in the country of importation of the narrowest group or range of imported goods of the same class or kind, which includes the goods being valued,



for which the necessary information can be provided, should be examined. For the purposes of Article 5, “goods of the same class or kind” includes goods imported from the same country as the goods being valued as well as goods imported from other countries.

10. For the purposes of paragraph 1(b) of Article 5, the “earliest date” shall be the date by which sales of the imported goods or of identical or similar imported goods are made in sufficient quantity to establish the unit price.
11. Where the method in paragraph 2 of Article 5 is used, deductions made for the value added by further processing shall be based on objective and quantifiable data relating to the cost of such work. Accepted industry formulas, recipes, methods of construction, and other industry practices would form the basis of the calculations.
12. It is recognised that the method of valuation provided for in paragraph 2 of Article 5 would normally not be applicable when, as a result of the further processing, the imported goods lose their identity. However, there can be instances where, although the identity of the imported goods is lost, the value added by the processing can be determined accurately without unreasonable difficulty. On the other hand, there can also be instances where the imported goods maintain their identity but form such a minor element in the goods sold in the country of importation that the use of this valuation method would be unjustified. In view of the above, each situation of this type must be considered on a case-by-case basis.

### **Note to Article 6**

1. As a general rule, customs value is determined under this Agreement on the basis of information readily available in the country of importation. In order to determine a computed value, however, it may be necessary to examine the costs of producing the goods being valued and other information which has to be obtained from outside the country of importation. Furthermore, in most cases the producer of the goods will be outside the jurisdiction of the authorities of the country of importation. The use of the computed value method will generally be limited to those cases where the buyer and seller are related, and the producer is prepared to supply to the authorities of the country of importation the necessary costings and to provide facilities for any subsequent verification which may be necessary.

2. The “cost or value” referred to in paragraph 1(a) of Article 6 is to be determined on the basis of information relating to the production of the goods being valued supplied by or on behalf of the producer. It is to be based upon the commercial accounts of the producer, provided that such accounts are consistent with the generally accepted accounting principles applied in the country where the goods are produced.
3. The “cost or value” shall include the cost of elements specified in paragraphs 1(a)(ii) and (iii) of Article 8. It shall also include the value, apportioned as appropriate under the provisions of the relevant note to Article 8, of any element specified in paragraph 1(b) of Article 8 which has been supplied directly or indirectly by the buyer for use in connection with the production of the imported goods. The value of the elements specified in paragraph 1(b)(iv) of Article 8 which are undertaken in the country of importation shall be included only to the extent that such elements are charged to the producer. It is to be understood that no cost or value of the elements referred to in this paragraph shall be counted twice in determining the computed value.
4. The “amount for profit and general expenses” referred to in paragraph 1(b) of Article 6 is to be determined on the basis of information supplied by or on behalf of the producer unless the producer’s figures are inconsistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation.
5. It should be noted in this context that the “amount for profit and general expenses” has to be taken as a whole. It follows that if, in any particular case, the producer’s profit figure is low and the producer’s general expenses are high, the producer’s profit and general expenses taken together may nevertheless be consistent with that usually reflected in sales of goods of the same class or kind. Such a situation might occur, for example, if a product were being launched in the country of importation and the producer accepted a nil or low profit to offset high general expenses associated with the launch. Where the producer can demonstrate a low profit on sales of the imported goods because of particular commercial circumstances, the producer’s actual profit figures should be taken into account provided that the producer has valid commercial reasons to justify them and the producer’s pricing

policy reflects usual pricing policies in the branch of industry concerned. Such a situation might occur, for example, where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where they sell goods to complement a range of goods being produced in the country of importation and accept a low profit to maintain competitiveness. Where the producer's own figures for profit and general expenses are not consistent with those usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation, the amount for profit and general expenses may be based upon relevant information other than that supplied by or on behalf of the producer of the goods.

6. Where information other than that supplied by or on behalf of the producer is used for the purposes of determining a computed value, the authorities of the importing country shall inform the importer, if the latter so requests, of the source of such information, the data used and the calculations based upon such data, subject to the provisions of Article 10.
7. The "general expenses" referred to in paragraph 1(b) of Article 6 covers the direct and indirect costs of producing and selling the goods for export which are not included under paragraph 1(a) of Article 6.
8. Whether certain goods are "of the same class or kind" as other goods must be determined on a case-by-case basis with reference to the circumstances involved. In determining the usual profits and general expenses under the provisions of Article 6, sales for export to the country of importation of the narrowest group or range of goods, which includes the goods being valued, for which the necessary information can be provided, should be examined. For the purposes of Article 6, "goods of the same class or kind" must be from the same country as the goods being valued.

#### **Note to Article 7**

1. Customs values determined under the provisions of Article 7 should, to the greatest extent possible, be based on previously determined customs values.
2. The methods of valuation to be employed under Article 7 should be those laid down in Articles 1 through 6 but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 7.

3. Some examples of reasonable flexibility are as follows:
  - (a) *Identical goods* – the requirement that the identical goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; identical imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of identical imported goods already determined under the provisions of Articles 5 and 6 could be used.
  - (b) *Similar goods* – the requirement that the similar goods should be exported at or about the same time as the goods being valued could be flexibly interpreted; similar imported goods produced in a country other than the country of exportation of the goods being valued could be the basis for customs valuation; customs values of similar imported goods already determined under the provisions of Articles 5 and 6 could be used.
  - (c) *Deductive method* – the requirement that the goods shall have been sold in the “condition as imported” in paragraph 1(a) of Article 5 could be flexibly interpreted; the “90 days” requirement could be administered flexibly.

### **Note to Article 8**

#### **Paragraph 1(a)(i)**

The term “buying commissions” means fees paid by an importer to the importer’s agent for the service of representing the importer abroad in the purchase of the goods being valued.

#### **Paragraph 1(b)(ii)**

1. There are two factors involved in the apportionment of the elements specified in paragraph 1(b)(ii) of Article 8 to the imported goods - the value of the element itself and the way in which that value is to be apportioned to the imported goods. The apportionment of these elements should be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.
2. Concerning the value of the element, if the importer acquires the element from a seller not related to the importer at a given cost, the value of the element is that cost. If the element was produced by the importer or by a person related to the importer, its value

would be the cost of producing it. If the element had been previously used by the importer, regardless of whether it had been acquired or produced by such importer, the original cost of acquisition or production would have to be adjusted downward to reflect its use in order to arrive at the value of the element.

3. Once a value has been determined for the element, it is necessary to apportion that value to the imported goods. Various possibilities exist. For example, the value might be apportioned to the first shipment if the importer wishes to pay duty on the entire value at one time. As another example, the importer may request that the value be apportioned over the number of units produced up to the time of the first shipment. As a further example, the importer may request that the value be apportioned over the entire anticipated production where contracts or firm commitments exist for that production. The method of apportionment used will depend upon the documentation provided by the importer.
4. As an illustration of the above, an importer provides the producer with a mould to be used in the production of the imported goods and contracts with the producer to buy 10,000 units. By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units. The importer may request the customs administration to apportion the value of the mould over 1,000 units, 4,000 units or 10,000 units.

#### **Paragraph 1(b)(iv)**

1. Additions for the elements specified in paragraph 1(b)(iv) of Article 8 should be based on objective and quantifiable data. In order to minimise the burden for both the importer and customs administration in determining the values to be added, data readily available in the buyer's commercial record system should be used in so far as possible.
2. For those elements supplied by the buyer which were purchased or leased by the buyer, the addition would be the cost of the purchase or the lease. No addition shall be made for those elements available in the public domain, other than the cost of obtaining copies of them.
3. The ease with which it may be possible to calculate the values to be added will depend on a particular firm's structure and management practice, as well as its accounting methods.

4. For example, it is possible that a firm which imports a variety of products from several countries maintains the records of its design centre outside the country of importation in such a way as to show accurately the costs attributable to a given product. In such cases, a direct adjustment may appropriately be made under the provisions of Article 8.
5. In another case, a firm may carry the cost of the design centre outside the country of importation as a general overhead expense without allocation to specific products. In this instance, an appropriate adjustment could be made under the provisions of Article 8 with respect to the imported goods by apportioning total design centre costs over total production benefiting from the design centre and adding such apportioned cost on a unit basis to imports.
6. Variations in the above circumstances will, of course, require different factors to be considered in determining the proper method of allocation.
7. In cases where the production of the element in question involves a number of countries and over a period of time, the adjustment should be limited to the value actually added to that element outside the country of importation.

#### **Paragraph 1(c)**

1. The royalties and licence fees referred to in paragraph 1(c) of Article 8 may include, among other things, payments in respect to patents, trade marks and copyrights. However, the charges for the right to reproduce the imported goods in the country of importation shall not be added to the price actually paid or payable for the imported goods in determining the customs value.
2. Payments made by the buyer for the right to distribute or resell the imported goods shall not be added to the price actually paid or payable for the imported goods if such payments are not a condition of the sale for export to the country of importation of the imported goods.

#### **Paragraph 3**

Where objective and quantifiable data do not exist with regard to the additions required to be made under the provisions of Article 8, the transaction value cannot be determined under the provisions of Article 1. As an illustration of this, a royalty is paid on the basis of the price in

a sale in the importing country of a litre of a particular product that was imported by the kilogramme and made up into a solution after importation. If the royalty is based partially on the imported goods and partially on other factors which have nothing to do with the imported goods (such as when the imported goods are mixed with domestic ingredients and are no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the buyer and the seller), it would be inappropriate to attempt to make an addition for the royalty. However, if the amount of this royalty is based only on the imported goods and can be readily quantified, an addition to the price actually paid or payable can be made.

### **Note to Article 9**

For the purposes of Article 9, “time of importation” may include the time of entry for customs purposes.

### **Note to Article 11**

1. Article 11 provides the importer with the right to appeal against a valuation determination made by the customs administration for the goods being valued. Appeal may first be to a higher level in the customs administration, but the importer shall have the right in the final instance to appeal to the judiciary.
2. “Without penalty” means that the importer shall not be subject to a fine or threat of fine merely because the importer chose to exercise the right of appeal. Payment of normal court costs and lawyers’ fees shall not be considered to be a fine.
3. However, nothing in Article 11 shall prevent a Member from requiring full payment of assessed customs duties prior to an appeal.

### **Note to Article 15**

#### **Paragraph 4**

For the purposes of Article 15, the term “persons” includes a legal person, where appropriate.

#### **Paragraph 4(e)**

For the purposes of this Agreement, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

## ANNEX III<sup>189</sup>

6. Article 17 recognises that in applying the Agreement, customs administrations may need to make enquiries concerning the truth or accuracy of any statement, document or declaration presented to them for customs valuation purposes. The Article thus acknowledges that enquiries may be made which are, for example, aimed at verifying that the elements of value declared or presented to customs in connection with a determination of customs value are complete and correct. Members, subject to their national laws and procedures, have the right to expect the full cooperation of importers in these enquiries.

7. The price actually paid or payable includes all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.

### (v) **Agreement on Pre-shipment Inspection**

*[Members,*

*Noting that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to “bring about further liberalisation and expansion of world trade”, “strengthen the role of GATT” and “increase the responsiveness of the GATT system to the evolving international economic environment”;*

*...;*

*...;*

*Mindful that such programmes must be carried out without giving rise to unnecessary delays or unequal treatment;*

*Noting that this inspection is by definition carried out on the territory of exporter Members;*

*Recognising the need to establish an agreed international framework of rights and obligations of both user Members and exporter Members;*

*Recognising that the principles and obligations of GATT 1994 apply to those activities of pre-shipment inspection entities that are mandated by governments that are Members of the WTO;*

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<sup>189</sup> Editor's note: in the original ECT Annex W the Annex III is called “Extra Provisions”.



*Recognising that it is desirable to provide transparency of the operation of pre-shipment inspection entities and of laws and regulations relating to pre-shipment inspection;*

*Desiring to provide for the speedy, effective and equitable resolution of disputes between exporters and pre-shipment inspection entities arising under this Agreement;*

*Hereby agree as follows:]*

### **Article 1: Coverage – Definitions**

1. This Agreement shall apply to all pre-shipment inspection activities carried out on the territory of Members, whether such activities are contracted or mandated by the government, or any government body, of a Member.
2. The term “user Member” means a Member of which the government or any government body contracts for or mandates the use of pre-shipment inspection activities.
3. Pre-shipment inspection activities are all activities relating to the verification of the quality, the quantity, the price, including currency exchange rate and financial terms, and/or the customs classification of goods to be exported to the territory of the user Member.
4. The term “pre-shipment inspection entity” is any entity contracted or mandated by a Member to carry out pre-shipment inspection activities.<sup>190</sup>

### **Article 2: Obligations of User Members**

#### **Non-discrimination**

1. User Members shall ensure that pre-shipment inspection activities are carried out in a non-discriminatory manner, and that the procedures and criteria employed in the conduct of these activities are objective and are applied on an equal basis to all exporters affected by such activities. They shall ensure uniform performance of inspection by all the inspectors of the pre-shipment inspection entities contracted or mandated by them.

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<sup>190</sup> It is understood that this provision does not obligate Members to allow government entities of other Members to conduct pre-shipment inspection activities on their territory.

## **Governmental Requirements**

2. User Members shall ensure that in the course of pre-shipment inspection activities relating to their laws, regulations and requirements, the provisions of paragraph 4 of Article III of GATT 1994 are respected to the extent that these are relevant.

## **Site of Inspection**

3. User Members shall ensure that all pre-shipment inspection activities, including the issuance of a Clean Report of Findings or a note of non-issuance, are performed in the customs territory from which the goods are exported or, if the inspection cannot be carried out in that customs territory given the complex nature of the products involved, or if both parties agree, in the customs territory in which the goods are manufactured.

## **Standards**

4. User Members shall ensure that quantity and quality inspections are performed in accordance with the standards defined by the seller and the buyer in the purchase agreement and that, in the absence of such standards, relevant international standards<sup>191</sup> apply.

## **Transparency**

5. User Members shall ensure that pre-shipment inspection activities are conducted in a transparent manner.
6. User Members shall ensure that, when initially contacted by exporters, pre-shipment inspection entities provide to the exporters a list of all the information which is necessary for the exporters to comply with inspection requirements. The pre-shipment inspection entities shall provide the actual information when so requested by exporters. This information shall include a reference to the laws and regulations of user Members relating to pre-shipment inspection activities, and shall also include the procedures and criteria used for inspection and for price and currency exchange-rate verification purposes, the exporters' rights vis-à-vis the inspection entities, and the appeals procedures set up under paragraph 21. Additional procedural requirements or changes in existing procedures shall not be applied to a shipment

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191 An international standard is a standard adopted by a governmental or non-governmental body whose membership is open to all Members, one of whose recognised activities is in the field of standardisation.

unless the exporter concerned is informed of these changes at the time the inspection date is arranged. However, in emergency situations of the types addressed by Articles XX and XXI of GATT 1994, such additional requirements or changes may be applied to a shipment before the exporter has been informed. This assistance shall not, however, relieve exporters from their obligations in respect of compliance with the import regulations of the user Members.

7. User Members shall ensure that the information referred to in paragraph 6 is made available to exporters in a convenient manner, and that the pre-shipment inspection offices maintained by pre-shipment inspection entities serve as information points where this information is available.
8. User Members shall publish promptly all applicable laws and regulations relating to pre-shipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

### **Protection of Confidential Business Information**

9. User Members shall ensure that pre-shipment inspection entities treat all information received in the course of the pre-shipment inspection as business confidential to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. User Members shall ensure that pre-shipment inspection entities maintain procedures to this end.
10. User Members shall provide information to Members on request on the measures they are taking to give effect to paragraph 9. The provisions of this paragraph shall not require any Member to disclose confidential information the disclosure of which would jeopardise the effectiveness of the pre-shipment inspection programmes or would prejudice the legitimate commercial interest of particular enterprises, public or private.
11. User Members shall ensure that pre-shipment inspection entities do not divulge confidential business information to any third party, except that pre-shipment inspection entities may share this information with the government entities that have contracted or mandated them. User Members shall ensure that confidential business information which they receive from pre-shipment inspection entities contracted or mandated by them is

adequately safeguarded. Pre-shipment inspection entities shall share confidential business information with the governments contracting or mandating them only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

12. User Members shall ensure that pre-shipment inspection entities do not request exporters to provide information regarding:
  - (a) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;
  - (b) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
  - (c) internal pricing, including manufacturing costs;
  - (d) profit levels;
  - (e) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. In such cases, the entity shall only request the information necessary for this purpose.
13. The information referred to in paragraph 12, which pre-shipment inspection entities shall not otherwise request, may be released voluntarily by the exporter to illustrate a specific case.

### **Conflicts of Interest**

14. User Members shall ensure that pre-shipment inspection entities, bearing in mind also the provisions on protection of confidential business information in paragraphs 9 through 13, maintain procedures to avoid conflicts of interest:
  - (a) between pre-shipment inspection entities and any related entities of the pre-shipment inspection entities in question, including any entities in which the latter have a financial or commercial interest or any entities which have a financial interest in the pre-shipment inspection entities in question, and whose shipments the pre-shipment inspection entities are to inspect;
  - (b) between pre-shipment inspection entities and any other entities, including other entities subject to pre-shipment

inspection, with the exception of the government entities contracting or mandating the inspections;

- (c) with divisions of pre-shipment inspection entities engaged in activities other than those required to carry out the inspection process.

## Delays

15. User Members shall ensure that pre-shipment inspection entities avoid unreasonable delays in inspection of shipments. User Members shall ensure that, once a pre-shipment inspection entity and an exporter agree on an inspection date, the pre-shipment inspection entity conducts the inspection on that date unless it is rescheduled on a mutually agreed basis between the exporter and the pre-shipment inspection entity, or the pre-shipment inspection entity is prevented from doing so by the exporter or by force majeure.<sup>192</sup>
16. User Members shall ensure that, following receipt of the final documents and completion of the inspection, pre-shipment inspection entities, within five working days, either issue a Clean Report of Findings or provide a detailed written explanation specifying the reasons for non-issuance. User Members shall ensure that, in the latter case, pre-shipment inspection entities give exporters the opportunity to present their views in writing and, if exporters so request, arrange for re-inspection at the earliest mutually convenient date.
17. User Members shall ensure that, whenever so requested by the exporters, pre-shipment inspection entities undertake, prior to the date of physical inspection, a preliminary verification of price and, where applicable, of currency exchange rate, on the basis of the contract between exporter and importer, the pro forma invoice and, where applicable, the application for import authorisation. User Members shall ensure that a price or currency exchange rate that has been accepted by a pre-shipment inspection entity on the basis of such preliminary verification is not withdrawn, providing the goods conform to the import documentation and/or import licence. They shall ensure that, after a preliminary verification has taken place, pre-shipment inspection entities immediately inform exporters in

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192 It is understood that, for the purposes of this Agreement, “force majeure” shall mean “irresistible compulsion or coercion, unforeseeable course of events excusing from fulfilment of contract”.

writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate.

18. User Members shall ensure that, in order to avoid delays in payment, pre-shipment inspection entities send to exporters or to designated representatives of the exporters a Clean Report of Findings as expeditiously as possible.
19. User Members shall ensure that, in the event of a clerical error in the Clean Report of Findings, pre-shipment inspection entities correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

### **Price Verification**

20. User Members shall ensure that, in order to prevent over- and under-invoicing and fraud, pre-shipment inspection entities conduct price verification<sup>193</sup> according to the following guidelines:
  - (a) pre-shipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in subparagraphs (b) through (e);
  - (b) the pre-shipment inspection entity shall base its price comparison for the verification of the export price on the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts. Such comparison shall be based on the following:
    - (i) only prices providing a valid basis of comparison shall be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison;
    - (ii) the pre-shipment inspection entity shall not rely upon the price of goods offered for export to different countries of

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193 The obligations of user Members with respect to the services of pre-shipment inspection entities in connection with customs valuation shall be the obligations which they have accepted in GATT 1994 and the other Multilateral Trade Agreements included in Annex 1A of the WTO Agreement.

- importation to arbitrarily impose the lowest price upon the shipment;
- (iii) the pre-shipment inspection entity shall take into account the specific elements listed in subparagraph (c);
  - (iv) at any stage in the process described above, the pre-shipment inspection entity shall provide the exporter with an opportunity to explain the price;
- (c) when conducting price verification, pre-shipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, licence or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price, such as the contractual relationship between the exporter and importer;
- (d) the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;
- (e) the following shall not be used for price verification purposes:
- (i) the selling price in the country of importation of goods produced in such country;
  - (ii) the price of goods for export from a country other than the country of exportation;
  - (iii) the cost of production;
  - (iv) arbitrary or fictitious prices or values.

### **Appeals Procedures**

21. User Members shall ensure that pre-shipment inspection entities establish procedures to receive, consider and render decisions concerning grievances raised by exporters, and that information concerning such procedures is made available to exporters in accordance with the provisions of paragraphs 6 and 7. User

Members shall ensure that the procedures are developed and maintained in accordance with the following guidelines:

- (a) pre-shipment inspection entities shall designate one or more officials who shall be available during normal business hours in each city or port in which they maintain a pre-shipment inspection administrative office to receive, consider and render decisions on exporters' appeals or grievances;
- (b) exporters shall provide in writing to the designated official(s) the facts concerning the specific transaction in question, the nature of the grievance and a suggested solution;
- (c) the designated official(s) shall afford sympathetic consideration to exporters' grievances and shall render a decision as soon as possible after receipt of the documentation referred to in subparagraph (b).

### **Derogation**

22. By derogation to the provisions of Article 2, user Members shall provide that, with the exception of part shipments, shipments whose value is less than a minimum value applicable to such shipments as defined by the user Member shall not be inspected, except in exceptional circumstances. This minimum value shall form part of the information furnished to exporters under the provisions of paragraph 6.

## **Article 3: Obligations of Exporter Members**

### **Non-discrimination**

1. Exporter Members shall ensure that their laws and regulations relating to pre-shipment inspection activities are applied in a non-discriminatory manner.

### **Transparency**

2. Exporter Members shall publish promptly all applicable laws and regulations relating to pre-shipment inspection activities in such a manner as to enable other governments and traders to become acquainted with them.

## **Article 4: Independent Review Procedures**

Members shall encourage pre-shipment inspection entities and exporters mutually to resolve their disputes. However, two working days after



submission of the grievance in accordance with the provisions of paragraph 21 of Article 2, either party may refer the dispute to independent review. Members shall take such reasonable measures as may be available to them to ensure that the following procedures are established and maintained to this end:

- (a) these procedures shall be administered by an independent entity constituted jointly by an organisation representing pre-shipment inspection entities and an organisation representing exporters for the purposes of this Agreement;
- (b) the independent entity referred to in subparagraph (a) shall establish a list of experts as follows:
  - (i) a section of members nominated by an organisation representing pre-shipment inspection entities;
  - (ii) a section of members nominated by an organisation representing exporters;
  - (iii) a section of independent trade experts, nominated by the independent entity referred to in subparagraph (a).

The geographical distribution of the experts on this list shall be such as to enable any disputes raised under these procedures to be dealt with expeditiously. This list shall be drawn up within two months of the entry into force of the WTO Agreement and shall be updated annually. The list shall be publicly available. It shall be notified to the Secretariat and circulated to all Members;

- (c) an exporter or pre-shipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in subparagraph (a) and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the above list by the pre-shipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the above list by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the above list by the independent entity referred to in subparagraph (a). No

objections shall be made to any independent trade expert drawn from section (iii) of the above list;

- (d) the independent trade expert drawn from section (iii) of the above list shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panelists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;
- (e) if the parties to the dispute so agree, one independent trade expert could be selected from section (iii) of the above list by the independent entity referred to in subparagraph (a) to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;
- (f) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of this Agreement. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;
- (g) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties to the dispute. This time-limit could be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;
- (h) the decision of the panel shall be binding upon the pre-shipment inspection entity and the exporter which are parties to the dispute.

### **Article 5: Notification**

Members shall submit to the Secretariat copies of the laws and regulations by which they put this Agreement into force, as well as copies of any other laws and regulations relating to pre-shipment inspection, when the WTO Agreement enters into force with respect to the Member

concerned. No changes in the laws and regulations relating to pre-shipment inspection shall be enforced before such changes have been officially published. They shall be notified to the Secretariat immediately after their publication. The Secretariat shall inform the Members of the availability of this information.

### **Article 9: Final Provisions**

1. Members shall take the necessary measures for the implementation of the present Agreement.
2. Members shall ensure that their laws and regulations shall not be contrary to the provisions of this Agreement.

#### **(vi) Agreement on Rules of Origin.**

*[Members,*

*Noting that Ministers on 20 September 1986 agreed that the Uruguay Round of Multilateral Trade Negotiations shall aim to “bring about further liberalisation and expansion of world trade”, “strengthen the role of GATT” and “increase the responsiveness of the GATT system to the evolving international economic environment”;*

*Desiring to further the objectives of GATT 1994;*

*Recognising that clear and predictable rules of origin and their application facilitate the flow of international trade;*

*Desiring to ensure that rules of origin themselves do not create unnecessary obstacles to trade;*

*Desiring to ensure that rules of origin do not nullify or impair the rights of Members under GATT 1994;*

*Recognising that it is desirable to provide transparency of laws, regulations, and practices regarding rules of origin;*

*Desiring to ensure that rules of origin are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner;*

*...;*

*Desiring to harmonise and clarify rules of origin;*

*Hereby agree as follows:]*

## **PART I**

### **DEFINITIONS AND COVERAGE**

#### **Article 1: Rules of Origin**

1. For the purposes of Parts I to IV of this Agreement, rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.
2. Rules of origin referred to in paragraph 1 shall include all rules of origin used in non-preferential commercial policy instruments, such as in the application of: most-favoured-nation treatment under Articles I, II, III, XI and XIII of GATT 1994; anti-dumping and countervailing duties under Article VI of GATT 1994; safeguard measures under Article XIX of GATT 1994; origin marking requirements under Article IX of GATT 1994; and any discriminatory quantitative restrictions or tariff quotas. They shall also include rules of origin used for government procurement and trade statistics.<sup>194</sup>

## **PART II**

### **DISCIPLINES TO GOVERN THE APPLICATION OF RULES OF ORIGIN**

#### **Article 2: Disciplines during the Transition Period**

Until the work programme for the harmonisation of rules of origin set out in Part IV is completed, Members shall ensure that:

- (a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:

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<sup>194</sup> It is understood that this provision is without prejudice to those determinations made for purposes of defining “domestic industry” or “like products of domestic industry” or similar terms wherever they apply.

- (i) in cases where the criterion of change of tariff classification is applied, such a rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;
  - (ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the rules of origin;
  - (iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the good concerned shall be precisely specified;
- (b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;
  - (c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion consistent with subparagraph (a);
  - (d) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned,<sup>195</sup>
  - (e) their rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
  - (f) their rules of origin are based on a positive standard. Rules of origin that state what does not confer origin (negative standard) are permissible as part of a clarification of a positive

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195 With respect to rules of origin applied for the purposes of government procurement, this provision shall not create obligations additional to those already assumed by Members under GATT 1994.

standard or in individual cases where a positive determination of origin is not necessary;

- (g) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
- (h) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days<sup>196</sup> after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (j). Such assessments shall be made publicly available subject to the provisions of subparagraph (k);
- (i) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (j) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
- (k) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing

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196 In respect of requests made during the first year from the date of entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.

such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

### **Article 3: Disciplines after the Transition Period**

Taking into account the aim of all Members to achieve, as a result of the harmonisation work programme set out in Part IV, the establishment of harmonised rules of origin, Members shall ensure, upon the implementation of the results of the harmonisation work programme, that:

- (a) they apply rules of origin equally for all purposes as set out in Article 1;
- (b) under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, the country where the last substantial transformation has been carried out;
- (c) the rules of origin that they apply to imports and exports are not more stringent than the rules of origin they apply to determine whether or not a good is domestic and shall not discriminate between other Members, irrespective of the affiliation of the manufacturers of the good concerned;
- (d) the rules of origin are administered in a consistent, uniform, impartial and reasonable manner;
- (e) their laws, regulations, judicial decisions and administrative rulings of general application relating to rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
- (f) upon the request of an exporter, importer or any person with a justifiable cause, assessments of the origin they would accord to a good are issued as soon as possible but no later than 150 days after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the rules of origin, under which they have been made remain comparable.

Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (h). Such assessments shall be made publicly available subject to the provisions of subparagraph (i);

- (g) when introducing changes to their rules of origin or new rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (h) any administrative action which they take in relation to the determination of origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
- (i) all information which is by nature confidential or which is provided on a confidential basis for the purpose of the application of rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

#### **Article 5: Information and Procedures for Modification and Introduction of New Rules of Origin**

1. Each Member shall provide to the Secretariat, within 90 days after the date of entry into force of the WTO Agreement for it, its rules of origin, judicial decisions, and administrative rulings of general application relating to rules of origin in effect on that date. If by inadvertence a rule of origin has not been provided, the Member concerned shall provide it immediately after this fact becomes known. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.
2. During the period referred to in Article 2, Members introducing modifications, other than de minimis modifications, to their rules of origin or introducing new rules of origin, which, for the purpose of this Article, shall include any rule of origin referred to in paragraph 1 and not provided to the Secretariat, shall publish a notice to that effect at least 60 days before the entry into force of



the modified or new rule in such a manner as to enable interested parties to become acquainted with the intention to modify a rule of origin or to introduce a new rule of origin, unless exceptional circumstances arise or threaten to arise for a Member. In these exceptional cases, the Member shall publish the modified or new rule as soon as possible.

## ANNEX II: COMMON DECLARATION WITH REGARD TO PREFERENTIAL RULES OF ORIGIN

1. Recognising that some Members apply preferential rules of origin, distinct from non-preferential rules of origin, the Members hereby *agree* as follows.
2. For the purposes of this Common Declaration, preferential rules of origin shall be defined as those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.
3. The Members *agree* to ensure that:
  - (a) when they issue administrative determinations of general application, the requirements to be fulfilled are clearly defined. In particular:
    - (i) in cases where the criterion of change of tariff classification is applied, such a preferential rule of origin, and any exceptions to the rule, must clearly specify the subheadings or headings within the tariff nomenclature that are addressed by the rule;
    - (ii) in cases where the ad valorem percentage criterion is applied, the method for calculating this percentage shall also be indicated in the preferential rules of origin;
    - (iii) in cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers preferential origin shall be precisely specified;
  - (b) their preferential rules of origin are based on a positive standard. Preferential rules of origin that state what does not confer preferential origin (negative standard) are permissible as part of a clarification of a positive standard or in individual

cases where a positive determination of preferential origin is not necessary;

- (c) their laws, regulations, judicial decisions and administrative rulings of general application relating to preferential rules of origin are published as if they were subject to, and in accordance with, the provisions of paragraph 1 of Article X of GATT 1994;
- (d) upon request of an exporter, importer or any person with a justifiable cause, assessments of the preferential origin they would accord to a good are issued as soon as possible but no later than 150 days<sup>197</sup> after a request for such an assessment provided that all necessary elements have been submitted. Requests for such assessments shall be accepted before trade in the good concerned begins and may be accepted at any later point in time. Such assessments shall remain valid for three years provided that the facts and conditions, including the preferential rules of origin, under which they have been made remain comparable. Provided that the parties concerned are informed in advance, such assessments will no longer be valid when a decision contrary to the assessment is made in a review as referred to in subparagraph (f). Such assessments shall be made publicly available subject to the provisions of subparagraph (g);
- (e) when introducing changes to their preferential rules of origin or new preferential rules of origin, they shall not apply such changes retroactively as defined in, and without prejudice to, their laws or regulations;
- (f) any administrative action which they take in relation to the determination of preferential origin is reviewable promptly by judicial, arbitral or administrative tribunals or procedures, independent of the authority issuing the determination, which can effect the modification or reversal of the determination;
- (g) all information that is by nature confidential or that is provided on a confidential basis for the purpose of the application of preferential rules of origin is treated as strictly confidential by the authorities concerned, which shall not disclose it without

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<sup>197</sup> In respect of requests made during the first year from entry into force of the WTO Agreement, Members shall only be required to issue these assessments as soon as possible.

the specific permission of the person or government providing such information, except to the extent that it may be required to be disclosed in the context of judicial proceedings.

4. Members *agree* to provide to the Secretariat promptly their preferential rules of origin, including a listing of the preferential arrangements to which they apply, judicial decisions, and administrative rulings of general application relating to their preferential rules of origin in effect on the date of entry into force of the WTO Agreement for the Member concerned. Furthermore, Members agree to provide any modifications to their preferential rules of origin or new preferential rules of origin as soon as possible to the Secretariat. Lists of information received and available with the Secretariat shall be circulated to the Members by the Secretariat.

**(vii) Agreement on Import Licensing Procedures**

*[Members,*

*Having regard to the Multilateral Trade Negotiations;*

*Desiring to further the objectives of GATT 1994;*

*Taking into account the particular trade, development and financial needs of developing country Members;*

*Recognising the usefulness of automatic import licensing for certain purposes and that such licensing should not be used to restrict trade;*

*Recognising that import licensing may be employed to administer measures such as those adopted pursuant to the relevant provisions of GATT 1994;*

*Recognising the provisions of GATT 1994 as they apply to import licensing procedures;*

*Desiring to ensure that import licensing procedures are not utilised in a manner contrary to the principles and obligations of GATT 1994;*

*Recognising that the flow of international trade could be impeded by the inappropriate use of import licensing procedures;*

*Convinced that import licensing, particularly non-automatic import licensing, should be implemented in a transparent and predictable manner;*

*Recognising that non-automatic licensing procedures should be no more administratively burdensome than absolutely necessary to administer the relevant measure;*

*Desiring to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices;*

*Desiring to provide for a consultative mechanism and the speedy, effective and equitable resolution of disputes arising under this Agreement;*

*Hereby agree as follows:]*

### **Article 1: General Provisions**

1. For the purpose of this Agreement, import licensing is defined as administrative procedures<sup>198</sup> used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.
2. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members.<sup>199</sup>

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198 Those procedures referred to as "licensing" as well as other similar administrative procedures.

199 Nothing in this Agreement shall be taken as implying that the basis, scope or duration of a measure being implemented by a licensing procedure is subject to question under this Agreement.

3. The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.
4. (a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as “the Committee”), in such a manner as to enable governments<sup>200</sup> and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. ....  
  
(b) Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion.
5. Application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application.
6. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of licence applications. Where there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies.

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200 For the purpose of this Agreement, the term “governments” is deemed to include the competent authorities of the European Communities.

7. No application shall be refused for minor documentation errors which do not alter basic data contained therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.
8. Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice.
9. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders on the same basis as to importers of goods not requiring import licences.
10. With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply.
11. The provisions of this Agreement shall not require any Member to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

### **Article 2: Automatic Import Licensing<sup>201</sup>**

1. Automatic import licensing is defined as import licensing where approval of the application is granted in all cases, and which is in accordance with the requirements of paragraph 2(a).
2. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1 and paragraph 1 of this Article, shall apply to automatic import licensing procedures:
  - (a) automatic licensing procedures shall not be administered in such a manner as to have restricting effects on imports subject to automatic licensing. Automatic licensing procedures shall be deemed to have trade-restricting effects unless, inter alia:
    - (i) any person, firm or institution which fulfils the legal requirements of the importing Member for engaging

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<sup>201</sup> Those import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of paragraphs 1 and 2.

- in import operations involving products subject to automatic licensing is equally eligible to apply for and to obtain import licences;
- (ii) applications for licences may be submitted on any working day prior to the customs clearance of the goods;
  - (iii) applications for licences when submitted in appropriate and complete form are approved immediately on receipt, to the extent administratively feasible, but within a maximum of 10 working days;
- (b) Members recognise that automatic import licensing may be necessary whenever other appropriate procedures are not available. Automatic import licensing may be maintained as long as the circumstances which gave rise to its introduction prevail and as long as its underlying administrative purposes cannot be achieved in a more appropriate way.

### **Article 3: Non-Automatic Import Licensing**

1. The following provisions, in addition to those in paragraphs 1 through 11 of Article 1, shall apply to non-automatic import licensing procedures. Non-automatic import licensing procedures are defined as import licensing not falling within the definition contained in paragraph 1 of Article 2.
2. Non-automatic licensing shall not have trade-restrictive or – distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.
3. In the case of licensing requirements for purposes other than the implementation of quantitative restrictions, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.
4. Where a Member provides the possibility for persons, firms or institutions to request exceptions or derogations from a licensing requirement, it shall include this fact in the information published under paragraph 4 of Article 1 as well as information on how to

make such a request and, to the extent possible, an indication of the circumstances under which requests would be considered.

5. (a) Members shall provide, upon the request of any Member having an interest in the trade in the product concerned, all relevant information concerning:
  - (i) the administration of the restrictions;
  - (ii) the import licences granted over a recent period;
  - (iii) the distribution of such licences among supplying countries;
  - (iv) where practicable, import statistics (i.e. value and/or volume) with respect to the products subject to import licensing. ... ;
- (b) Members administering quotas by means of licensing shall publish the overall amount of quotas to be applied by quantity and/or value, the opening and closing dates of quotas, and any change thereof, within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;
- (c) in the case of quotas allocated among supplying countries, the Member applying the restrictions shall promptly inform all other Members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall publish this information within the time periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;
- (d) where situations arise which make it necessary to provide for an early opening date of quotas, the information referred to in paragraph 4 of Article 1 should be published within the time-periods specified in paragraph 4 of Article 1 and in such a manner as to enable governments and traders to become acquainted with them;
- (e) any person, firm or institution which fulfils the legal and administrative requirements of the importing Member shall be equally eligible to apply and to be considered for a licence. If the licence application is not approved, the applicant shall, on request, be given the reason therefor and shall have a



right of appeal or review in accordance with the domestic legislation or procedures of the importing Member;

- (f) the period for processing applications shall, except when not possible for reasons outside the control of the Member, not be longer than 30 days if applications are considered as and when received, i.e. on a first-come first-served basis, and no longer than 60 days if all applications are considered simultaneously. In the latter case, the period for processing applications shall be considered to begin on the day following the closing date of the announced application period;
- (g) the period of licence validity shall be of reasonable duration and not be so short as to preclude imports. The period of licence validity shall not preclude imports from distant sources, except in special cases where imports are necessary to meet unforeseen short-term requirements;
- (h) when administering quotas, Members shall not prevent importation from being effected in accordance with the issued licences, and shall not discourage the full utilisation of quotas;
- (i) when issuing licences, Members shall take into account the desirability of issuing licences for products in economic quantities;
- (j) in allocating licences, the Member should consider the import performance of the applicant. In this regard, consideration should be given as to whether licences issued to applicants in the past have been fully utilised during a recent representative period. In cases where licences have not been fully utilised, the Member shall examine the reasons for this and take these reasons into consideration when allocating new licences. Consideration shall also be given to ensuring a reasonable distribution of licences to new importers, taking into account the desirability of issuing licences for products in economic quantities. In this regard, special consideration should be given to those importers importing products originating in developing country Members and, in particular, the least-developed country Members;

- (k) in the case of quotas administered through licences which are not allocated among supplying countries, licence holders<sup>202</sup> shall be free to choose the sources of imports. In the case of quotas allocated among supplying countries, the licence shall clearly stipulate the country or countries;
- (l) in applying paragraph 8 of Article 1, compensating adjustments may be made in future licence allocations where imports exceeded a previous licence level.

### **Article 5: Notification**

1. Members which institute licensing procedures or changes in these procedures shall notify the Committee of such within 60 days of publication.
2. Notifications of the institution of import licensing procedures shall include the following information:
  - (a) list of products subject to licensing procedures;
  - (b) contact point for information on eligibility;
  - (c) administrative body(ies) for submission of applications;
  - (d) date and name of publication where licensing procedures are published;
  - (e) indication of whether the licensing procedure is automatic or non-automatic according to definitions contained in Articles 2 and 3;
  - (f) in the case of automatic import licensing procedures, their administrative purpose;
  - (g) in the case of non-automatic import licensing procedures, indication of the measure being implemented through the licensing procedure; and
  - (h) expected duration of the licensing procedure if this can be estimated with some probability, and if not, reason why this information cannot be provided.
3. Notifications of changes in import licensing procedures shall indicate the elements mentioned above, if changes in such occur.

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<sup>202</sup> Sometimes referred to as “quota holders”.

4. Members shall notify the Committee of the publication(s) in which the information required in paragraph 4 of Article 1 will be published.
5. Any interested Member which considers that another Member has not notified the institution of a licensing procedure or changes therein in accordance with the provisions of paragraphs 1 through 3 may bring the matter to the attention of such other Member. If notification is not made promptly thereafter, such Member may itself notify the licensing procedure or changes therein, including all relevant and available information.

#### **Article 7: Review**

3. Members undertake to complete the annual questionnaire on import licensing procedures promptly and in full.

#### **Article 8: Final Provisions**

##### **Domestic Legislation**

2. (a) Each Member shall ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.  
(b) Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

##### **(viii) Agreement on Subsidies and Countervailing Measures**

*[Members hereby agree as follows:]*

#### **PART I: GENERAL PROVISIONS**

##### **Article 1: Definition of a Subsidy**

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
  - (a) (1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);<sup>203</sup>
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

- (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

- (b) a benefit is thereby conferred.

1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

## **Article 2: Specificity**

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

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203 In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>204</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>205</sup> In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

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204 Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

205 In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

- 2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.
- 2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

## **PART II: PROHIBITED SUBSIDIES**

### **Article 3: Prohibition**

- 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
- (a) subsidies contingent, in law or in fact,<sup>206</sup> whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I,<sup>207</sup>
  - (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
- 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.

### **Article 4: Remedies**

- 4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.
- 4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.
- 4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

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206 This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

207 Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

## PART III: ACTIONABLE SUBSIDIES

### Article 5: Adverse Effects

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

- (a) injury to the domestic industry of another Member;<sup>208</sup>
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;<sup>209</sup>
- (c) serious prejudice to the interests of another Member.<sup>210</sup>

### Article 6: Serious Prejudice

6.1 Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of:

- (a) the total ad valorem subsidisation<sup>211</sup> of a product exceeding 5 percent;<sup>212</sup>
- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by an enterprise, other than one time measures which are non recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long term solutions and to avoid acute social problems;

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208 The term “injury to the domestic industry” is used here in the same sense as it is used in Part V.

209 The term “nullification or impairment” is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

210 The term “serious prejudice to the interests of another Member” is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

211 The total ad valorem subsidisation shall be calculated in accordance with the provisions of Annex IV.

212 Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the threshold in this subparagraph does not apply to civil aircraft.

- (d) direct forgiveness of debt, i.e. forgiveness of government held debt, and grants to cover debt repayment.<sup>213</sup>
- 6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidising Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.
- 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
  - (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidising Member;
  - (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
  - (c) the effect of the subsidy is a significant price undercutting by the subsidised product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
  - (d) the effect of the subsidy is an increase in the world market share of the subsidising Member in a particular subsidised primary product or commodity<sup>214</sup> as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.
- 6.4 For the purpose of paragraph 3(b), the displacement or impeding of exports shall include any case in which, subject to the provisions of paragraph 7, it has been demonstrated that there has been a change in relative shares of the market to the disadvantage of the non subsidised like product (over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year). "Change in relative

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213 Members recognise that where royalty based financing for a civil aircraft programme is not being fully repaid due to the level of actual sales falling below the level of forecast sales, this does not in itself constitute serious prejudice for the purposes of this subparagraph.

214 Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.



shares of the market” shall include any of the following situations: (a) there is an increase in the market share of the subsidised product; (b) the market share of the subsidised product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the market share of the subsidised product declines, but at a slower rate than would have been the case in the absence of the subsidy.

- 6.5 For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidised product with prices of a non subsidised like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.
- 6.6 Each Member in the market of which serious prejudice is alleged to have arisen shall ... make available to the parties to a dispute ... all relevant information that can be obtained as to the changes in market shares of the parties to the dispute as well as concerning prices of the products involved.
- 6.7 Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist<sup>215</sup> during the relevant period:
- (a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;
  - (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non commercial reasons, imports from the complaining Member to another country or countries;
  - (c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;

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215 The fact that certain circumstances are referred to in this paragraph does not, in itself, confer upon them any legal status in terms of either GATT 1994 or this Agreement. These circumstances must not be isolated, sporadic or otherwise insignificant.

- (d) existence of arrangements limiting exports from the complaining Member;
  - (e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);
  - (f) failure to conform to standards and other regulatory requirements in the importing country.
- 6.8 In the absence of circumstances referred to in paragraph 7, the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel ... .

### **Article 7: Remedies**

- 7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.
- 7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice<sup>216</sup> caused to the interests of the Member requesting consultations.
- 7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

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216 In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

## PART IV: NON-ACTIONABLE SUBSIDIES

### Article 8: Identification of Non-Actionable Subsidies

- 8.1 The following subsidies shall be considered as non actionable:<sup>217</sup>
- (a) subsidies which are not specific within the meaning of Article 2;
  - (b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.
- 8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non actionable:
- (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:<sup>218219</sup>

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217 It is recognised that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

218 Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

219 The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term “fundamental research” means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

the assistance covers<sup>220</sup> not more than 75 percent of the costs of industrial research<sup>221</sup> or 50 percent of the costs of pre competitive development activity;<sup>222223</sup>

and provided that such assistance is limited exclusively to:

- (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
- (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
- (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought in research, technical knowledge, patents, etc.;
- (iv) additional overhead costs incurred directly as a result of the research activity;
- (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

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220 The allowable levels of non actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

221 The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

222 The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

223 In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

- (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development<sup>224</sup> and non-specific (within the meaning of Article 2) within eligible regions provided that:
- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
  - (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria,<sup>225</sup> indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;
  - (iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:
    - one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 percent of the average for the territory concerned;
    - unemployment rate, which must be at least 110 percent of the average for the territory concerned; as measured over a three year period; such measurement, however, may be a composite one and may include other factors.

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224 A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

225 "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidised project. Such ceilings must be differentiated according to the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

- (c) assistance to promote adaptation of existing facilities<sup>226</sup> to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:
  - (i) is a one time non recurring measure; and
  - (ii) is limited to 20 percent of the cost of adaptation; and
  - (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
  - (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
  - (v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidisation under a notified programme.<sup>227</sup>

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidising Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a

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226 The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

227 It is recognised that nothing in this notification provision requires the provision of confidential information, including confidential business information.

view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

## PART V: COUNTERVAILING MEASURES

### Article 10: Application of Article VI of GATT 1994<sup>228</sup>

Members shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>229</sup> on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated<sup>230</sup> and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

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228 The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available. The provisions of Parts III and V shall not be invoked regarding measures considered non actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8.

229 The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

230 The term “initiated” as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

## Article 11: Initiation and Subsequent Investigation

- 11.1 Except as provided in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.
- 11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidised imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
  - (ii) a complete description of the allegedly subsidised product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
  - (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
  - (iv) evidence that alleged injury to a domestic industry is caused by subsidised imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidised imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a



bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.

- 11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.
- 11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>231</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>232</sup> The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 percent of total production of the like product produced by the domestic industry.
- 11.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the application for the initiation of an investigation.
- 11.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.
- 11.7 The evidence of both subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter, during the course of the

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231 In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

232 Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

- 11.8 In cases where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the importing Member.
- 11.9 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidisation or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is de minimis, or where the volume of subsidised imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 percent ad valorem.
- 11.10 An investigation shall not hinder the procedures of customs clearance.
- 11.11 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

## Article 12: Evidence

- 12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
- 12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.<sup>233</sup>

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<sup>233</sup> As a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the

Due consideration should be given to any request for an extension of the 30 day period and, upon cause shown, such an extension should be granted whenever practicable.

- 12.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation.
- 12.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 11 to the known exporters<sup>234</sup> and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the protection of confidential information, as provided for in paragraph 4.
- 12.2. Interested Members and interested parties also shall have the right, upon justification, to present information orally. Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing. Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.
- 12.3 The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 4, and that is used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.
- 12.4 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive

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exporting territory.

234 It being understood that where the number of exporters involved is particularly high, the full text of the application should instead be provided only to the authorities of the exporting Member or to the relevant trade association who then should forward copies to the exporters concerned.

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 the supplier 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.<sup>235</sup>

12.4.1 The authorities shall require interested Members or 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 Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarisation is not possible must be provided.

12.4.2 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 authorise its disclosure in generalised 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.<sup>236</sup>

12.5 Except in circumstances provided for in paragraph 7, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based.

12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees

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235 Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

236 Members agree that requests for confidentiality should not be arbitrarily rejected. Members further agree that the investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.

and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

- 12.7 In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.
- 12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.
- 12.9 For the purposes of this Agreement, "interested parties" shall include:
- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; and
  - (ii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

- 12.10 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organisations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding subsidisation, injury and causality.
- 12.11 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies,

in supplying information requested, and shall provide any assistance practicable.

- 12.12 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

### **Article 13: Consultations**

- 13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.
- 13.2 Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.<sup>237</sup>
- 13.3 Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.
- 13.4 The Member which intends to initiate any investigation or is conducting such an investigation shall permit, upon request, the Member or Members the products of which are subject to such investigation access to non confidential evidence, including the non confidential summary of confidential data being used for initiating or conducting the investigation.

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<sup>237</sup> It is particularly important, in accordance with the provisions of this paragraph, that no affirmative determination whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part II, III or X.

## Article 14: Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

- (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
- (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
- (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
- (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

## Article 15: Determination of Injury<sup>238</sup>

- 15.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidised imports and the effect of the subsidised imports on prices in the domestic market for like products<sup>239</sup> and (b) the consequent impact of these imports on the domestic producers of such products.
- 15.2 With regard to the volume of the subsidised imports, the investigating authorities shall consider whether there has been a significant increase in subsidised imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidised imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidised imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.
- 15.3 Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the amount of subsidisation established in relation to the imports from each country is more than de minimis as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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238 Under this Agreement the term “injury” shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

239 Throughout this Agreement the term “like product” (“produit similaire”) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.



- 15.4 The examination of the impact of the subsidised imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
- 15.5 It must be demonstrated that the subsidised imports are, through the effects<sup>240</sup> of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidised imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidised imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidised imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non subsidised imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.
- 15.6 The effect of the subsidised imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the subsidised imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

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240 As set forth in paragraphs 2 and 4.

- 15.7 A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, inter alia, such factors as:
- (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
  - (ii) a significant rate of increase of subsidised imports into the domestic market indicating the likelihood of substantially increased importation;
  - (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidised exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
  - (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
  - (v) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidised exports are imminent and that, unless protective action is taken, material injury would occur.

- 15.8 With respect to cases where injury is threatened by subsidised imports, the application of countervailing measures shall be considered and decided with special care.

### **Article 16: Definition of Domestic Industry**

- 16.1 For the purposes of this Agreement, the term "domestic industry" shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production

of those products, except that when producers are related<sup>241</sup> to the exporters or importers or are themselves importers of the allegedly subsidised product or a like product from other countries, the term “domestic industry” may be interpreted as referring to the rest of the producers.

- 16.2. In exceptional circumstances, the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of subsidised imports into such an isolated market and provided further that the subsidised imports are causing injury to the producers of all or almost all of the production within such market.
- 16.3 When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 2, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing Member does not permit the levying of countervailing duties on such a basis, the importing Member may levy the countervailing duties without limitation only if (a) the exporters shall have been given an opportunity to cease exporting at subsidised prices to the area concerned or otherwise give assurances pursuant to Article 18, and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.

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241 For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

- 16.4 Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry referred to in paragraphs 1 and 2.
- 16.5 The provisions of paragraph 6 of Article 15 shall be applicable to this Article.

### **Article 17: Provisional Measures**

- 17.1 Provisional measures may be applied only if:
- (a) an investigation has been initiated in accordance with the provisions of Article 11, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments;
  - (b) a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidised imports; and
  - (c) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.
- 17.2 Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidisation.
- 17.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.
- 17.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months.
- 17.5 The relevant provisions of Article 19 shall be followed in the application of provisional measures.

### **Article 18: Undertakings**

- 18.1 Proceedings may<sup>242</sup> be suspended or terminated without the imposition of provisional measures or countervailing duties upon receipt of satisfactory voluntary undertakings under which:

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<sup>242</sup> The word "may" shall not be interpreted to allow the simultaneous continuation

- (a) the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
  - (b) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy. It is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.
- 18.2 Undertakings shall not be sought or accepted unless the authorities of the importing Member have made a preliminary affirmative determination of subsidisation and injury caused by such subsidisation and, in case of undertakings from exporters, have obtained the consent of the exporting Member.
- 18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.
- 18.4 If an undertaking is accepted, the investigation of subsidisation and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidisation or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidisation and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

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of proceedings with the implementation of undertakings, except as provided in paragraph 4.

- 18.5 Price undertakings may be suggested by the authorities of the importing Member, but no exporter shall be forced to enter into such undertakings. The fact that governments or exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realised if the subsidised imports continue.
- 18.6 Authorities of an importing Member may require any government or exporter from whom an undertaking has been accepted to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. In case of violation of an undertaking, the authorities of the importing Member may take, under this Agreement in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on products entered for consumption not more than 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

### **Article 19: Imposition and Collection of Countervailing Duties**

- 19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidised imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.
- 19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations

made by domestic interested parties<sup>243</sup> whose interests might be adversely affected by the imposition of a countervailing duty.

- 19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non discriminatory basis on imports of such product from all sources found to be subsidised and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.
- 19.4 No countervailing duty shall be levied<sup>244</sup> on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidisation per unit of the subsidised and exported product.

### **Article 20: Retroactivity**

- 20.1 Provisional measures and countervailing duties shall only be applied to products which enter for consumption after the time when the decision under paragraph 1 of Article 17 and paragraph 1 of Article 19, respectively, enters into force, subject to the exceptions set out in this Article.
- 20.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidised imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.
- 20.3 If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount

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243 For the purpose of this paragraph, the term “domestic interested parties” shall include consumers and industrial users of the imported product subject to investigation.

244 As used in this Agreement “levy” shall mean the definitive or final legal assessment or collection of a duty or tax.

guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

- 20.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.
- 20.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.
- 20.6 In critical circumstances where for the subsidised product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

#### **Article 21: Duration and Review of Countervailing Duties and Undertakings**

- 21.1 A countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidisation which is causing injury.
- 21.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidisation, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the



authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

- 21.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive countervailing duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both subsidisation and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury.<sup>245</sup> The duty may remain in force pending the outcome of such a review.
- 21.4 The provisions of Article 12 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.
- 21.5 The provisions of this Article shall apply *mutatis mutandis* to undertakings accepted under Article 18.

### **Article 23: Judicial Review**

Each Member whose national legislation contains provisions on countervailing duty measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 21. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question, and shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review.

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<sup>245</sup> When the amount of the countervailing duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

## PART VII: NOTIFICATION AND SURVEILLANCE

### Article 25: Notifications

- 25.1 Members agree that, without prejudice to the provisions of paragraph 1 of Article XVI of GATT 1994, their notifications of subsidies shall be submitted not later than 30 June of each year and shall conform to the provisions of paragraphs 2 through 6.
- 25.2 Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.
- 25.3 The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies,<sup>246</sup> Members shall ensure that their notifications contain the following information:
- (i) form of a subsidy (i.e. grant, loan, tax concession, etc.);
  - (ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy (indicating, if possible, the average subsidy per unit in the previous year);
  - (iii) policy objective and/or purpose of a subsidy;
  - (iv) duration of a subsidy and/or any other time limits attached to it;
  - (v) statistical data permitting an assessment of the trade effects of a subsidy.
- 25.4 Where specific points in paragraph 3 have not been addressed in a notification, an explanation shall be provided in the notification itself.
- 25.5 If subsidies are granted to specific products or sectors, the notifications should be organised by product or sector.
- 25.6 Members which consider that there are no measures in their territories requiring notification under paragraph 1 of Article XVI of GATT 1994 and this Agreement shall so inform the Secretariat in writing.

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<sup>246</sup> The Committee shall establish a Working Party to review the contents and form of the questionnaire as contained in BISD 9S/193 194.

- 25.7 Members recognise that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.
- 25.8 Any Member may, at any time, make a written request for information on the nature and extent of any subsidy granted or maintained by another Member (including any subsidy referred to in Part IV), or for an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.
- 25.9 Members so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready, upon request, to provide additional information to the requesting Member. In particular, they shall provide sufficient details to enable the other Member to assess their compliance with the terms of this Agreement. Any Member which considers that such information has not been provided may bring the matter to the attention of the Committee.
- 25.10 Any Member which considers that any measure of another Member having the effects of a subsidy has not been notified in accordance with the provisions of paragraph 1 of Article XVI of GATT 1994 and this Article may bring the matter to the attention of such other Member. If the alleged subsidy is not thereafter notified promptly, such Member may itself bring the alleged subsidy in question to the notice of the Committee.
- 25.11 Members shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months. The semi annual reports shall be submitted on an agreed standard form.
- 25.12 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 11 and (b) its domestic procedures governing the initiation and conduct of such investigations.

## **PART IX: TRANSITIONAL ARRANGEMENTS**

### **Article 28: Existing Programmes**

- 28.1 Subsidy programmes which have been established within the territory of any Member before the date on which such a Member signed the WTO Agreement and which are inconsistent with the provisions of this Agreement shall be:
- (a) notified to the Committee not later than 90 days after the date of entry into force of the WTO Agreement for such Member; and
  - (b) brought into conformity with the provisions of this Agreement within three years of the date of entry into force of the WTO Agreement for such Member and until then shall not be subject to Part II.
- 28.2 No Member shall extend the scope of any such programme, nor shall such a programme be renewed upon its expiry.

### **Article 29: Transformation into a Market Economy**

- 29.1 Members in the process of transformation from a centrally planned into a market, free enterprise economy may apply programmes and measures necessary for such a transformation.
- 29.2 For such Members, subsidy programmes falling within the scope of Article 3, and notified according to paragraph 3, shall be phased out or brought into conformity with Article 3 within a period of seven years from the date of entry into force of the WTO Agreement. . . .
- 29.3 Subsidy programmes falling within the scope of Article 3 shall be notified to the Committee by the earliest practicable date after the date of entry into force of the WTO Agreement. Further notifications of such subsidies may be made up to two years after the date of entry into force of the WTO Agreement.
- 29.4 In exceptional circumstances Members referred to in paragraph 1 may be given departures from their notified programmes and measures and their time frame by the Committee if such departures are deemed necessary for the process of transformation.

## PART XI: FINAL PROVISIONS

### Article 32: Other Final Provisions

- 32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>247</sup>
- 32.3 Subject to paragraph 4, the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.
- 32.4 For the purposes of paragraph 3 of Article 21, existing countervailing measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force at that date already included a clause of the type provided for in that paragraph.
- 32.5 Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question.
- 32.6 Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.
- 32.8 The Annexes to this Agreement constitute an integral part thereof.<sup>248</sup>

### ANNEX I: ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

- (a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.

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247 This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

248 Editor's note: this paragraph applies to the ECT only insofar as it refers to Annexes I, II, III, IV, VI.

- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The provision by governments or their agencies either directly or indirectly through government mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available<sup>249</sup> on world markets to their exporters.
- (e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes<sup>250</sup> or social welfare charges paid or payable by industrial or commercial enterprises.<sup>251</sup>

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249 The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

250 For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

251 The Members recognise that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes<sup>252</sup> in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.
- (h) The exemption, remission or deferral of prior stage cumulative indirect taxes<sup>253</sup> on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).<sup>254</sup> This item shall be interpreted in

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Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another Member.

252 For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.

253 Id.

254 Paragraph (h) does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

accordance with the guidelines on consumption of inputs in the production process contained in Annex II.

- (i) The remission or drawback of import charges<sup>255</sup> in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.
- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.
- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same

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255 For the purpose of this Agreement:

The term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

"Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

"Remission" of taxes includes the refund or rebate of taxes;

"Remission or drawback" includes the full or partial exemption or deferral of import charges.



maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

## **ANNEX II: GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS<sup>256</sup>**

### **I**

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).
2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an

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<sup>256</sup> Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product.

export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.

## II

In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.
2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

3. Investigating authorities should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. The Members note that an input need not be present in the final product in the same form in which it entered the production process.
4. In determining the amount of a particular input that is consumed in the production of the exported product, a “normal allowance for waste” should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term “waste” refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.
5. The investigating authority’s determination of whether the claimed allowance for waste is “normal” should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The investigating authority should bear in mind that an important question is whether the authorities in the exporting Member have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

### **ANNEX III: GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES**

#### **I**

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Annex I, substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

## II

In examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis:

1. Paragraph (i) of the Illustrative List stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.
2. Where it is alleged that a substitution drawback system conveys a subsidy, the investigating authorities should first proceed to determine whether the government of the exporting Member has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. It may be deemed necessary by the investigating authorities to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.
3. Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 2.

4. The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.
5. An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

#### **ANNEX IV: CALCULATION OF THE TOTAL AD VALOREM SUBSIDISATION (PARAGRAPH 1(A) OF ARTICLE 6)<sup>257</sup>**

1. Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government.
2. Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidisation exceeds 5 percent of the value of the product, the value of the product shall be calculated as the total value of the recipient firm's<sup>258</sup> sales in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.<sup>259</sup>
3. Where the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted.
4. Where the recipient firm is in a start up situation, serious prejudice shall be deemed to exist if the overall rate of subsidisation exceeds 15 percent of the total funds invested. For purposes of this paragraph, a start up period will not extend beyond the first year of production.<sup>260</sup>

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257 An understanding among Members should be developed, as necessary, on matters which are not specified in this Annex or which need further clarification for the purposes of paragraph 1(a) of Article 6.

258 The recipient firm is a firm in the territory of the subsidising Member.

259 In the case of tax related subsidies the value of the product shall be calculated as the total value of the recipient firm's sales in the fiscal year in which the tax related measure was earned.

260 Start-up situations include instances where financial commitments for product development or construction of facilities to manufacture products benefiting from the subsidy have been made, even though production has not begun.

5. Where the recipient firm is located in an inflationary economy country, the value of the product shall be calculated as the recipient firm's total sales (or sales of the relevant product, if the subsidy is tied) in the preceding calendar year indexed by the rate of inflation experienced in the 12 months preceding the month in which the subsidy is to be given.
6. In determining the overall rate of subsidisation in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.
7. Subsidies granted prior to the date of entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidisation.
8. Subsidies which are non actionable under relevant provisions of this Agreement shall not be included in the calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6.

#### **ANNEX VI: PROCEDURES FOR ON-THE-SPOT INVESTIGATIONS PURSUANT TO PARAGRAPH 6 OF ARTICLE 12**

1. Upon initiation of an investigation, the authorities of the exporting Member and the firms known to be concerned should be informed of the intention to carry out on-the-spot investigations.
2. If in exceptional circumstances it is intended to include non governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non governmental experts should be subject to effective sanctions for breach of confidentiality requirements.
3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.
4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
5. Sufficient advance notice should be given to the firms in question before the visit is made.
6. Visits to explain the questionnaire should only be made at the request of an exporting firm. In case of such a request the

investigating authorities may place themselves at the disposal of the firm; such a visit may only be made if (a) the authorities of the importing Member notify the representatives of the government of the Member in question and (b) the latter do not object to the visit.

7. As the main purpose of the on the spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.
8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on the spot investigation should, whenever possible, be answered before the visit is made.

**(ix) Agreement on Safeguards**

*[Members,*

*Having in mind the overall objective of the Members to improve and strengthen the international trading system based on GATT 1994;*

*Recognising the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re establish multilateral control over safeguards and eliminate measures that escape such control;*

*Recognising the importance of structural adjustment and the need to enhance rather than limit competition in international markets; and*

*Recognising further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for;*

*Hereby agree as follows:]*

## **Article 1: General Provision**

This Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994.

## **Article 2: Conditions**

1. A Member<sup>261</sup> may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.
2. Safeguard measures shall be applied to a product being imported irrespective of its source.

## **Article 3: Investigation**

1. A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

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261 A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that member State. Nothing in this Agreement prejudices the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.



2. Any information which is by nature confidential or which is provided on a confidential basis shall, upon cause being shown, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non confidential summaries thereof or, if such parties indicate that such information cannot be summarised, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorise its disclosure in generalised 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.

#### **Article 4: Determination of Serious Injury or Threat Thereof**

1. For the purposes of this Agreement:
  - (a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
  - (b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and
  - (c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.
2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by

increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.

- (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.
- (c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

#### **Article 5: Application of Safeguard Measures**

- 1. A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. If a quantitative restriction is used, such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury. Members should choose measures most suitable for the achievement of these objectives.
- 2.
  - (a) In cases in which a quota is allocated among supplying countries, the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product.
  - (b) A Member may depart from the provisions in subparagraph (a) provided that consultations under paragraph 3 of Article

12 are conducted under the auspices of the Committee on Safeguards provided for in paragraph 1 of Article 13 and that clear demonstration is provided to the Committee that (i) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period, (ii) the reasons for the departure from the provisions in subparagraph (a) are justified, and (iii) the conditions of such departure are equitable to all suppliers of the product concerned. The duration of any such measure shall not be extended beyond the initial period under paragraph 1 of Article 7. The departure referred to above shall not be permitted in the case of threat of serious injury.

### **Article 6: Provisional Safeguard Measures**

In critical circumstances where delay would cause damage which it would be difficult to repair, a Member may take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury. The duration of the provisional measure shall not exceed 200 days, during which period the pertinent requirements of Articles 2 through 7 and 12 shall be met. Such measures should take the form of tariff increases to be promptly refunded if the subsequent investigation referred to in paragraph 2 of Article 4 does not determine that increased imports have caused or threatened to cause serious injury to a domestic industry. The duration of any such provisional measure shall be counted as a part of the initial period and any extension referred to in paragraphs 1, 2 and 3 of Article 7.

### **Article 7: Duration and Review of Safeguard Measures**

1. A Member shall apply safeguard measures only for such period of time as may be necessary to prevent or remedy serious injury and to facilitate adjustment. The period shall not exceed four years, unless it is extended under paragraph 2.
2. The period mentioned in paragraph 1 may be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence

that the industry is adjusting, and provided that the pertinent provisions of Articles 8 and 12 are observed.

3. The total period of application of a safeguard measure including the period of application of any provisional measure, the period of initial application and any extension thereof, shall not exceed eight years.
4. In order to facilitate adjustment in a situation where the expected duration of a safeguard measure as notified under the provisions of paragraph 1 of Article 12 is over one year, the Member applying the measure shall progressively liberalise it at regular intervals during the period of application. If the duration of the measure exceeds three years, the Member applying such a measure shall review the situation not later than the mid term of the measure and, if appropriate, withdraw it or increase the pace of liberalisation. A measure extended under paragraph 2 shall not be more restrictive than it was at the end of the initial period, and should continue to be liberalised.
5. No safeguard measure shall be applied again to the import of a product which has been subject to such a measure, taken after the date of entry into force of the WTO Agreement, for a period of time equal to that during which such measure had been previously applied, provided that the period of non application is at least two years.
6. Notwithstanding the provisions of paragraph 5, a safeguard measure with a duration of 180 days or less may be applied again to the import of a product if:
  - (a) at least one year has elapsed since the date of introduction of a safeguard measure on the import of that product; and
  - (b) such a safeguard measure has not been applied on the same product more than twice in the five year period immediately preceding the date of introduction of the measure.

### **Article 8: Level of Concessions and Other Obligations**

1. A Member proposing to apply a safeguard measure or seeking an extension of a safeguard measure shall endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting Members which would be affected by such a measure,

in accordance with the provisions of paragraph 3 of Article 12. To achieve this objective, the Members concerned may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade.

2. If no agreement is reached within 30 days in the consultations under paragraph 3 of Article 12, then the affected exporting Members shall be free, not later than 90 days after the measure is applied, to suspend, upon the expiration of 30 days from the day on which written notice of such suspension is received by the Council for Trade in Goods, the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the Member applying the safeguard measure, the suspension of which the Council for Trade in Goods does not disapprove.
3. The right of suspension referred to in paragraph 2 shall not be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of this Agreement.

#### **Article 10: Pre existing Article XIX Measures**

Members shall terminate all safeguard measures taken pursuant to Article XIX of GATT 1947 that were in existence on the date of entry into force of the WTO Agreement not later than eight years after the date on which they were first applied or five years after the date of entry into force of the WTO Agreement, whichever comes later.

#### **Article 11: Prohibition and Elimination of Certain Measures**

1.
  - (a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.
  - (b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import

side.<sup>262</sup><sup>263</sup> These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

- (c) This Agreement does not apply to measures sought, taken or maintained by a Member pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement, or pursuant to protocols and agreements or arrangements concluded within the framework of GATT 1994.
2. The phasing out of measures referred to in paragraph 1(b) shall be carried out according to timetables to be presented to the Committee on Safeguards by the Members concerned not later than 180 days after the date of entry into force of the WTO Agreement. These timetables shall provide for all measures referred to in paragraph 1 to be phased out or brought into conformity with this Agreement within a period not exceeding four years after the date of entry into force of the WTO Agreement, subject to not more than one specific measure per importing Member,<sup>264</sup> the duration of which shall not extend beyond 31 December 1999. Any such exception must be mutually agreed between the Members directly concerned and notified to the Committee on Safeguards for its review and acceptance within 90 days of the entry into force of the WTO Agreement. The Annex to this Agreement indicates a measure which has been agreed as falling under this exception.
3. Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.

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262 An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.

263 Examples of similar measures include export moderation, export-price or import-price monitoring systems, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes, any of which afford protection.

264 The only such exception to which the European Communities is entitled is indicated in the Annex to this Agreement.

## Article 12: Notification and Consultation

1. A Member shall immediately notify the Committee on Safeguards upon:
  - (a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it;
  - (b) making a finding of serious injury or threat thereof caused by increased imports; and
  - (c) taking a decision to apply or extend a safeguard measure.
2. In making the notifications referred to in paragraphs 1(b) and 1(c), the Member proposing to apply or extend a safeguard measure shall provide the Committee on Safeguards with all pertinent information, which shall include evidence of serious injury or threat thereof caused by increased imports, precise description of the product involved and the proposed measure, proposed date of introduction, expected duration and timetable for progressive liberalisation. In the case of an extension of a measure, evidence that the industry concerned is adjusting shall also be provided. The Council for Trade in Goods or the Committee on Safeguards may request such additional information as they may consider necessary from the Member proposing to apply or extend the measure.
3. A Member proposing to apply or extend a safeguard measure shall provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided under paragraph 2, exchanging views on the measure and reaching an understanding on ways to achieve the objective set out in paragraph 1 of Article 8.
4. A Member shall make a notification to the Committee on Safeguards before taking a provisional safeguard measure referred to in Article 6. Consultations shall be initiated immediately after the measure is taken.
5. The results of the consultations referred to in this Article, as well as the results of mid term reviews referred to in paragraph 4 of Article 7, any form of compensation referred to in paragraph 1 of Article 8, and proposed suspensions of concessions and other obligations referred to in paragraph 2 of Article 8, shall be notified immediately to the Council for Trade in Goods by the Members concerned.

6. Members shall notify promptly the Committee on Safeguards of their laws, regulations and administrative procedures relating to safeguard measures as well as any modifications made to them.
7. Members maintaining measures described in Article 10 and paragraph 1 of Article 11 which exist on the date of entry into force of the WTO Agreement shall notify such measures to the Committee on Safeguards not later than 60 days after the date of entry into force of the WTO Agreement.
8. Any Member may notify the Committee on Safeguards of all laws, regulations, administrative procedures and any measures or actions dealt with in this Agreement that have not been notified by other Members that are required by this Agreement to make such notifications.
9. Any Member may notify the Committee on Safeguards of any non governmental measures referred to in paragraph 3 of Article 11.
11. The provisions on notification in this Agreement shall not require any Member to disclose confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

**(x) Agreement on Trade Facilitation<sup>265</sup>**

*[Preamble*

*Members,*

*Having regard to the negotiations launched under the Doha Ministerial Declaration;*

*Recalling and reaffirming the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) and in Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004 (WT/L/579), as*

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265 Editor's note: the Trade Facilitation Agreement will apply to the Energy Charter Treaty when it takes effect under the WTO, namely, once two-thirds of the WTO Members have completed their domestic ratification process. As of 22 February 2016, 69 WTO Members have accepted the Protocol of Amendment to insert the WTO Trade Facilitation Agreement into Annex 1A of the WTO Agreement. According to the Annex W(B) Rule 10(b) the Agreement on Trade Facilitation will apply to the Energy Charter Treaty unless a Contracting Party requests the Charter Conference to disapply or modify it.



*well as in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC);*

*Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit;*

*Recognising the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area;*

*Recognising the need for effective cooperation among Members on trade facilitation and customs compliance issues;*

*Hereby agree as follows:]*

## SECTION I

### Article 1: Publication and Availability of Information

#### 1 Publication

- 1.1 Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them:
- (a) procedures for importation, exportation, and transit (including port, airport, and other entry-point procedures), and required forms and documents;
  - (b) applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation;
  - (c) fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;
  - (d) rules for the classification or valuation of products for customs purposes;
  - (e) laws, regulations, and administrative rulings of general application relating to rules of origin;
  - (f) import, export or transit restrictions or prohibitions;
  - (g) penalty provisions for breaches of import, export, or transit formalities;

- (h) procedures for appeal or review;
  - (i) agreements or parts thereof with any country or countries relating to importation, exportation, or transit; and
  - (j) procedures relating to the administration of tariff quotas.
- 1.2 Nothing in these provisions shall be construed as requiring the publication or provision of information other than in the language of the Member except as stated in paragraph 2.2.

## **2 Information Available Through Internet**

- 2.1 Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:
- (a) a description<sup>266</sup> of its procedures for importation, exportation, and transit, including procedures for appeal or review, that informs governments, traders, and other interested parties of the practical steps needed for importation, exportation, and transit;
  - (b) the forms and documents required for importation into, exportation from, or transit through the territory of that Member;
  - (c) contact information on its enquiry point(s).
- 2.2 Whenever practicable, the description referred to in subparagraph 2.1(a) shall also be made available in one of the official languages of the WTO.
- 2.3 Members are encouraged to make available further trade-related information through the internet, including relevant trade-related legislation and other items referred to in paragraph 1.1.

## **3 Enquiry Points**

- 3.1 Each Member shall, within its available resources, establish or maintain one or more enquiry points to answer reasonable enquiries of governments, traders, and other interested parties on matters covered by paragraph 1.1 and to provide the required forms and documents referred to in subparagraph 1.1(a).
- 3.2 Members of a customs union or involved in regional integration may establish or maintain common enquiry points at the regional level to satisfy the requirement of paragraph 3.1 for common procedures.

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<sup>266</sup> Each Member has the discretion to state on its website the legal limitations of this description.

- 3.3 Members are encouraged not to require the payment of a fee for answering enquiries and providing required forms and documents. If any, Members shall limit the amount of their fees and charges to the approximate cost of services rendered.
- 3.4 The enquiry points shall answer enquiries and provide the forms and documents within a reasonable time period set by each Member, which may vary depending on the nature or complexity of the request.

#### **4 Notification**

Each Member shall notify the Committee on Trade Facilitation established under paragraph 1.1 of Article 23 (referred to in this Agreement as the “Committee”) of:

- (a) the official place(s) where the items in subparagraphs 1.1(a) to (j) have been published;
- (b) the Uniform Resource Locators of website(s) referred to in paragraph 2.1; and
- (c) the contact information of the enquiry points referred to in paragraph 3.1.

### **Article 2: Opportunity to Comment, Information before Entry into Force, and Consultations**

#### **1 Opportunity to Comment and Information before Entry into Force**

- 1.1 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit.
- 1.2 Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release, and clearance of goods, including goods in transit, are published or information on them made otherwise publicly available, as early as possible before their entry into force,

in order to enable traders and other interested parties to become acquainted with them.

- 1.3 Changes to duty rates or tariff rates, measures that have a relieving effect, measures the effectiveness of which would be undermined as a result of compliance with paragraphs 1.1 or 1.2, measures applied in urgent circumstances, or minor changes to domestic law and legal system are each excluded from paragraphs 1.1 and 1.2.

## **2 Consultations**

Each Member shall, as appropriate, provide for regular consultations between its border agencies and traders or other stakeholders located within its territory.

### **Article 3: Advance Rulings**

1. Each Member shall issue an advance ruling in a reasonable, time-bound manner to the applicant that has submitted a written request containing all necessary information. If a Member declines to issue an advance ruling, it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision.
2. A Member may decline to issue an advance ruling to the applicant where the question raised in the application:
  - (a) is already pending in the applicant's case before any governmental agency, appellate tribunal, or court; or
  - (b) has already been decided by any appellate tribunal or court.
3. The advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts, or circumstances supporting that ruling have changed.
4. Where the Member revokes, modifies, or invalidates the advance ruling, it shall provide written notice to the applicant setting out the relevant facts and the basis for its decision. Where a Member revokes, modifies, or invalidates advance rulings with retroactive effect, it may only do so where the ruling was based on incomplete, incorrect, false, or misleading information.
5. An advance ruling issued by a Member shall be binding on that Member in respect of the applicant that sought it. The Member may provide that the advance ruling is binding on the applicant.

6. Each Member shall publish, at a minimum:
  - (a) the requirements for the application for an advance ruling, including the information to be provided and the format;
  - (b) the time period by which it will issue an advance ruling; and
  - (c) the length of time for which the advance ruling is valid.
7. Each Member shall provide, upon written request of an applicant, a review of the advance ruling or the decision to revoke, modify, or invalidate the advance ruling.<sup>267</sup>
8. Each Member shall endeavour to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.
9. Definitions and scope:
  - (a) An advance ruling is a written decision provided by a Member to the applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to:
    - (i) the good's tariff classification; and
    - (ii) the origin of the good.<sup>268</sup>
  - (b) In addition to the advance rulings defined in subparagraph (a), Members are encouraged to provide advance rulings on:
    - (i) the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts;

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267 Under this paragraph: (a) a review may, either before or after the ruling has been acted upon, be provided by the official, office, or authority that issued the ruling, a higher or independent administrative authority, or a judicial authority; and (b) a Member is not required to provide the applicant with recourse to paragraph 1 of Article 4.

268 It is understood that an advance ruling on the origin of a good may be an assessment of origin for the purposes of the Agreement on Rules of Origin where the ruling meets the requirements of this Agreement and the Agreement on Rules of Origin. Likewise, an assessment of origin under the Agreement on Rules of Origin may be an advance ruling on the origin of a good for the purposes of this Agreement where the ruling meets the requirements of both agreements. Members are not required to establish separate arrangements under this provision in addition to those established pursuant to the Agreement on Rules of Origin in relation to the assessment of origin provided that the requirements of this Article are fulfilled.

- (ii) the applicability of the Member's requirements for relief or exemption from customs duties;
  - (iii) the application of the Member's requirements for quotas, including tariff quotas; and
  - (iv) any additional matters for which a Member considers it appropriate to issue an advance ruling.
- (c) An applicant is an exporter, importer or any person with a justifiable cause or a representative thereof.
- (d) A Member may require that the applicant have legal representation or registration in its territory. To the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium-sized enterprises. These requirements shall be clear and transparent and not constitute a means of arbitrary or unjustifiable discrimination.

#### **Article 4: Procedures for Appeal or Review**

1. Each Member shall provide that any person to whom customs issues an administrative decision<sup>269</sup> has the right, within its territory, to:
  - (a) an administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;and/or
  - (b) a judicial appeal or review of the decision.
2. The legislation of a Member may require that an administrative appeal or review be initiated prior to a judicial appeal or review.

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<sup>269</sup> An administrative decision in this Article means a decision with a legal effect that affects the rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1(a).

3. Each Member shall ensure that its procedures for appeal or review are carried out in a non-discriminatory manner.
4. Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1(a) is not given either:
  - (a) within set periods as specified in its laws or regulations; or
  - (b) without undue delay the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.<sup>270</sup>
5. Each Member shall ensure that the person referred to in paragraph 1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to procedures for appeal or review where necessary.
6. Each Member is encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs.

## **Article 5: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency**

### **1 Notifications for enhanced controls or inspections**

Where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages, or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination, or suspension:

- (a) the Member may, as appropriate, issue the notification or guidance based on risk;
- (b) the Member may issue the notification or guidance so that it applies uniformly only to those points of entry where the sanitary and phytosanitary conditions on which the notification or guidance are based apply;

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<sup>270</sup> Nothing in this paragraph shall prevent a Member from recognising administrative silence on appeal or review as a decision in favour of the petitioner in accordance with its laws and regulations.

- (c) the Member shall promptly terminate or suspend the notification or guidance when circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade-restrictive manner; and
- (d) when the Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

## **2 Detention**

A Member shall promptly inform the carrier or importer in case of detention of goods declared for importation, for inspection by customs or any other competent authority.

## **3 Test Procedures**

- 3.1 A Member may, upon request, grant an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding.
- 3.2 A Member shall either publish, in a non-discriminatory and easily accessible manner, the name and address of any laboratory where the test can be carried out or provide this information to the importer when it is granted the opportunity provided under paragraph 3.1.
- 3.3 A Member shall consider the result of the second test, if any, conducted under paragraph 3.1, for the release and clearance of goods and, if appropriate, may accept the results of such test.

## **Article 6: Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation and Penalties**

### **1 General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation**

- 1.1 The provisions of paragraph 1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with the importation or exportation of goods.
- 1.2 Information on fees and charges shall be published in accordance with Article 1. This information shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made.



- 1.3 An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force, except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published.
- 1.4 Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.
- 2 Specific disciplines on Fees and Charges for Customs Processing Imposed on or in Connection with Importation and Exportation**

Fees and charges for customs processing:

- (i) shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and
- (ii) are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.

### **3 Penalty Disciplines**

- 3.1 For the purpose of paragraph 3, the term “penalties” shall mean those imposed by a Member’s customs administration for a breach of the Member’s customs laws, regulations, or procedural requirements.
- 3.2 Each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws.
- 3.3 The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.
- 3.4 Each Member shall ensure that it maintains measures to avoid:
  - (a) conflicts of interest in the assessment and collection of penalties and duties; and
  - (b) creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.
- 3.5 Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying the nature of the breach and the

applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed.

- 3.6 When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.
- 3.7 The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1.

## **Article 7: Release and Clearance of Goods**

### **1 Pre-arrival Processing**

- 1.1 Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival.
- 1.2 Each Member shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.

### **2 Electronic Payment**

Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees, and charges collected by customs incurred upon importation and exportation.

### **3 Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges**

- 3.1 Each Member shall adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees, and charges, if such a determination is not done prior to, or upon arrival, or as rapidly as possible after arrival and provided that all other regulatory requirements have been met.
- 3.2 As a condition for such release, a Member may require:
  - (a) payment of customs duties, taxes, fees, and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a

deposit, or another appropriate instrument provided for in its laws and regulations; or

(b) a guarantee in the form of a surety, a deposit, or another appropriate instrument provided for in its laws and regulations.

3.3 Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees, and charges ultimately due for the goods covered by the guarantee.

3.4 In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.

3.5 The guarantee as set out in paragraphs 3.2 and 3.4 shall be discharged when it is no longer required.

3.6 Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.

#### **4 Risk Management**

4.1 Each Member shall, to the extent possible, adopt or maintain a risk management system for customs control.

4.2 Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or a disguised restriction on international trade.

4.3 Each Member shall concentrate customs control and, to the extent possible other relevant border controls, on high-risk consignments and expedite the release of low-risk consignments. A Member also may select, on a random basis, consignments for such controls as part of its risk management.

4.4 Each Member shall base risk management on an assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, inter alia, the Harmonised System code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.

#### **5 Post-clearance Audit**

5.1 With a view to expediting the release of goods, each Member shall adopt or maintain post-clearance audit to ensure compliance with customs and other related laws and regulations.

- 5.2 Each Member shall select a person or a consignment for post-clearance audit in a risk-based manner, which may include appropriate selectivity criteria. Each Member shall conduct post-clearance audits in a transparent manner. Where the person is involved in the audit process and conclusive results have been achieved the Member shall, without delay, notify the person whose record is audited of the results, the person's rights and obligations, and the reasons for the results.
- 5.3 The information obtained in post-clearance audit may be used in further administrative or judicial proceedings.
- 5.4 Members shall, wherever practicable, use the result of post-clearance audit in applying risk management.

## **6 Establishment and Publication of Average Release Times**

- 6.1 Members are encouraged to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, inter alia, the Time Release Study of the World Customs Organization (referred to in this Agreement as the "WCO").<sup>271</sup>
- 6.2 Members are encouraged to share with the Committee their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency.

## **7 Trade Facilitation Measures for Authorised Operators**

- 7.1 Each Member shall provide additional trade facilitation measures related to import, export, or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorised operators. Alternatively, a Member may offer such trade facilitation measures through customs procedures generally available to all operators and is not required to establish a separate scheme.
- 7.2 The specified criteria to qualify as an authorised operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures.
- (a) Such criteria, which shall be published, may include:

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<sup>271</sup> Each Member may determine the scope and methodology of such average release time measurement in accordance with its needs and capacity.

- (i) an appropriate record of compliance with customs and other related laws and regulations;
  - (ii) a system of managing records to allow for necessary internal controls;
  - (iii) financial solvency, including, where appropriate, provision of a sufficient security or guarantee; and
  - (iv) supply chain security.
- (b) Such criteria shall not:
- (i) be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and
  - (ii) to the extent possible, restrict the participation of small and medium-sized enterprises.
- 7.3 The trade facilitation measures provided pursuant to paragraph 7.1 shall include at least three of the following measures:<sup>272</sup>
- (a) low documentary and data requirements, as appropriate;
  - (b) low rate of physical inspections and examinations, as appropriate;
  - (c) rapid release time, as appropriate;
  - (d) deferred payment of duties, taxes, fees, and charges;
  - (e) use of comprehensive guarantees or reduced guarantees;
  - (f) a single customs declaration for all imports or exports in a given period; and
  - (g) clearance of goods at the premises of the authorised operator or another place authorised by customs.
- 7.4 Members are encouraged to develop authorised operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfilment of the legitimate objectives pursued.
- 7.5 In order to enhance the trade facilitation measures provided to operators, Members shall afford to other Members the possibility

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<sup>272</sup> A measure listed in subparagraphs 7.3 (a) to (g) will be deemed to be provided to authorised operators if it is generally available to all operators.

of negotiating mutual recognition of authorised operator schemes.

7.6 Members shall exchange relevant information within the Committee about authorised operator schemes in force.

## **8 Expedited Shipments**

8.1 Each Member shall adopt or maintain procedures allowing for the expedited release of at least those goods entered through air cargo facilities to persons who apply for such treatment, while maintaining customs control.<sup>273</sup>

If a Member employs criteria<sup>274</sup> limiting who may apply, the Member may, in published criteria, require that the applicant shall, as conditions for qualifying for the application of the treatment described in paragraph 8.2 to its expedited shipments:

- (a) provide adequate infrastructure and payment of customs expenses related to processing of expedited shipments in cases where the applicant fulfils the Member's requirements for such processing to be performed at a dedicated facility;
- (b) submit in advance of the arrival of an expedited shipment the information necessary for the release;
- (c) be assessed fees limited in amount to the approximate cost of services rendered in providing the treatment described in paragraph 8.2;
- (d) maintain a high degree of control over expedited shipments through the use of internal security, logistics, and tracking technology from pick-up to delivery;
- (e) provide expedited shipment from pick-up to delivery;
- (f) assume liability for payment of all customs duties, taxes, fees, and charges to the customs authority for the goods;
- (g) have a good record of compliance with customs and other related laws and regulations;

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273 In cases where a Member has an existing procedure that provides the treatment in paragraph 8.2, this provision does not require that Member to introduce separate expedited release procedures.

274 Such application criteria, if any, shall be in addition to the Member's requirements for operating with respect to all goods or shipments entered through air cargo facilities.

- (h) comply with other conditions directly related to the effective enforcement of the Member's laws, regulations, and procedural requirements, that specifically relate to providing the treatment described in paragraph 8.2.

8.2 Subject to paragraphs 8.1 and 8.3, Members shall:

- (a) minimise the documentation required for the release of expedited shipments in accordance with paragraph 1 of Article 10 and, to the extent possible, provide for release based on a single submission of information on certain shipments;
- (b) provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;
- (c) endeavour to apply the treatment in subparagraphs (a) and (b) to shipments of any weight or value recognising that a Member is permitted to require additional entry procedures, including declarations and supporting documentation and payment of duties and taxes, and to limit such treatment based on the type of good, provided the treatment is not limited to low value goods such as documents; and
- (d) provide, to the extent possible, for a de minimis shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods. Internal taxes, such as value added taxes and excise taxes, applied to imports consistently with Article III of the GATT 1994 are not subject to this provision.

8.3 Nothing in paragraphs 8.1 and 8.2 shall affect the right of a Member to examine, detain, seize, confiscate or refuse entry of goods, or to carry out post-clearance audits, including in connection with the use of risk management systems. Further, nothing in paragraphs 8.1 and 8.2 shall prevent a Member from requiring, as a condition for release, the submission of additional information and the fulfilment of non-automatic licensing requirements.

## 9 Perishable Goods<sup>275</sup>

9.1 With a view to preventing avoidable loss or deterioration of perishable goods, and provided that all regulatory requirements

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<sup>275</sup> For the purposes of this provision, perishable goods are goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions.

have been met, each Member shall provide for the release of perishable goods:

- (a) under normal circumstances within the shortest possible time; and
  - (b) in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.
- 9.2 Each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required.
- 9.3 Each Member shall either arrange or allow an importer to arrange for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorisations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities.
- 9.4 In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay.

### **Article 8: Border Agency Cooperation**

1. Each Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation, and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.
2. Each Member shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom it shares a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include:
  - (a) alignment of working days and hours;



- (b) alignment of procedures and formalities;
- (c) development and sharing of common facilities;
- (d) joint controls;
- (e) establishment of one stop border post control.

### **Article 9: Movement of Goods Intended for Import under Customs Control**

Each Member shall, to the extent practicable, and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.

### **Article 10: Formalities Connected with Importation, Exportation and Transit**

#### **1 Formalities and Documentation Requirements**

- 1.1 With a view to minimising the incidence and complexity of import, export, and transit formalities and to decreasing and simplifying import, export, and transit documentation requirements and taking into account the legitimate policy objectives and other factors such as changed circumstances, relevant new information, business practices, availability of techniques and technology, international best practices, and inputs from interested parties, each Member shall review such formalities and documentation requirements and, based on the results of the review, ensure, as appropriate, that such formalities and documentation requirements are:
- (a) adopted and/or applied with a view to a rapid release and clearance of goods, particularly perishable goods;
  - (b) adopted and/or applied in a manner that aims at reducing the time and cost of compliance for traders and operators;
  - (c) the least trade restrictive measure chosen where two or more alternative measures are reasonably available for fulfilling the policy objective or objectives in question; and
  - (d) not maintained, including parts thereof, if no longer required.

- 1.2 The Committee shall develop procedures for the sharing by Members of relevant information and best practices, as appropriate.

## **2 Acceptance of Copies**

- 2.1 Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export, or transit formalities.
- 2.2 Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document.
- 2.3 A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.<sup>276</sup>

## **3 Use of International Standards**

- 3.1 Members are encouraged to use relevant international standards or parts thereof as a basis for their import, export, or transit formalities and procedures, except as otherwise provided for in this Agreement.
- 3.2 Members are encouraged to take part, within the limits of their resources, in the preparation and periodic review of relevant international standards by appropriate international organisations.
- 3.3 The Committee shall develop procedures for the sharing by Members of relevant information, and best practices, on the implementation of international standards, as appropriate.

The Committee may also invite relevant international organisations to discuss their work on international standards. As appropriate, the Committee may identify specific standards that are of particular value to Members.

## **4 Single Window**

- 4.1 Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data

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<sup>276</sup> Nothing in this paragraph precludes a Member from requiring documents such as certificates, permits or licenses as a requirement for the importation of controlled or regulated goods.

requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.

- 4.2 In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or data requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.
- 4.3 Members shall notify the Committee of the details of operation of the single window.
- 4.4 Members shall, to the extent possible and practicable, use information technology to support the single window.

## **5 Pre-shipment Inspection**

- 5.1 Members shall not require the use of pre-shipment inspections in relation to tariff classification and customs valuation.
- 5.2 Without prejudice to the rights of Members to use other types of pre-shipment inspection not covered by paragraph 5.1, Members are encouraged not to introduce or apply new requirements regarding their use.<sup>277</sup>

## **6 Use of Customs Brokers**

- 6.1 Without prejudice to the important policy concerns of some Members that currently maintain a special role for customs brokers, from the entry into force of this Agreement Members shall not introduce the mandatory use of customs brokers.
- 6.2 Each Member shall notify the Committee and publish its measures on the use of customs brokers. Any subsequent modifications thereof shall be notified and published promptly.
- 6.3 With regard to the licensing of customs brokers, Members shall apply rules that are transparent and objective.

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<sup>277</sup> This paragraph refers to pre-shipment inspections covered by the Agreement on Pre-shipment Inspection, and does not preclude pre-shipment inspections for sanitary and phytosanitary purposes.

## **7 Common Border Procedures and Uniform Documentation Requirements**

7.1 Each Member shall, subject to paragraph 7.2, apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout its territory.

7.2 Nothing in this Article shall prevent a Member from:

(a) differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;

(b) differentiating its procedures and documentation requirements for goods based on risk management;

(c) differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;

(d) applying electronic filing or processing; or

(e) differentiating its procedures and documentation requirements in a manner consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures.

## **8 Rejected Goods**

8.1 Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter.

8.2 When such an option under paragraph 8.1 is given and the importer fails to exercise it within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.

## **9 Temporary Admission of Goods and Inward and Outward Processing**

9.1 Temporary Admission of Goods

Each Member shall allow, as provided for in its laws and regulations, goods to be brought into its customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are

brought into its customs territory for a specific purpose, are intended for re-exportation within a specific period, and have not undergone any change except normal depreciation and wastage due to the use made of them.

## 9.2 Inward and Outward Processing

- (a) Each Member shall allow, as provided for in its laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be reimported with total or partial exemption from import duties and taxes in accordance with the Member's laws and regulations.
- (b) For the purposes of this Article, the term "inward processing" means the customs procedure under which certain goods can be brought into a Member's customs territory conditionally relieved, totally or partially, from payment of import duties and taxes, or eligible for duty drawback, on the basis that such goods are intended for manufacturing, processing, or repair and subsequent exportation.
- (c) For the purposes of this Article, the term "outward processing" means the customs procedure under which goods which are in free circulation in a Member's customs territory may be temporarily exported for manufacturing, processing, or repair abroad and then re-imported.

### **Article 11: Freedom of Transit**

- 1. Any regulations or formalities in connection with traffic in transit imposed by a Member shall not be:
  - (a) maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner;
  - (b) applied in a manner that would constitute a disguised restriction on traffic in transit.
- 2. Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

3. Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules.
4. Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.
5. Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.
6. Formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to:
  - (a) identify the goods; and
  - (b) ensure fulfilment of transit requirements.
7. Once goods have been put under a transit procedure and have been authorised to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory.
8. Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit.
9. Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.
10. Once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met.
11. Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary<sup>278</sup>

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<sup>278</sup> Nothing in this provision shall preclude a Member from maintaining existing procedures whereby the means of transport can be used as a guarantee for traffic in transit.

- instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled.
12. Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.
  13. Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.
  14. Each Member shall make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee.
  15. Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.
  16. Members shall endeavour to cooperate and coordinate with one another with a view to enhancing freedom of transit. Such cooperation and coordination may include, but is not limited to, an understanding on:
    - (a) charges;
    - (b) formalities and legal requirements; and
    - (c) the practical operation of transit regimes.
  17. Each Member shall endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

## **Article 12: Customs Cooperation**

### **1 Measures Promoting Compliance and Cooperation**

- 1.1 Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in

appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders.<sup>279</sup>

- 1.2 Members are encouraged to share information on best practices in managing customs compliance, including through the Committee. Members are encouraged to cooperate in technical guidance or assistance and support for capacity building for the purposes of administering compliance measures and enhancing their effectiveness.

## **2 Exchange of Information**

- 2.1 Upon request and subject to the provisions of this Article, Members shall exchange the information set out in subparagraphs 6.1(b) and/or (c) for the purpose of verifying an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy of the declaration.
- 2.2 Each Member shall notify the Committee of the details of its contact point for the exchange of this information.

## **3 Verification**

A Member shall make a request for information only after it has conducted appropriate verification procedures of an import or export declaration and after it has inspected the available relevant documentation.

## **4 Request**

- 4.1 The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed official language of the WTO or other mutually agreed language, including:
  - (a) the matter at issue including, where appropriate and available, the number identifying the export declaration corresponding to the import declaration in question;
  - (b) the purpose for which the requesting Member is seeking the information or documents, along with the names and contact details of the persons to whom the request relates, if known;

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<sup>279</sup> Such activity has the overall objective of lowering the frequency of non-compliance, and consequently reducing the need for exchange of information in pursuit of enforcement.



- (c) where required by the requested Member, confirmation<sup>280</sup> of the verification where appropriate;
  - (d) the specific information or documents requested;
  - (e) the identity of the originating office making the request;
  - (f) reference to provisions of the requesting Member's domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information and personal data.
- 4.2 If the requesting Member is not in a position to comply with any of the subparagraphs of paragraph 4.1, it shall specify this in the request.

## **5 Protection and Confidentiality**

- 5.1 The requesting Member shall, subject to paragraph 5.2:
- (a) hold all information or documents provided by the requested Member strictly in confidence and grant at least the same level of such protection and confidentiality as that provided under the domestic law and legal system of the requested Member as described by it under subparagraphs 6.1(b) or (c);
  - (b) provide information or documents only to the customs authorities dealing with the matter at issue and use the information or documents solely for the purpose stated in the request unless the requested Member agrees otherwise in writing;
  - (c) not disclose the information or documents without the specific written permission of the requested Member;
  - (d) not use any unverified information or documents from the requested Member as the deciding factor towards alleviating the doubt in any given circumstance;
  - (e) respect any case-specific conditions set out by the requested Member regarding retention and disposal of confidential information or documents and personal data; and

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280 This may include pertinent information on the verification conducted under paragraph 3. Such information shall be subject to the level of protection and confidentiality specified by the Member conducting the verification.

- (f) upon request, inform the requested Member of any decisions and actions taken on the matter as a result of the information or documents provided.
- 5.2 A requesting Member may be unable under its domestic law and legal system to comply with any of the subparagraphs of paragraph 5.1. If so, the requesting Member shall specify this in the request.
- 5.3 The requested Member shall treat any request and verification information received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested Member to its own similar information.

## **6 Provision of Information**

- 6.1 Subject to the provisions of this Article, the requested Member shall promptly:
- (a) respond in writing, through paper or electronic means;
  - (b) provide the specific information as set out in the import or export declaration, or the declaration, to the extent it is available, along with a description of the level of protection and confidentiality required of the requesting Member;
  - (c) if requested, provide the specific information as set out in the following documents, or the documents, submitted in support of the import or export declaration, to the extent it is available: commercial invoice, packing list, certificate of origin and bill of lading, in the form in which these were filed, whether paper or electronic, along with a description of the level of protection and confidentiality required of the requesting Member;
  - (d) confirm that the documents provided are true copies;
  - (e) provide the information or otherwise respond to the request, to the extent possible, within 90 days from the date of the request.
- 6.2 The requested Member may require, under its domestic law and legal system, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings, or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position

to comply with this requirement, it should specify this to the requested Member.

## **7 Postponement or Refusal of a Request**

7.1 A requested Member may postpone or refuse part or all of a request to provide information, and shall inform the requesting Member of the reasons for doing so, where:

- (a) it would be contrary to the public interest as reflected in the domestic law and legal system of the requested Member;
- (b) its domestic law and legal system prevents the release of the information. In such a case it shall provide the requesting Member with a copy of the relevant, specific reference;
- (c) the provision of the information would impede law enforcement or otherwise interfere with an on-going administrative or judicial investigation, prosecution or proceeding;
- (d) the consent of the importer or exporter is required by its domestic law and legal system that govern the collection, protection, use, disclosure, retention, and disposal of confidential information or personal data and that consent is not given; or
- (e) the request for information is received after the expiration of the legal requirement of the requested Member for the retention of documents.

7.2 In the circumstances of paragraphs 4.2, 5.2, or 6.2, execution of such a request shall be at the discretion of the requested Member.

## **8 Reciprocity**

If the requesting Member is of the opinion that it would be unable to comply with a similar request if it was made by the requested Member, or if it has not yet implemented this Article, it shall state that fact in its request. Execution of such a request shall be at the discretion of the requested Member.

## **9 Administrative Burden**

9.1 The requesting Member shall take into account the associated resource and cost implications for the requested Member in responding to requests for information. The requesting Member shall consider the proportionality between its fiscal interest in pursuing its request and the efforts to be made by the requested Member in providing the information.

- 9.2 If a requested Member receives an unmanageable number of requests for information or a request for information of unmanageable scope from one or more requesting Member(s) and is unable to meet such requests within a reasonable time, it may request one or more of the requesting Member(s) to prioritise with a view to agreeing on a practical limit within its resource constraints. In the absence of a mutually-agreed approach, the execution of such requests shall be at the discretion of the requested Member based on the results of its own prioritisation.

## **10 Limitations**

A requested Member shall not be required to:

- (a) modify the format of its import or export declarations or procedures;
- (b) call for documents other than those submitted with the import or export declaration as specified in subparagraph 6.1(c);
- (c) initiate enquiries to obtain the information;
- (d) modify the period of retention of such information;
- (e) introduce paper documentation where electronic format has already been introduced;
- (f) translate the information;
- (g) verify the accuracy of the information; or
- (h) provide information that would prejudice the legitimate commercial interests of particular enterprises, public or private.

## **11 Unauthorised Use or Disclosure**

11.1 In the event of any breach of the conditions of use or disclosure of information exchanged under this Article, the requesting Member that received the information shall promptly communicate the details of such unauthorised use or disclosure to the requested Member that provided the information and:

- (a) take necessary measures to remedy the breach;
- (b) take necessary measures to prevent any future breach; and
- (c) notify the requested Member of the measures taken under subparagraphs (a) and (b).

- 11.2 The requested Member may suspend its obligations to the requesting Member under this Article until the measures set out in paragraph 11.1 have been taken.

## **12 Bilateral and Regional Agreements**

- 12.1 Nothing in this Article shall prevent a Member from entering into or maintaining a bilateral, plurilateral, or regional agreement for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment.
- 12.2 Nothing in this Article shall be construed as altering or affecting a Member's rights or obligations under such bilateral, plurilateral, or regional agreements, or as governing the exchange of customs information and data under such other agreements.

## **SECTION II**

### **SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS FOR DEVELOPING COUNTRY MEMBERS AND LEAST-DEVELOPED COUNTRY MEMBERS**

#### **Article 13: General Principles**

1. The provisions contained in Articles 1 to 12 of this Agreement shall be implemented by developing and least-developed country Members in accordance with this Section, which is based on the modalities agreed in Annex D of the July 2004 Framework Agreement (WT/L/579) and in paragraph 33 of and Annex E to the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC).
2. Assistance and support for capacity building<sup>281</sup> should be provided to help developing and least-developed country Members implement the provisions of this Agreement, in accordance with their nature and scope. The extent and the timing of implementation of the provisions of this Agreement shall be related to the implementation capacities of developing and least-developed country Members. Where a developing or least-developed country Member continues to lack the necessary

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281 For the purposes of this Agreement, "assistance and support for capacity building" may take the form of technical, financial, or any other mutually agreed form of assistance provided.

capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.

3. Least-developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.
4. These principles shall be applied through the provisions set out in Section II.

#### **Article 14: Categories of Provisions**

1. There are three categories of provisions:
  - (a) Category A contains provisions that a developing country Member or a least-developed country Member designates for implementation upon entry into force of this Agreement, or in the case of a least-developed country Member within one year after entry into force, as provided in Article 15.
  - (b) Category B contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement, as provided in Article 16.
  - (c) Category C contains provisions that a developing country Member or a least-developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in Article 16.
2. Each developing country and least-developed country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories A, B and C.

#### **Article 15: Notification and Implementation of Category A**

1. Upon entry into force of this Agreement, each developing country Member shall implement its Category A commitments. Those commitments designated under Category A will thereby be made an integral part of this Agreement.

2. A least-developed country Member may notify the Committee of the provisions it has designated in Category A for up to one year after entry into force of this Agreement. Each least-developed country Member's commitments designated under Category A will thereby be made an integral part of this Agreement.

### **Article 16: Notification of Definitive Dates for Implementation of Category B and Category C**

1. With respect to the provisions that a developing country Member has not designated in Category A, the Member may delay implementation in accordance with the process set out in this Article.

#### **Developing Country Member Category B**

- (a) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category B and their corresponding indicative dates for implementation.<sup>282</sup>
- (b) No later than one year after entry into force of this Agreement, each developing country Member shall notify the Committee of its definitive dates for implementation of the provisions it has designated in Category B. If a developing country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficient to notify its dates.

#### **Developing Country Member Category C**

- (c) Upon entry into force of this Agreement, each developing country Member shall notify the Committee of the provisions that it has designated in Category C and their corresponding indicative dates for implementation. For transparency purposes, notifications submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement.<sup>283</sup>

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282 Notifications submitted may also include such further information as the notifying Member deems appropriate. Members are encouraged to provide information on the domestic agency or entity responsible for implementation.

283 Members may also include information on national trade facilitation implementation plans or projects, the domestic agency or entity responsible for implementation, and

- (d) Within one year after entry into force of this Agreement, developing country Members and relevant donor Members, taking into account any existing arrangements already in place, notifications pursuant to paragraph 1 of Article 22 and information submitted pursuant to subparagraph (c) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.<sup>284</sup> The participating developing country Member shall promptly inform the Committee of such arrangements. The Committee shall also invite non-Member donors to provide information on existing or concluded arrangements.
  - (e) Within 18 months from the date of the provision of the information stipulated in subparagraph (d), donor Members and respective developing country Members shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each developing country Member shall, at the same time, notify its list of definitive dates for implementation.
2. With respect to those provisions that a least-developed country Member has not designated under Category A, least-developed country Members may delay implementation in accordance with the process set forth in this Article.

#### Least-Developed Country Member Category B

- (a) No later than one year after entry into force of this Agreement, a least-developed country Member shall notify the Committee of its Category B provisions and may notify their corresponding indicative dates for implementation of these provisions, taking into account maximum flexibilities for least-developed country Members.
- (b) No later than two years after the notification date stipulated under subparagraph (a) above, each least-developed country Member shall notify the Committee to confirm designations of provisions and notify its dates for implementation. If a least-

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the donors with which the Member may have an arrangement in place to provide assistance.

<sup>284</sup> Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organisations, consistent with paragraph 3 of Article 21.



developed country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficiently to notify its dates.

#### Least-Developed Country Member Category C

- (c) For transparency purposes and to facilitate arrangements with donors, one year after entry into force of this Agreement, each least-developed country Member shall notify the Committee of the provisions it has designated in Category C, taking into account maximum flexibilities for least-developed country Members.
- (d) One year after the date stipulated in subparagraph (c) above, least-developed country Members shall notify information on assistance and support for capacity building that the Member requires in order to implement.<sup>285</sup>
- (e) No later than two years after the notification under subparagraph (d) above, least-developed country Members and relevant donor Members, taking into account information submitted pursuant to subparagraph (d) above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.<sup>286</sup> The participating least-developed country Member shall promptly inform the Committee of such arrangements. The least-developed country Member shall, at the same time, notify indicative dates for implementation of corresponding Category C commitments covered by the assistance and support arrangements. The Committee shall also invite non-Member donors to provide information on existing and concluded arrangements.
- (f) No later than 18 months from the date of the provision of the information stipulated in subparagraph (e), relevant donor Members and respective least-developed country Members

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285 Members may also include information on national trade facilitation implementation plans or projects, the domestic agency or entity responsible for implementation, and the donors with which the Member may have an arrangement in place to provide assistance.

286 Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organisations, consistent with paragraph 3 of Article 21.

shall inform the Committee of the progress in the provision of assistance and support for capacity building. Each least-developed country Member shall, at the same time, notify the Committee of its list of definitive dates for implementation.

3. Developing country Members and least-developed country Members experiencing difficulties in submitting definitive dates for implementation within the deadlines set out in paragraphs 1 and 2 because of the lack of donor support or lack of progress in the provision of assistance and support for capacity building should notify the Committee as early as possible prior to the expiration of those deadlines. Members agree to cooperate to assist in addressing such difficulties, taking into account the particular circumstances and special problems facing the Member concerned. The Committee shall, as appropriate, take action to address the difficulties including, where necessary, by extending the deadlines for the Member concerned to notify its definitive dates.
4. Three months before the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), the Secretariat shall remind a Member if that Member has not notified a definitive date for implementation of provisions that it has designated in Category B or C. If the Member does not invoke paragraph 3, or in the case of a developing country Member subparagraph 1(b), or in the case of a least-developed country Member subparagraph 2(b), to extend the deadline and still does not notify a definitive date for implementation, the Member shall implement the provisions within one year after the deadline stipulated in subparagraphs 1(b) or (e), or in the case of a least-developed country Member, subparagraphs 2(b) or (f), or extended by paragraph 3.
5. No later than 60 days after the dates for notification of definitive dates for implementation of Category B and Category C provisions in accordance with paragraphs 1, 2, or 3, the Committee shall take note of the annexes containing each Member's definitive dates for implementation of Category B and Category C provisions, including any dates set under paragraph 4, thereby making these annexes an integral part of this Agreement.

## Article 17: Early Warning Mechanism: Extension of Implementation Dates for Provisions in Categories B and C

1.
  - (a) A developing country Member or least-developed country Member that considers itself to be experiencing difficulty in implementing a provision that it has designated in Category B or Category C by the definitive date established under subparagraphs 1(b) or (e) of Article 16, or in the case of a least-developed country Member subparagraphs 2(b) or (f) of Article 16, should notify the Committee. Developing country Members shall notify the Committee no later than 120 days before the expiration of the implementation date. Least-developed country Members shall notify the Committee no later than 90 days before such date.
  - (b) The notification to the Committee shall indicate the new date by which the developing country Member or least-developed country Member expects to be able to implement the provision concerned. The notification shall also indicate the reasons for the expected delay in implementation. Such reasons may include the need for assistance and support for capacity building not earlier anticipated or additional assistance and support to help build capacity.
2. Where a developing country Member's request for additional time for implementation does not exceed 18 months or a least-developed country Member's request for additional time does not exceed 3 years, the requesting Member is entitled to such additional time without any further action by the Committee.
3. Where a developing country or least-developed country Member considers that it requires a first extension longer than that provided for in paragraph 2 or a second or any subsequent extension, it shall submit to the Committee a request for an extension containing the information described in subparagraph 1(b) no later than 120 days in respect of a developing country Member and 90 days in respect of a least-developed country Member before the expiration of the original definitive implementation date or that date as subsequently extended.
4. The Committee shall give sympathetic consideration to granting requests for extension taking into account the specific circumstances of the Member submitting the request. These

circumstances may include difficulties and delays in obtaining assistance and support for capacity building.

### **Article 18: Implementation of Category B and Category C**

1. In accordance with paragraph 2 of Article 13, if a developing country Member or a least-developed country Member, having fulfilled the procedures set forth in paragraphs 1 or 2 of Article 16 and in Article 17, and where an extension requested has not been granted or where the developing country Member or least-developed country Member otherwise experiences unforeseen circumstances that prevent an extension being granted under Article 17, self-assesses that its capacity to implement a provision under Category C continues to be lacking, that Member shall notify the Committee of its inability to implement the relevant provision.
2. The Committee shall establish an Expert Group immediately, and in any case no later than 60 days after the Committee receives the notification from the relevant developing country Member or least-developed country Member. The Expert Group will examine the issue and make a recommendation to the Committee within 120 days of its composition.
3. The Expert Group shall be composed of five independent persons that are highly qualified in the fields of trade facilitation and assistance and support for capacity building. The composition of the Expert Group shall ensure balance between nationals from developing and developed country Members. Where a least-developed country Member is involved, the Expert Group shall include at least one national from a least-developed country Member. If the Committee cannot agree on the composition of the Expert Group within 20 days of its establishment, the Director-General, in consultation with the chair of the Committee, shall determine the composition of the Expert Group in accordance with the terms of this paragraph.
4. The Expert Group shall consider the Member's self-assessment of lack of capacity and shall make a recommendation to the Committee. When considering the Expert Group's recommendation concerning a least-developed country Member, the Committee shall, as appropriate, take action that will facilitate the acquisition of sustainable implementation capacity.

5. The Member shall not be subject to proceedings under the Dispute Settlement Understanding on this issue from the time the developing country Member notifies the Committee of its inability to implement the relevant provision until the first meeting of the Committee after it receives the recommendation of the Expert Group. At that meeting, the Committee shall consider the recommendation of the Expert Group. For a least-developed country Member, the proceedings under the Dispute Settlement Understanding shall not apply to the respective provision from the date of notification to the Committee of its inability to implement the provision until the Committee makes a decision on the issue, or within 24 months after the date of the first Committee meeting set out above, whichever is earlier.
6. Where a least-developed country Member loses its ability to implement a Category C commitment, it may inform the Committee and follow the procedures set out in this Article.

#### **Article 19: Shifting between Categories B and C**

1. Developing country Members and least-developed country Members who have notified provisions under Categories B and C may shift provisions between such categories through the submission of a notification to the Committee. Where a Member proposes to shift a provision from Category B to Category C, the Member shall provide information on the assistance and support required to build capacity.
2. In the event that additional time is required to implement a provision shifted from Category B to Category C, the Member may:
  - (a) use the provisions of Article 17, including the opportunity for an automatic extension; or
  - (b) request an examination by the Committee of the Member's request for extra time to implement the provision and, if necessary, for assistance and support for capacity building, including the possibility of a review and recommendation by the Expert Group under Article 18; or
  - (c) in the case of a least-developed country Member, any new implementation date of more than four years after the original date notified under Category B shall require approval by the Committee. In addition, a least-developed country Member

shall continue to have recourse to Article 17. It is understood that assistance and support for capacity building is required for a least-developed country Member so shifting.

#### **Article 20: Grace Period for the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes**

1. For a period of two years after entry into force of this Agreement, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against a developing country Member concerning any provision that the Member has designated in Category A.
2. For a period of six years after entry into force of this Agreement, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against a least-developed country Member concerning any provision that the Member has designated in Category A.
3. For a period of eight years after implementation of a provision under Category B or C by a least-developed country Member, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against that least-developed country Member concerning that provision.
4. Notwithstanding the grace period for the application of the Understanding on Rules and Procedures Governing the Settlement of Disputes, before making a request for consultations pursuant to Articles XXII or XXIII of GATT 1994, and at all stages of dispute settlement procedures with regard to a measure of a least-developed country Member, a Member shall give particular consideration to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under the Understanding on Rules and Procedures Governing the Settlement of Disputes involving least-developed country Members.
5. Each Member shall, upon request, during the grace period allowed under this Article, provide adequate opportunity to other

Members for discussion with respect to any issue relating to the implementation of this Agreement.

## **Article 21: Provision of Assistance and Support for Capacity Building**

1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least-developed country Members on mutually agreed terms either bilaterally or through the appropriate international organisations. The objective is to assist developing country and least-developed country Members to implement the provisions of Section I of this Agreement.
2. Given the special needs of least-developed country Members, targeted assistance and support should be provided to the least-developed country Members so as to help them build sustainable capacity to implement their commitments. Through the relevant development cooperation mechanisms and consistent with the principles of technical assistance and support for capacity building as referred to in paragraph 3, development partners shall endeavour to provide assistance and support for capacity building in this area in a way that does not compromise existing development priorities.
3. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:
  - (a) take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programmes;
  - (b) include, where relevant and appropriate, activities to address regional and sub-regional challenges and promote regional and sub-regional integration;
  - (c) ensure that ongoing trade facilitation reform activities of the private sector are factored into assistance activities;
  - (d) promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:

- (i) coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors and among bilateral and multilateral donors should aim to avoid overlap and duplication in assistance programmes and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;
  - (ii) for least-developed country Members, the Enhanced Integrated Framework for trade-related assistance for the least-developed countries should be a part of this coordination process; and
  - (iii) Members should also promote internal coordination between their trade and development officials, both in capitals and in Geneva, in the implementation of this Agreement and technical assistance.
- (e) encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and
  - (f) encourage developing country Members to provide capacity building to other developing and least-developed country Members and consider supporting such activities, where possible.
4. The Committee shall hold at least one dedicated session per year to:
- (a) discuss any problems regarding implementation of provisions or sub-parts of provisions of this Agreement;
  - (b) review progress in the provision of assistance and support for capacity building to support the implementation of the Agreement, including any developing or least-developed country Members not receiving adequate assistance and support for capacity building;
  - (c) share experiences and information on ongoing assistance and support for capacity building and implementation programmes, including challenges and successes;
  - (d) review donor notifications as set forth in Article 22; and
  - (e) review the operation of paragraph 2.



## Article 22: Information on Assistance and Support for Capacity Building to Be Submitted to the Committee

1. To provide transparency to developing country Members and least-developed country Members on the provision of assistance and support for capacity building for implementation of Section I, each donor Member assisting developing country Members and least-developed country Members with the implementation of this Agreement shall submit to the Committee, at entry into force of this Agreement and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding 12 months and, where available, that is committed in the next 12 months:<sup>287</sup>
  - (a) a description of the assistance and support for capacity building;
  - (b) the status and amount committed/disbursed;
  - (c) procedures for disbursement of the assistance and support;
  - (d) the beneficiary Member or, where necessary, the region; and
  - (e) the implementing agency in the Member providing assistance and support.

The information shall be provided in the format specified in Annex 1. In the case of Organisation for Economic Co-operation and Development (referred to in this Agreement as the "OECD") Members, the information submitted can be based on relevant information from the OECD Creditor Reporting System. Developing country Members declaring themselves in a position to provide assistance and support for capacity building are encouraged to provide the information above.

2. Donor Members assisting developing country Members and least-developed country Members shall submit to the Committee:
  - (a) contact points of their agencies responsible for providing assistance and support for capacity building related to the implementation of Section I of this Agreement including, where practicable, information on such contact points within the country or region where the assistance and support is to be provided; and

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<sup>287</sup> The information provided will reflect the demand driven nature of the provision of assistance and support for capacity building.

- (b) information on the process and mechanisms for requesting assistance and support for capacity building.

Developing country Members declaring themselves in a position to provide assistance and support are encouraged to provide the information above.

3. Developing country Members and least-developed country Members intending to avail themselves of trade facilitation-related assistance and support for capacity building shall submit to the Committee information on contact point(s) of the office(s) responsible for coordinating and prioritising such assistance and support.
4. Members may provide the information referred to in paragraphs 2 and 3 through internet references and shall update the information as necessary. The Secretariat shall make all such information publicly available.
5. The Committee shall invite relevant international and regional organisations (such as the International Monetary Fund, the OECD, the United Nations Conference on Trade and Development, the WCO, United Nations Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks) and other agencies of cooperation to provide information referred to in paragraphs 1, 2, and 4.

### **SECTION III: INSTITUTIONAL ARRANGEMENTS AND FINAL PROVISIONS**

#### **Article 23: Institutional Arrangements**

##### **1 Committee on Trade Facilitation**

- 1.1 A Committee on Trade Facilitation is hereby established.
- 1.2 The Committee shall be open for participation by all Members and shall elect its own Chairperson. The Committee shall meet as needed and envisaged by the relevant provisions of this Agreement, but no less than once a year, for the purpose of affording Members the opportunity to consult on any matters related to the operation of this Agreement or the furtherance of its objectives. The Committee shall carry out such responsibilities as assigned to it under this Agreement or by the Members. The Committee shall establish its own rules of procedure.

- 1.3 The Committee may establish such subsidiary bodies as may be required. All such bodies shall report to the Committee.
- 1.4 The Committee shall develop procedures for the sharing by Members of relevant information and best practices as appropriate.
- 1.5 The Committee shall maintain close contact with other international organisations in the field of trade facilitation, such as the WCO, with the objective of securing the best available advice for the implementation and administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided. To this end, the Committee may invite representatives of such organisations or their subsidiary bodies to:
  - (a) attend meetings of the Committee; and
  - (b) discuss specific matters related to the implementation of this Agreement.
- 1.6 The Committee shall review the operation and implementation of this Agreement four years from its entry into force, and periodically thereafter.
- 1.7 Members are encouraged to raise before the Committee questions relating to issues on the implementation and application of this Agreement.
- 1.8 The Committee shall encourage and facilitate ad hoc discussions among Members on specific issues under this Agreement with a view to reaching a mutually satisfactory solution promptly.

## **2 National Committee on Trade Facilitation**

Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement.

### **Article 24: Final Provisions**

1. For the purpose of this Agreement, the term "Member" is deemed to include the competent authority of that Member.
2. All provisions of this Agreement are binding on all Members.
3. Members shall implement this Agreement from the date of its entry into force. Developing country Members and least-

developed country Members that choose to use the provisions of Section II shall implement this Agreement in accordance with Section II.

4. A Member which accepts this Agreement after its entry into force shall implement its Category B and C commitments counting the relevant periods from the date this Agreement enters into force.
5. Members of a customs union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under this Agreement including through the establishment and use of regional bodies.
6. Notwithstanding the general interpretative note to Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994. In addition, nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.
7. All exceptions and exemptions<sup>288</sup> under the GATT 1994 shall apply to the provisions of this Agreement. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement Establishing the World Trade Organization and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.
8. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided for in this Agreement.
9. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.
10. The Category A commitments of developing country Members and least-developed country Members annexed to this Agreement in accordance with paragraphs 1 and 2 of Article 15 shall constitute an integral part of this Agreement.

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288 This includes Articles V:7 and X:1 of the GATT 1994 and the Ad note to Article VIII of the GATT 1994.

11. The Category B and C commitments of developing country Members and least-developed country Members taken note of by the Committee and annexed to this Agreement pursuant to paragraph 5 of Article 16 shall constitute an integral part of this Agreement.

**ANNEX 1: FORMAT FOR NOTIFICATION UNDER PARAGRAPH 1 OF ARTICLE 22**

Donor Member:

Period covered by the notification:

Description of the technical and financial assistance and capacity building resources	Status and amount committed/ disbursed	Beneficiary country/ Region (where necessary)	The implementing agency in the Member providing assistance	Procedures for Disbursement of the assistance

**(B) Rules Governing the Application of Provisions of the WTO Agreement.**

- (1) In the absence of a relevant interpretation of the WTO Agreement adopted by the Ministerial Conference or the General Council of the World Trade Organization under paragraph 2 of article IX of the WTO Agreement concerning provisions applicable under Article 29(2)(a), the Charter Conference may adopt an interpretation.
- (2) Requests for waivers under Article 29(2) and (6)(b) shall be submitted to the Charter Conference, which shall follow, in carrying out these duties, the procedures of paragraphs 3 and 4 of article IX of the WTO Agreement.
- (3) Waivers of obligations in force in the WTO shall be considered in force for the purposes of Article 29 while they remain in force in the WTO.
- (4) The provisions of article II of the GATT 1994 which have not been disapplied shall, without prejudice to Article 29(4), (5) and (7), be modified as follows:
  - (i) All Energy Materials and Products listed in Annex EM II and Energy-Related Equipment listed in Annex EQ II imported from or exported to any other Contracting Party shall also be exempt from all other duties or charges of any kind imposed

on or in connection with importation or exportation, in excess of those imposed on the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7), or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing or exporting territory on the date referred to in Article 29(6), first sentence.

- (ii) Nothing in article II of the GATT 1994 shall prevent any Contracting Party from imposing at any time on the importation or exportation of any product:
  - (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of article III of GATT 1994 in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
  - (b) any anti-dumping or countervailing duty applied consistently with the provisions of article VI of GATT 1994;
  - (c) fees or other charges commensurate with the cost of services rendered.
- (iii) No Contracting Party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of the standstill obligations provided for in Article 29(6) or (7).
- (iv) If any Contracting Party establishes, maintains or authorises, formally or in effect, a monopoly of the importation or exportation of any Energy Material or Product listed in Annex EM II or in respect of Energy-Related Equipment listed in EQ II, such monopoly shall not operate so as to afford protection on the average in excess of the amount of protection permitted by the standstill obligation provided for in Article 29(6) or (7). The provisions of this paragraph shall not limit the use by Contracting Parties of any form of assistance to domestic producers permitted by other provisions of this Treaty.
- (v) If any Contracting Party considers that a product is not receiving from another Contracting Party the treatment which the first Contracting Party believes to have been contemplated by the standstill obligation provided for in Article 29(6) or (7), it shall bring the matter directly to the attention of the other Contracting Party. If the latter agrees that the treatment

contemplated was that claimed by the first Contracting Party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such Contracting Party so as to permit the treatment contemplated in this Treaty, the two Contracting Parties, together with any other Contracting Parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

- (vi) (a) The specific duties and charges included in the Tariff Record relating to the Contracting Parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such Contracting Parties, are expressed in the appropriate currency at the par value accepted or provisionally recognised by the Fund at the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7). Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; Provided that the Conference concurs that such adjustments will not impair the value of the standstill obligation provided for in Article 29(6) or (7) or elsewhere in this Treaty, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.
- (b) Similar provisions shall apply to any Contracting Party not a member of the Fund, as from the date on which such Contracting Party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV of GATT 1994.
- (vii) Each Contracting Party shall notify the Secretariat of the customs duties and charges of any kind applicable on the date of the standstill referred to in Article 29(6) first sentence. The Secretariat shall keep a Tariff Record of the customs duties and charges of any kind relevant for the purpose of the standstill on customs duties and charges of any kind under Article 29(6) or (7).

- (5) The Decision of 26 March 1980 on "Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions" (BISD 27S/24) shall not be applicable under Article 29(2)(a). The applicable provisions of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 shall, without prejudice to Article 29(4), (5) or (7), apply with the following modifications:
- (i) In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of article II of GATT 1994, the nature and level of any "other duties or charges" levied on any Energy Materials and Products listed in Annex EM II or Energy-Related Equipment listed in Annex EQ II with respect to their importation or exportation, as referred to in that provision, shall be recorded in the Tariff Record at the levels applying at the date of the standstill referred to in Article 29(6), first sentence, or under Article 29(7) respectively, against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
  - (ii) "Other duties or charges" shall be recorded in respect of all Energy Materials and Products listed in Annex EM II and Energy-Related Equipment listed in Annex EQ II.
  - (iii) It will be open to any Contracting Party to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the date of the standstill referred to in Article 29(6), first sentence, or the relevant date under Article 29(7), for the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the standstill obligation provided for by Article 29(6) or (7), for a period of one year after the entry into force of the Amendment to the trade-related provisions of this Treaty, adopted by the Charter Conference on 24 April 1998, or one year after the notification to the Secretariat of the level of customs duties and charges of any kind referred to in Article 29(6), first sentence, or Article 29(7), if that is the later.
  - (iv) The recording of "other duties or charges" in the Tariff Record is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by sub-paragraph (iii) above. All Contracting Parties retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.



- (v) "Other duties or charges" omitted from a notification to the Secretariat shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the notification to the Secretariat.
- (6) Where the WTO Agreement refers to "duties inscribed in the Schedule" or to "bound duties", there shall be substituted "the level of customs duties and charges of any kind permitted under Article 29(4) to (8)".
- (7) Where the WTO Agreement specifies the date of entry into force of the WTO Agreement (or an analogous phrase) as the reference date for an action, there shall be substituted the date of entry into force of the Amendment to the trade-related provisions of this Treaty adopted by the Charter Conference on 24 April 1998.
- (8) With respect to notifications required by the provisions made applicable by Article 29(2)(a):
- (a) Contracting Parties which are not members of the WTO shall make their notifications to the Secretariat. The Secretariat shall circulate copies of the notifications to all Contracting Parties. Notifications to the Secretariat shall be in one of the authentic languages of this Treaty. The accompanying documents may be solely in the language of the Contracting Party;
  - (b) such requirements shall not apply to Contracting Parties to this Treaty which are also members of the WTO which provides for its own notification requirements.
- (9) Where Article 29(2)(a) or (6)(b) applies, the Charter Conference shall carry out any applicable duties that the WTO Agreement assigned to the relevant bodies under the WTO Agreement.
- (10) (a) Interpretations of the WTO Agreement adopted by the Ministerial Conference or the General Council of the WTO under paragraph 2 of article IX of the WTO Agreement insofar as they interpret provisions applicable under Article 29(2)(a) shall apply.
- (b) Amendments to the WTO Agreement under article X of the WTO Agreement that are binding on all members of the WTO (other than those under paragraph 9 of article X) insofar as they amend or relate to provisions applicable under Article

29(2)(a), shall apply unless a Contracting Party requests the Charter Conference to disapply or modify such amendment. The Charter Conference shall take the decision by a three-fourths majority of the Contracting Parties and determine the date of the disapplication or modification of such amendment. A request for the disapplication or modification of such amendment may include a request that the application of the amendment be suspended pending the decision of the Charter Conference.

A request to the Charter Conference made under this paragraph shall be made within six months of the circulation of a notification from the Secretariat that the amendment has taken effect under the WTO Agreement.

- (c) Interpretations, amendments, or new instruments adopted by the WTO, other than the interpretations and amendments applied under paragraphs (a) and (b) shall not apply.

**13. Annex TFU: Provisions regarding Trade Agreements between States which Were Constituent Parts of the Former Union of Soviet Socialist Republics<sup>289</sup>**

(in accordance with article 29(2)(B))

**14. Annex BR: List of Contracting Parties which Shall Not Increase any Customs Duty or Other Charge above the Level Resulting from their Commitments or any Provisions Applicable to Them under the WTO Agreement<sup>290</sup>**

(in accordance with article 29 (7))

*[CHAIRMAN'S STATEMENT AT THE ADOPTION SESSION ON 24 APRIL 1998*

*"On the issue of future listing of countries on Annexes BR and BRQ, I conclude that all delegations are aware of the long standing positions of those delegations which like Australia, Hungary and Japan have repeatedly underlined that they support legally binding tariff commitments provided their commitments under the Energy Charter Treaty reflect their commitments in the WTO. This also reflects the position*

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289 Editor's note: The applicability of Annex TFU terminated on 1 December 1999 as per Art. 29.2.b ECT. For the text of the Annex TFU and Understanding with respect to the Annex TFU: <http://www.energycharter.org/>.

290 Introduced by Art. 5 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

*of other delegations, and there is a general acceptance among delegations that they will give positive consideration to that position at the time when the decision on legally binding tariff commitments is taken.”<sup>291</sup>*

**15. Annex BRQ: List of Contracting Parties which Shall Not Increase any Customs Duty or Other Charge above the Level Resulting from their Commitments or any Provisions Applicable to Them under the WTO Agreement<sup>292</sup>**

(in accordance with article 29 (7))

*[CHAIRMAN’S STATEMENT AT THE ADOPTION SESSION ON 24 APRIL 1998*

*“On the issue of future listing of countries on Annexes BR and BRQ, I conclude that all delegations are aware of the long standing positions of those delegations which like Australia, Hungary and Japan have repeatedly underlined that they support legally binding tariff commitments provided their commitments under the Energy Charter Treaty reflect their commitments in the WTO. This also reflects the position of other delegations, and there is a general acceptance among delegations that they will give positive consideration to that position at the time when the decision on legally binding tariff commitments is taken.”<sup>293</sup>*

**16. Annex D: Interim Provisions for Trade Dispute Settlement<sup>294</sup>**

(in accordance with Article 29(9))

*[CHAIRMAN’S CONCLUSION ON THE IMPLEMENTATION OF TRADE-RELATED RULES, AT THE ENERGY CHARTER CONFERENCE ON 24 APRIL 1998: There was furthermore a consensus that in developing dispute settlement rules and procedures WTO rules of procedure and practice would be followed and the roster of panellists to be*

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291 Editor’s note: Document CS(98) 338 CC 124, point 6, of 24 May 1998 (not published). This Statement was read out by the Chairman to the Adoption Session on 24 April 1998 and also circulated in written form. This Statement, which reflected the outcome of informal consultations, replaced a draft Declaration on the issue of listing on Annexes BR and BRQ, the text of which was consequently deleted from the text for adoption.

292 Introduced by Art. 5 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

293 Editor’s note: Document CS(98) 338 CC 124, point 6, of 24 May 1998 (not published). This Statement was read out by the Chairman to the Adoption Session on 24 April 1998 and also circulated in written form. This Statement, which reflected the outcome of informal consultations, replaced a draft Declaration on the issue of listing on Annexes BR and BRQ, the text of which was consequently deleted from the text for adoption.

294 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

*adopted by the Conference would be drawn up in accordance with Article 3 of the Amendment.*<sup>295</sup>

- (1) (a) In their relations with one another, Contracting Parties shall make every effort through cooperation and consultations to arrive at a mutually satisfactory resolution of any dispute about existing measures that might materially affect compliance with the provisions applicable to trade under Article 5 or 29, or about any measures that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29.<sup>296</sup>
- (b) A Contracting Party may make a written request to any other Contracting Party for consultations regarding any existing measure of the other Contracting Party that it considers might affect materially compliance with provisions applicable to trade under Article 5 or 29, or any measure that might nullify or impair any benefit accruing to a Contracting Party directly or indirectly under the provisions applicable to trade under Article 29.<sup>297</sup> A Contracting Party which requests consultations shall to the fullest extent possible indicate the measure complained of and specify the provisions of Article 5 or 29 and of the WTO Agreement<sup>298</sup> that it considers relevant. Requests to consult pursuant to this paragraph shall be notified to the Secretariat, which shall periodically inform the Contracting Parties of pending consultations that have been notified.
- (c) A Contracting Party shall treat any confidential or proprietary information identified as such and contained in or received in response to a written request, or received in the course of consultations, in the same manner in which it is treated by the Contracting Party providing the information.
- (d) In seeking to resolve matters considered by a Contracting Party to affect compliance with provisions applicable to trade under Article 5 or 29 as between itself and another Contracting Party, or to nullify or impair any benefit accruing to it directly or indirectly under the provisions applicable to trade under Article 29,<sup>299</sup> the

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295 Editor's note: Document CS (98) 338 CC 124, point 13, of 24 May 1998 (not published). The Conclusion was drawn by the Chairman to the first Energy Charter Conference on 24 April 1998. The Conference agreed without objection to this conclusion.

296 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

297 *Id.*

298 *Id.*

299 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the

Contracting Parties participating in consultations or other dispute settlement shall make every effort to avoid a resolution that adversely affects the trade of any other Contracting Party.

- (2) (a) If, within 60 days from the receipt of the request for consultation referred to in subparagraph (1)(b), the Contracting Parties have not resolved their dispute or agreed to resolve it by conciliation, mediation, arbitration or other method, either Contracting Party may deliver to the Secretariat a written request for the establishment of a panel in accordance with sub-paragraphs (b) to (f). In its request the requesting Contracting Party shall state the substance of the dispute and indicate which provisions of Article 5 or 29 and of the WTO Agreement<sup>300</sup> are considered relevant. The Secretariat shall promptly deliver copies of the request to all Contracting Parties.
- (b) The interests of other Contracting Parties shall be taken into account during the resolution of a dispute. Any other Contracting Party having a substantial interest in a matter shall have the right to be heard by the panel and to make written submissions to it, provided that both the disputing Contracting Parties and the Secretariat have received written notice of its interest no later than the date of establishment of the panel, as determined in accordance with subparagraph (c).
- (c) A panel shall be deemed to be established 45 days after the receipt of the written request of a Contracting Party by the Secretariat pursuant to subparagraph (a).
- (d) A panel shall be composed of three members who shall be chosen by the Secretary General from the roster described in paragraph (7). Except where the disputing Contracting Parties agree otherwise, the members of a panel shall not be citizens of Contracting Parties which either are party to the dispute or have notified their interest in accordance with sub-paragraph (b), or citizens of states members of a Regional Economic Integration Organisation which either is party to the dispute or has notified its interest in accordance with sub-paragraph (b).
- (e) The disputing Contracting Parties shall respond within ten working days to the nominations of panel members and shall not oppose nominations except for compelling reasons.

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Energy Charter Treaty.

300 Id.

- (f) Panel members shall serve in their individual capacities and shall neither seek nor take instruction from any government or other body. Each Contracting Party undertakes to respect these principles and not to seek to influence panel members in the performance of their tasks. Panel members shall be selected with a view to ensuring their independence, and that a sufficient diversity of backgrounds and breadth of experience are reflected in a panel.
  - (g) The Secretariat shall promptly notify all Contracting Parties that a panel has been constituted.
- (3) (a) The Charter Conference shall adopt rules of procedure for panel proceedings consistent with this Annex. Rules of procedure shall be as close as possible to those of the WTO Agreement.<sup>301</sup> A panel shall also have the right to adopt additional rules of procedure not inconsistent with the rules of procedure adopted by the Charter Conference or with this Annex. In a proceeding before a panel each disputing Contracting Party and any other Contracting Party which has notified its interest in accordance with sub-paragraph (2)(b), shall have the right to at least one hearing before the panel and to provide a written submission. Disputing Contracting Parties shall also have the right to provide a written rebuttal. A panel may grant a request by any other Contracting Party which has notified its interest in accordance with sub-paragraph (2)(b) for access to any written submission made to the panel, with the consent of the Contracting Party which has made it.

The proceedings of a panel shall be confidential. A panel shall make an objective assessment of the matters before it, including the facts of the dispute and the compliance of measures with the provisions applicable to trade under Article 5 or 29. In exercising its functions, a panel shall consult with the disputing Contracting Parties and give them adequate opportunity to arrive at a mutually satisfactory solution. Unless otherwise agreed by the disputing Contracting Parties, a panel shall base its decision on the arguments and submissions of the disputing Contracting Parties. Panels shall be guided by the interpretations given to the WTO Agreement within the framework of the WTO Agreement and shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a member of

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<sup>301</sup> Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

the WTO to other members of the WTO to which it applies the WTO Agreement and which have not been taken by those other members to dispute resolution under the WTO Agreement.<sup>302</sup>

Unless otherwise agreed by the disputing Contracting Parties, all procedures involving a panel, including the issuance of its final report, should be completed within 180 days of the date of establishment of the panel; however, a failure to complete all procedures within this period shall not affect the validity of a final report.

- (b) A panel shall determine its jurisdiction; such determination shall be final and binding. Any objection by a disputing Contracting Party that a dispute is not within the jurisdiction of the panel shall be considered by the panel, which shall decide whether to deal with the objection as a preliminary question or to join it to the merits of the dispute.
  - (c) In the event of two or more requests for establishment of a panel in relation to disputes that are substantively similar, the Secretary General may with the consent of all the disputing Contracting Parties appoint a single panel.
- (4) (a) After having considered rebuttal arguments, a panel shall submit to the disputing Contracting Parties the descriptive sections of its draft written report, including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties. The disputing Contracting Parties shall be afforded an opportunity to submit written comments on the descriptive sections within a period set by the panel.

Following the date set for receipt of comments from the Contracting Parties, the panel shall issue to the disputing Contracting Parties an interim written report, including both the descriptive sections and the panel's proposed findings and conclusions. Within a period set by the panel a disputing Contracting Party may submit to the panel a written request that the panel review specific aspects of the interim report before issuing a final report. Before issuing a final report the panel may, in its discretion, meet with the disputing Contracting Parties to consider the issues raised in such a request.

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302 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.



The final report shall include descriptive sections (including a statement of the facts and a summary of the arguments made by the disputing Contracting Parties), the panel's findings and conclusions, and a discussion of arguments made on specific aspects of the interim report at the stage of its review. The final report shall deal with every substantial issue raised before the panel and necessary to the resolution of the dispute and shall state the reasons for the panel's conclusions.

A panel shall issue its final report by providing it promptly to the Secretariat and to the disputing Contracting Parties. The Secretariat shall at the earliest practicable opportunity distribute the final report, together with any written views that a disputing Contracting Party desires to have appended, to all Contracting Parties.

- (b) Where a panel concludes that a measure introduced or maintained by a Contracting Party does not comply with a provision of Article 5 or 29 or with a provision of the WTO Agreement<sup>303</sup> that applies under Article 29, the panel may recommend in its final report that the Contracting Party alter or abandon the measure or conduct so as to be in compliance with that provision.
- (c) Panel reports shall be adopted by the Charter Conference. In order to provide sufficient time for the Charter Conference to consider panel reports, a report shall not be adopted by the Charter Conference until at least 30 days after it has been provided to all Contracting Parties by the Secretariat. Contracting Parties having objections to a panel report shall give written reasons for their objections to the Secretariat at least 10 days prior to the date on which the report is to be considered for adoption by the Charter Conference, and the Secretariat shall promptly provide them to all Contracting Parties. The disputing Contracting Parties and Contracting Parties which notified their interest in accordance with sub-paragraph (2)(b) shall have the right to participate fully in the consideration of the panel report on that dispute by the Charter Conference, and their views shall be fully recorded.
- (d) In order to ensure effective resolution of disputes to the benefit of all Contracting Parties, prompt compliance with rulings and recommendations of a final panel report that has been adopted by the Charter Conference is essential. A Contracting Party which

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303 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.



is subject to a ruling or recommendation of a final panel report that has been adopted by the Charter Conference shall inform the Charter Conference of its intentions regarding compliance with such ruling or recommendation. In the event that immediate compliance is impracticable, the Contracting Party concerned shall explain its reasons for non-compliance to the Charter Conference and, in light of this explanation, shall have a reasonable period of time to effect compliance. The aim of dispute resolution is the modification or removal of inconsistent measures.

- (5) (a) Where a Contracting Party has failed within a reasonable period of time to comply with a ruling or recommendation of a final panel report that has been adopted by the Charter Conference, a Contracting Party to the dispute injured by such non-compliance may deliver to the non-complying Contracting Party a written request that the non-complying Contracting Party enter into negotiations with a view to agreeing upon mutually acceptable compensation. If so requested the non-complying Contracting Party shall promptly enter into such negotiations.
- (b) If the non-complying Contracting Party refuses to negotiate, or if the Contracting Parties have not reached agreement within 30 days after delivery of the request for negotiations, the injured Contracting Party may make a written request for authorisation of the Charter Conference to suspend obligations owed by it to the non-complying Contracting Party under Article 5 or 29.
- (c) The Charter Conference may authorise the injured Contracting Party to suspend such of its obligations to the non-complying Contracting Party, under provisions of Article 5 or 29 or under provisions of the WTO Agreement<sup>304</sup> that apply under Article 29, as the injured Contracting Party considers equivalent in the circumstances.
- (d) The suspension of obligations shall be temporary and shall be applied only until such time as the measure found to be inconsistent with Article 5 or 29 has been removed, or until a mutually satisfactory solution is reached.
- (6) (a) Before suspending such obligations the injured Contracting Party shall inform the non-complying Contracting Party of the nature and level of its proposed suspension. If the non-complying

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304 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

Contracting Party delivers to the Secretary General a written objection to the level of suspension of obligations proposed by the injured Contracting Party, the objection shall be referred to arbitration as provided below. The proposed suspension of obligations shall be stayed until the arbitration has been completed and the determination of the arbitral panel has become final and binding in accordance with subparagraph (e).

- (b) The Secretary General shall establish an arbitral panel in accordance with sub-paragraphs (2)(d) to (f), which if practicable shall be the same panel which made the ruling or recommendation referred to in sub-paragraph (4)(d), to examine the level of obligations that the injured Contracting Party proposes to suspend. Unless the Charter Conference decides otherwise the rules of procedure for panel proceedings shall be adopted in accordance with sub-paragraph (3)(a).
- (c) The arbitral panel shall determine whether the level of obligations proposed to be suspended by the injured Contracting Party is excessive in relation to the injury it experienced, and if so, to what extent. It shall not review the nature of the obligations suspended, except insofar as this is inseparable from the determination of the level of suspended obligations.
- (d) The arbitral panel shall deliver its written determination to the injured and the non-complying Contracting Parties and to the Secretariat within 60 days of the establishment of the panel or within such other period as may be agreed by the injured and the non-complying Contracting Parties. The Secretariat shall present the determination to the Charter Conference at the earliest practicable opportunity, and no later than the meeting of the Charter Conference following receipt of the determination.
- (e) The determination of the arbitral panel shall become final and binding 30 days after the date of its presentation to the Charter Conference, and any level of suspension of benefits allowed thereby may thereupon be put into effect by the injured Contracting Party in such manner as that Contracting Party considers equivalent in the circumstances, unless prior to the expiration of the 30 days period the Charter Conference decides otherwise.
- (f) In suspending any obligations to a non-complying Contracting Party, an injured Contracting Party shall make every effort not to affect adversely the trade of any other Contracting Party.

- (7) Each Contracting Party may designate two individuals who shall, in the case of Contracting Parties which are also member of the WTO,<sup>305</sup> if they are willing and able to serve as panellists under this Annex, be persons whose names appear on the indicative list of governmental and non-governmental individuals, referred to in article 8 of the Understanding on Rules and Procedures Governing the Settlement of Disputes contained in Annex 2 to the WTO Agreement or who have in the past served as panellists on a GATT or WTO dispute settlement panel.<sup>306</sup> The Secretary General may also designate, with the approval of the Charter Conference, not more than ten individuals, who are willing and able to serve as panellists for purposes of dispute resolution in accordance with paragraphs (2) to (4). The Charter Conference may in addition decide to designate for the same purposes up to 20 individuals, who serve on dispute settlement rosters of other international bodies, who are willing and able to serve as panellists. The names of all of the individuals so designated shall constitute the dispute settlement roster. Individuals shall be designated strictly on the basis of objectivity, reliability and sound judgement and, to the greatest extent possible, shall have expertise in international trade and energy matters, in particular as relates to provisions applicable under Article 29. In fulfilling any function under this Annex, designees shall not be affiliated with or take instructions from any Contracting Party. Designees shall serve for renewable terms of five years and until their successors have been designated. A designee whose term expires shall continue to fulfil any function for which that individual has been chosen under this Annex. In the case of death, resignation or incapacity of a designee, the Contracting Party or the Secretary General, whichever designated said designee, shall have the right to designate another individual to serve for the remainder of that designee's term, the designation by the Secretary General being subject to approval of the Charter Conference.
- (8) Notwithstanding the provisions contained in this Annex, Contracting Parties are encouraged to consult throughout the dispute resolution proceeding with a view to settling their dispute.
- (9) The Charter Conference may appoint or designate other bodies or fora to perform any of the functions delegated in this Annex to the Secretariat and the Secretary General.
- (10) Where a Contracting Party invokes Article 29(9)(b), this Annex shall apply, subject to the following modifications:<sup>307</sup>

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305 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty.

306 Id.

307 Modification based on Art. 3 of the Amendment to the Trade-Related Provisions of the

- (a) the complaining party shall present a detailed justification in support of any request for consultations or for the establishment of a panel regarding a measure which it considers to nullify or impair any benefit accruing to it directly or indirectly under Article 29;
- (b) where a measure has been found to nullify or impair benefits under Article 29 without violation thereof, there is no obligation to withdraw the measure; however, in such a case the panel shall recommend that the Contracting Party concerned make a mutually satisfactory adjustment;
- (c) the arbitral panel provided for in paragraph (6)(b), upon the request of either party, may determine the level of benefits that have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties to the dispute.

#### **17. Annex B: Formula for Allocating Charter Costs**

(in accordance with Article 37(3))

- (1) Contributions payable by Contracting Parties shall be determined by the Secretariat annually on the basis of their percentage contributions required under the latest available United Nations Regular Budget Scale of Assessment (supplemented by information on theoretical contributions for any Contracting Parties which are not UN members).
- (2) The contributions shall be adjusted as necessary to ensure that the total of all Contracting Parties' contributions is 100%.

#### **18. Annex PA: List of Signatories which Do Not Accept the Provisional Application Obligation of Article 45(3)(B)<sup>308</sup>**

(in accordance with Article 45(3)(c))

#### **19. Annex T: Contracting Parties' Transitional Measures<sup>309</sup>**

(in accordance with Article 32(1))

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Energy Charter Treaty.

308 Editor's note: all signatories initially listed here already became full Contracting Parties. For the previously listed states: <http://www.energycharter.org/>.

309 Editor's note: The applicability of Annex T terminated on 1 July 2001. For the text of Annex T: <http://www.energycharter.org/>.

# **ENERGY CHARTER PROTOCOL ON ENERGY EFFICIENCY AND RELATED ENVIRONMENTAL ASPECTS**

(Annex 3 to the Final Act of the European Energy Charter Conference)

## **PREAMBLE**

THE CONTRACTING PARTIES to this Protocol,

Having regard to the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter, signed at The Hague on 17 December 1991; and in particular to the declarations therein that cooperation is necessary in the field of energy efficiency and related environmental protection;

Having regard also to the Energy Charter Treaty, opened for signature from 17 December 1994 to 16 June 1995;

Mindful of the work undertaken by international organisations and fora in the field of energy efficiency and environmental aspects of the energy cycle;

Aware of the improvements in supply security, and of the significant economic and environmental gains, which result from the implementation of cost-effective energy efficiency measures; and aware of their importance for restructuring economies and improving living standards;

Recognising that improvements in energy efficiency reduce negative environmental consequences of the energy cycle including global warming and acidification;

Convinced that energy prices should reflect as far as possible a competitive market, ensuring market-oriented price formation, including fuller reflection of environmental costs and benefits, and recognising that such price formation is vital to progress in energy efficiency and associated environmental protection;

Appreciating the vital role of the private sector including small and medium-sized enterprises in promoting and implementing energy efficiency measures, and intent on ensuring a favourable institutional framework for economically viable investment in energy efficiency;

Recognising that commercial forms of cooperation may need to be complemented by intergovernmental cooperation, particularly in the area of energy policy

formulation and analysis as well as in other areas which are essential to the enhancement of energy efficiency but not suitable for private funding; and

Desiring to undertake cooperative and coordinated action in the field of energy efficiency and related environmental protection and to adopt a Protocol providing a framework for using energy as economically and efficiently as possible:

**HAVE AGREED AS FOLLOWS:**

**Part I: Introduction**

**Article 1: Scope and Objectives of the Protocol**

- (1) This Protocol defines policy principles for the promotion of energy efficiency as a considerable source of energy and for consequently reducing adverse Environmental Impacts of energy systems. It furthermore provides guidance on the development of energy efficiency programmes, indicates areas of cooperation and provides a framework for the development of cooperative and coordinated action. Such action may include the prospecting for, exploration, production, conversion, storage, transport, distribution, and consumption of energy, and may relate to any economic sector.
- (2) The objectives of this Protocol are:
  - (a) the promotion of energy efficiency policies consistent with sustainable development;
  - (b) the creation of framework conditions which induce producers and consumers to use energy as economically, efficiently and environmentally soundly as possible, particularly through the organisation of efficient energy markets and a fuller reflection of environmental costs and benefits; and
  - (c) the fostering of cooperation in the field of energy efficiency.

**Article 2: Definitions**

As used in this Protocol:

- (1) "Charter" means the European Energy Charter adopted in the Concluding Document of the Hague Conference on the European Energy Charter

signed at The Hague on 17 December 1991; signature of the Concluding Document is considered to be signature of the Charter.

- (2) “Contracting Party” means a state or Regional Economic Integration Organisation which has consented to be bound by this Protocol and for which the Protocol is in force.
- (3) “Regional Economic Integration Organisation” means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Protocol, including the authority to take decisions binding on them in respect of those matters.
- (4) “Energy Cycle” means the entire energy chain, including activities related to prospecting for, exploration, production, conversion, storage, transport, distribution and consumption of the various forms of energy, and the treatment and disposal of wastes, as well as the decommissioning, cessation or closure of these activities, minimising harmful Environmental Impacts.
- (5) “Cost-Effectiveness” means to achieve a defined objective at the lowest cost or to achieve the greatest benefit at a given cost.
- (6) “Improving Energy Efficiency” means acting to maintain the same unit of output (of a good or service) without reducing the quality or performance of the output, while reducing the amount of energy required to produce that output.
- (7) “Environmental Impact” means any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors.

## **Part II: Policy Principles**

### **Article 3: Basic Principles**

Contracting Parties shall be guided by the following principles:

- (1) Contracting Parties shall cooperate and, as appropriate, assist each other in developing and implementing energy efficiency policies, laws and regulations.

- (2) Contracting Parties shall establish energy efficiency policies and appropriate legal and regulatory frameworks which promote, *inter alia*:
  - (a) efficient functioning of market mechanisms including market-oriented price formation and a fuller reflection of environmental costs and benefits;
  - (b) reduction of barriers to energy efficiency, thus stimulating investments;
  - (c) mechanisms for financing energy efficiency initiatives;
  - (d) education and awareness;
  - (e) dissemination and transfer of technologies;
  - (f) transparency of legal and regulatory frameworks.
- (3) Contracting Parties shall strive to achieve the full benefit of energy efficiency throughout the Energy Cycle. To this end they shall, to the best of their competence, formulate and implement energy efficiency policies and cooperative or coordinated actions based on Cost-Effectiveness and economic efficiency, taking due account of environmental aspects.
- (4) Energy efficiency policies shall include both short-term measures for the adjustment of previous practices and long-term measures to improve energy efficiency throughout the Energy Cycle.
- (5) When cooperating to achieve the objectives of this Protocol, Contracting Parties shall take into account the differences in adverse effects and abatement costs between Contracting Parties.
- (6) Contracting Parties recognise the vital role of the private sector. They shall encourage action by energy utilities, responsible authorities and specialised agencies, and close cooperation between industry and administrations.
- (7) Cooperative or coordinated action shall take into account relevant principles adopted in international agreements, aimed at protection and improvement of the environment, to which Contracting Parties are parties.
- (8) Contracting Parties shall take full advantage of the work and expertise of competent international or other bodies and shall take care to avoid duplication.



#### **Article 4: Division of Responsibility and Coordination**

Each Contracting Party shall strive to ensure that energy efficiency policies are coordinated among all of its responsible authorities.

#### **Article 5: Strategies and Policy Aims**

Contracting Parties shall formulate strategies and policy aims for Improving Energy Efficiency and thereby reducing Environmental Impacts of the Energy Cycle as appropriate in relation to their own specific energy conditions. These strategies and policy aims shall be transparent to all interested parties.

#### **Article 6: Financing and Financial Incentives**

- (1) Contracting Parties shall encourage the implementation of new approaches and methods for financing energy efficiency and energy-related environmental protection investments, such as joint venture arrangements between energy users and external investors (hereinafter referred to as "Third Party Financing").
- (2) Contracting Parties shall endeavour to take advantage of and promote access to private capital markets and existing international financing institutions in order to facilitate investments in Improving Energy Efficiency and in environmental protection related to energy efficiency.
- (3) Contracting Parties may, subject to the provisions of the Energy Charter Treaty and to their other international legal obligations, provide fiscal or financial incentives to energy users in order to facilitate market penetration of energy efficiency technologies, products and services. They shall strive to do so in a manner that both ensures transparency and minimises the distortion of international markets.

#### **Article 7: Promotion of Energy Efficient Technology**

- (1) Consistent with the provisions of the Energy Charter Treaty, Contracting Parties shall encourage commercial trade and cooperation in energy efficient and environmentally sound technologies, energy-related services and management practices.
- (2) Contracting Parties shall promote the use of these technologies, services and management practices throughout the Energy Cycle.

## Article 8: Domestic Programmes

- (1) In order to achieve the policy aims formulated according to Article 5, each Contracting Party shall develop, implement and regularly update energy efficiency programmes best suited to its circumstances.
- (2) These programmes may include activities such as the:
  - (a) development of long-term energy demand and supply scenarios to guide decision-making;
  - (b) assessment of the energy, environmental and economic impact of actions taken;
  - (c) definition of standards designed to improve the efficiency of energy using equipment, and efforts to harmonise these internationally to avoid trade distortions;
  - (d) development and encouragement of private initiative and industrial cooperation, including joint ventures;
  - (e) promotion of the use of the most energy efficient technologies that are economically viable and environmentally sound;
  - (f) encouragement of innovative approaches for investments in energy efficiency improvements, such as Third Party Financing and co-financing;
  - (g) development of appropriate energy balances and data bases, for example with data on energy demand at a sufficiently detailed level and on technologies for Improving Energy Efficiency;
  - (h) promotion of the creation of advisory and consultancy services which may be operated by public or private industry or utilities and which provide information about energy efficiency programmes and technologies, and assist consumers and enterprises;
  - (i) support and promotion of cogeneration and of measures to increase the efficiency of district heat production and distribution systems to buildings and industry;
  - (j) establishment of specialised energy efficiency bodies at appropriate levels, that are sufficiently funded and staffed to develop and implement policies.
- (3) In implementing their energy efficiency programmes, Contracting Parties shall ensure that adequate institutional and legal infrastructures exist.

## **Part III: International Cooperation**

### **Article 9: Areas of Cooperation**

The cooperation between Contracting Parties may take any appropriate form. Areas of possible cooperation are listed in the Annex.

## **Part IV: Administrative and Legal Arrangements**

### **Article 10: Role of the Charter Conference**

- (1) All decisions made by the Charter Conference in accordance with this Protocol shall be made by only those Contracting Parties to the Energy Charter Treaty who are Contracting Parties to this Protocol.
- (2) The Charter Conference shall endeavour to adopt, within 180 days after the entry into force of this Protocol, procedures for keeping under review and facilitating the implementation of its provisions, including reporting requirements, as well as for identifying areas of cooperation in accordance with Article 9.

### **Article 11: Secretariat and Financing**

- (1) The Secretariat established under Article 35 of the Energy Charter Treaty shall provide the Charter Conference with all necessary assistance for the performance of its duties under this Protocol and provide such other services in support of the Protocol as may be required from time to time, subject to approval by the Charter Conference.
- (2) The costs of the Secretariat and Charter Conference arising from this Protocol shall be met by the Contracting Parties to this Protocol according to their capacity to pay, determined according to the formula specified in Annex B to the Energy Charter Treaty.

### **Article 12: Voting**

- (1) Unanimity of Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions to:
  - (a) adopt amendments to this Protocol; and
  - (b) approve accessions to this Protocol under Article 16.

Contracting Parties shall make every effort to reach agreement by consensus on any other matter requiring their decision under this Protocol. If agreement cannot be reached by consensus, decisions on non-budgetary matters shall be taken by a three-fourths majority of Contracting Parties Present and Voting at the meeting of the Charter Conference at which such matters fall to be decided.

Decisions on budgetary matters shall be taken by a qualified majority of Contracting Parties whose assessed contributions under Article 11(2) represent, in combination, at least three-fourths of the total assessed contributions.

- (2) For purposes of this Article, "Contracting Parties Present and Voting" means Contracting Parties to this Protocol present and casting affirmative or negative votes, provided that the Charter Conference may decide upon rules of procedure to enable such decisions to be taken by Contracting Parties by correspondence.
- (3) Except as provided in paragraph (1) in relation to budgetary matters, no decision referred to in this Article shall be valid unless it has the support of a simple majority of Contracting Parties.
- (4) A Regional Economic Integration Organisation shall, when voting, have a number of votes equal to the number of its member states which are Contracting Parties to this Protocol; provided that such an Organisation shall not exercise its right to vote if its member states exercise theirs, and vice versa.
- (5) In the event of persistent arrears in a Contracting Party's discharge of financial obligations under this Protocol, the Charter Conference may suspend that Contracting Party's voting rights in whole or in part.

### **Article 13: Relation to the Energy Charter Treaty**

- (1) In the event of inconsistency between the provisions of this Protocol and the provisions of the Energy Charter Treaty, the provisions of the Energy Charter Treaty shall, to the extent of the inconsistency, prevail.
- (2) Article 10(1) and Article 12(1) to (3) shall not apply to votes in the Charter Conference on amendments to this Protocol which assign duties or functions to the Charter Conference or the Secretariat, the establishment of which is provided for in the Energy Charter Treaty.

## **Part V: Final Provisions**

### **Article 14: Signature**

This Protocol shall be open for signature at Lisbon from 17 December 1994 to 16 June 1995 by the states and Regional Economic Integration Organisations whose representatives have signed the Charter and the Energy Charter Treaty.

### **Article 15: Ratification, Acceptance or Approval**

This Protocol shall be subject to ratification, acceptance or approval by signatories. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

### **Article 16: Accession**

This Protocol shall be open for accession, from the date on which the Protocol is closed for signature, by states and Regional Economic Integration Organisations which have signed the Charter and are Contracting Parties to the Energy Charter Treaty, on terms to be approved by the Charter Conference. The instruments of accession shall be deposited with the Depositary.

### **Article 17: Amendments**

- (1) Any Contracting Party may propose amendments to this Protocol.
- (2) The text of any proposed amendment to this Protocol shall be communicated to Contracting Parties by the Secretariat at least three months before the date on which it is proposed for adoption by the Charter Conference.
- (3) Amendments to this Protocol, texts of which have been adopted by the Charter Conference, shall be communicated by the Secretariat to the Depositary which shall submit them to all Contracting Parties for ratification, acceptance or approval.
- (4) Instruments of ratification, acceptance or approval of amendments to this Protocol shall be deposited with the Depositary. Amendments shall enter into force between Contracting Parties having ratified, accepted or approved them on the thirtieth day after deposit with the Depositary of instruments of ratification, acceptance or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter

into force for any other Contracting Party on the thirtieth day after that Contracting Party deposits its instrument of ratification, acceptance or approval of the amendments.

### **Article 18: Entry into Force**

- (1) This Protocol shall enter into force on the thirtieth day after the date of deposit of the fifteenth instrument of ratification, acceptance or approval thereof, or of accession thereto, by a state or Regional Economic Integration Organisation which is a signatory to the Charter and a Contracting Party to the Energy Charter Treaty or on the same date as the Energy Charter Treaty enters into force, whichever is later.
- (2) For each state or Regional Economic Integration Organisation for which the Energy Charter Treaty has entered into force and which ratifies, accepts, or approves this Protocol or accedes thereto after the Protocol has entered into force in accordance with paragraph (1), the Protocol shall enter into force on the thirtieth day after the date of deposit by such state or Regional Economic Integration Organisation of its instrument of ratification, acceptance, approval or accession.
- (3) For the purposes of paragraph (1), any instrument deposited by a Regional Economic Integration Organisation shall not be counted as additional to those deposited by member states of such Organisation.

### **Article 19: Reservations**

No reservations may be made to this Protocol.

### **Article 20: Withdrawal**

- (1) At any time after this Protocol has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Protocol.
- (2) Any Contracting Party which withdraws from the Energy Charter Treaty shall be considered as also having withdrawn from this Protocol.
- (3) The effective date of withdrawal under paragraph (1) shall be ninety days after receipt of notification by the Depositary. The effective date of withdrawal under paragraph (2) shall be the same as the effective date of withdrawal from the Energy Charter Treaty.

## Article 21: Depositary

The Government of the Portuguese Republic shall be the Depositary of this Protocol.

## Article 22: Authentic Texts

In witness whereof the undersigned, being duly authorised to that effect, have signed this Protocol in English, French, German, Italian, Russian and Spanish, of which every text is equally authentic, in one original, which will be deposited with the Government of the Portuguese Republic.

Done at Lisbon on the seventeenth day of December in the year one thousand nine hundred and ninety-four.<sup>310</sup>

### **Annex: Illustrative and Non-Exhaustive List of Possible Areas of Cooperation pursuant to Article 9**

Development of energy efficiency programmes, including identifying energy efficiency barriers and potentials, and the development of energy labelling and efficiency standards;

Assessment of the Environmental Impacts of the Energy Cycle;

Development of economic, legislative and regulatory measures;

Technology transfer, technical assistance and industrial joint ventures subject to international property rights regimes and other applicable international agreements;

Research and development;

Education, training, information and statistics;

Identification and assessment of measures such as fiscal or other market based instruments, including tradeable<sup>311</sup> permits to take account of external, notably environmental, costs and benefits.

Energy analysis and policy formulation:

- assessment of energy efficiency potentials;

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310 For signatories: <http://www.energycharter.org/>.

311 Editor's note: spelling as in authenticated version.

- energy demand analysis and statistics;
- development of legislative and regulatory measures;
- integrated resource planning and demand side management;
- Environmental Impact assessment, including major energy projects.

Evaluation of economic instruments for Improving Energy Efficiency and environmental objectives.

Energy efficiency analysis in refining, conversion, transport and distribution of hydro carbons.

Improving Energy Efficiency in power generation and transmission:

- cogeneration;
- plant component (boilers, turbines, generators, etc.);
- network integration.

Improving Energy Efficiency in the building sector:

- thermal insulation standards, passive solar and ventilation;
- space heating and air conditioning systems;
- high efficiency low NOx burners;
- metering technologies and individual metering;
- domestic appliances and lighting.

Municipalities and local community services:

- district heating systems;
- efficient gas distribution systems;
- energy planning technologies;
- twinning of towns or of other relevant territorial entities;
- energy management in cities and in public buildings;
- waste management and energy recovery of waste.

Improving Energy Efficiency in the industrial sector:

- joint ventures;
- energy cascading, cogeneration and waste heat recovery;
- energy audits.



### Improving Energy Efficiency in the transport sector:

- motor vehicle performance standards;
- development of efficient transport infrastructures.

### Information:

- awareness creation;
- data bases: access, technical specifications, information systems;
- dissemination, collection and collation of technical information;
- behavioural studies.

### Training and education:

- exchanges of energy managers, officials, engineers and students;
- organisation of international training courses.

### Financing:

- development of legal framework;
- Third Party Financing;
- joint ventures;
- co-financing.

