

Brussels, 30<sup>th</sup> October 1996

**NOTE FROM THE SECRETARIAT**

**Subject: Tariff Standstill; Draft Chairman's compromise proposal**

During the September meeting of Working Group II the Chairman undertook to prepare a compromise proposal which would be a complete response to the remit given to the Working Group under Article 29(6) including any amendments to Annexes G and D appropriate to the introduction of a mandatory tariff standstill. The attached Room Document 3 of Working Group II of 18 September 1996 contains an outline of the Chairman's intentions relevant to the suggested proposal for a tariff standstill.

The draft compromise proposal for the full text of Article 29 and for Annex G and the draft amendment to Annex D are contained in Attachments 1, 2 and 3 respectively.

These drafts are intended as a basis for reflection; a discussion of the texts is on the Agenda of the meeting of Working Group II on 12-13 November.

The draft compromise proposal is aimed at providing a way forward to finding a package of compromises concerning issues, including the standstill provisions, exceptions, waivers, the inclusion of the content of Understanding 18(a), the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 and the necessary modifications thereto.

Explanatory notes:

(a) Attachment 1

- Article 29 is - for ease of reference - reproduced in full i.e., including the unaltered paragraphs 1 and 3.
- Paragraph 2, which relates to Annex G, has been modified by deleting the reference to GATT 1947. The need to introduce additional precision in the trade provisions as a consequence of a mandatory tariff standstill, and the aim to avoid the introduction of additional GATT-related trade rules which would be outdated and no longer applicable in the GATT/WTO context, made the change of reference recommendable.
- Paragraph 4 contains a legally binding tariff standstill at applied rates relative to import and export tariffs and other charges of any kind. There is a waiver possibility provided for in the context of this standstill provision which should be

considered in connection with Annex G paragraphs 3 and 4. The date for the standstill has - for the time being - been left open because several options have been mentioned and no consensus on this issue has emerged so far.

- Paragraph 5 provides the possibility for individual WTO-members (to be listed in a new Annex BR) to commit themselves instead not to increase the level of their tariffs or other charges above those resulting from their commitments, and other provisions applicable to them, under the WTO.
- Paragraphs 4 and 5 are supplemented by provisions in paragraphs 5 and 6 of Annex G which in turn should be read in conjunction with the respective provisions on the applicability and disapplication of GATT rules in paragraph 1(b) of Annex G.
- Paragraph 6 on the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 may be redundant if the suggested approach under paragraph 2 on the change of reference and the respective parts of the new Annex G II (i.e., paragraph 1(b) as far as it relates to the Understanding and paragraph 6) were acceptable.
- Paragraph 7 is based on the draft by the Legal Advisory Committee (see Attachment II to document T 35 of 27 September 1996) related to the introduction of Non-Violation Complaints into the trade-related dispute settlement system of the Energy Charter Treaty.

(b) Attachment 2

- Annex G II would replace the present Annex G; the present paragraph 2 may become paragraph 9 of Annex G II (instead of invoking provisions of the Understanding on the Balance of Payments Provisions of the GATT 1994), the present paragraphs 3 and 4 were retained as the new paragraphs 10 and 12 respectively.
- Annex G II follows the same main sequence as the present Annex G; first, paragraph 1 lists the provisions of GATT and Related Instruments which shall not apply to the trade governed by Article 29 of the Energy Charter Treaty. Then, in paragraphs 2 to 12, there are the special rules which modify the application of trade related rules which have not been disapplied in paragraph 1 of Annex G. The list of disapplied rules under the present Annex G was the starting point for drafting the corresponding list in paragraph 1 of Annex G II, taking - as far as possible - into account the interventions during the meetings of the Working Group.
- Paragraph 2 explains the function of Article IX: 2 WTO Agreement: Authoritative interpretations of WTO rules which are taken under that article would, as far as they pertain to applicable provisions, result in the same interpretation in the ECT context.
- Paragraphs 3 and 4 deal with waivers. The principle of consensus, and if that cannot be achieved, a three quarters majority, as a voting requirement for waiver decisions is laid down in the relevant provisions of the WTO and it would equally follow from Article 36 of the ECT. The relevant WTO provisions, however, add

precision concerning pre-requirements and other aspects, such as necessary justifications for waivers, review, prolongation and termination of waivers. Pre-existing WTO waivers are taken into account in paragraph 4.

- Paragraph 5 modifies the applicable provisions of article II of the GATT and it should be read together with the amended paragraphs 2, 4 and 5 of Article 29 (see above) and with paragraph 1(b) of Annex G.
- Paragraph 6 builds on paragraph 5. It modifies the applicable provisions of the Understanding on the Interpretation of Article II:1(b) of the GATT. The provision should be read together with paragraphs 4 and 5 of Article 29; they may render paragraph 6 of that Article superfluous (see above). The applicable provisions of that Understanding are those not listed in paragraph 1(b) of Annex G.
- Paragraphs 7 and 8 adapt the references to specific dates and to the respective bound tariffs to the needs of the ECT tariff standstill.
- Paragraph 9 contains an alternative to the draft of paragraph 1(b) on the Balance-of-Payments provisions.
- Paragraph 11 is based on the draft by the Legal Advisory Committee for the inclusion of the content of Understanding 18(a) (see Attachment II to document T 35 of 27 September 1996); it is slightly modified as a consequence of the new paragraph 29(2)(a) and Annex G II paragraph 1.
- Paragraphs 10 and 12 are identical to the language of paragraphs 3 and 4 of the present Annex G.

(c) Attachment 3

Annex D amendments:

The Legal Advisory Committee draft for amendments to Annex D, providing for the introduction of Non-Violation Complaints to the Energy Charter Treaty (see Attachment II to document T 35 of 27 September 1996), was incorporated; the only additions being the introduction of references to “Related Instruments” in the texts of paragraphs 3 and 5 in view of the terminology and reference now used in Article 29(2)(a) and Annex G II.

List of Attachments to document T 36:

1. Chairman’s draft compromise proposal for Article 29
2. Chairman’s draft compromise proposal for Annex G II
3. Chairman’s draft compromise proposal for Annex D amendments
4. Room Document 3 revised of 18 September (WG II)
5. Australian proposal, Room Document 1 of 18 March 1996 (WG II)
6. EU proposal, document T 28 of 14 May 1996.

ARTICLE 29

INTERIM PROVISIONS ON TRADE-RELATED MATTERS

- (1) The provisions of this Article shall apply to trade in Energy Materials and Products while any Contracting Party is not a party to the GATT and Related Instruments.
- (2)
  - (a) Trade in Energy Materials and Products between Contracting Parties at least one of which is not a party to the GATT or a relevant Related Instrument shall be governed, subject to subparagraphs (b) and (c) and to the exceptions and rules provided for in Annex GII\*, by the provisions of GATT and Related Instruments, as applied [on 1 March 1994]\*\* and practised with regard to Energy Materials and Products by parties to GATT among themselves, as if all Contracting Parties were parties to GATT and Related Instruments.
  - (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 GATT, whichever is the earlier.
  - (c) As concerns trade between any two parties to the GATT, subparagraph (a) shall not apply.
- (3) Each signatory to this Treaty, and each state or Regional Economic Integration Organization acceding to this Treaty, shall on the date of its signature or of its deposit of its instrument of accession provide to the Secretariat a list of all tariff rates and other charges levied on Energy Materials and Products at the time of importation or exportation, notifying the level of such rates and charges applied on such date of signature or deposit. Any changes to such rates or other charges shall be notified to the Secretariat, which shall inform the Contracting Parties of such changes.
- (4) In respect of trade between Contracting Parties at least one of which is not a party to the GATT or a relevant Related Instrument, no Contracting Party shall increase any tariff rate or other charge levied at the time of importation or exportation of Energy Materials and Products above the lowest of the levels applied [ ]\*\*\*.

A Contracting Party may increase such tariff rate or other charge above the level referred to above only if:

- (a) in case of a rate or other charge levied at the time of importation, such action is not inconsistent with the applicable provisions of the GATT and

Related Instruments, other than those provisions of GATT and Related Instruments listed in Annex GII;

- (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 a different rate, subject to any conditions it may impose;
- (5) Notwithstanding paragraph 4, in the case of trade referred to in that paragraph, Contracting Parties listed in Annex BR shall not increase any tariff or other charge above the level resulting from their commitments and any provisions applicable to them under the GATT and Related Instruments.
- [(6) Other charges levied at the time of importation or exportation of Energy Materials or Products shall be subject to the provisions of the Understanding on the Interpretation of Article II: I(b) of the GATT 1994 as modified according to Annex GII]\*\*\*\*.
- (7) Annex D shall apply to:
- (a) disputes regarding compliance with provisions applicable to trade under this Article;
  - (b) 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, disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a party to the GATT,

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.

**Notes:**

- \* *The “new Annex G” has been named GII for the ease of reference, one might later decide to revert to “Annex G” if misunderstandings can be excluded.*

*\*\* Text in brackets to be deleted if a dynamic reference was acceptable; otherwise a suitable date after 1.1.1996 would need to be found in co-operation with the WTO Legal Service.*

*\*\*\* Relevant date(s) for the standstill to be added in brackets after consultations.*

*\*\*\*\* Text might be redundant in view of the new Annex GII.*

**ANNEX G II**

**EXCEPTIONS AND RULES GOVERNING THE APPLICATION OF THE  
PROVISIONS OF THE GATT1994 AND RELATED INSTRUMENTS  
(in accordance with Article 29(2)(a))**

(1) The following provisions of GATT1994 and Related Instruments shall not be applicable under Article 29(2)(a):

(a) Agreement Establishing the World Trade Organization  
All except Article IX, paragraphs 2, 3 and 4 and XVI, paragraphs 1 and 3

Annex 1A to the WTO Agreement: Multilateral Agreements on Trade in Goods:

(b) General Agreement on Tariffs and Trade 1994

II	paragraphs (1)(a),(1)(b)(1st sentence), (1)(c) and (7)
IV	Special Provisions relating to Cinematographic Films
XV	Exchange Arrangements
XVIII	Governmental Assistance to Economic Development
XXII	Consultation
XXIII	Nullification and Impairment
XXV	Joint Action by the Contracting Parties
XXVI	Acceptance, Entry into Force and Registration
XXVII	Withholding or Withdrawal of Concessions
XXVIII	Modification of Schedules except in application of the provisions of Article XXIV
XXVIIIbis	Tariff negotiations
XXIX	The relation of this Agreement to the Havana Charter
XXX	Amendments
XXXI	Withdrawal
XXXII	Contracting Parties
XXXIII	Accession
XXXV	Non-application of the Agreement between particular Contracting Parties
XXXVI	Principles and Objectives
XXXVII	Commitments
XXXVIII	Joint Action
Annex H	Relating to Article XXVI
Annex I	Notes and Supplementary Provisions ( related to the above-mentioned GATT Articles )

Understanding on the Interpretation of Article II: 1(b) of the GATT 1994

- 2 Date of incorporation of other duties and charges into the schedule
- 4 ( 1st sentence only ) Challenges
- 6 Dispute settlement
- 8 Supersession of BISD 27S/24

Understanding on the Interpretation of Article XVII of the GATT 1994

- 1 only the phrase " for review by the working party to be set up under paragraph (5) "
- 5 Working Party on state trading

Understanding on the Balance-of-Payments Provisions of the GATT 1994

- 5 Committee on Balance-of-Payments Restrictions, except last sentence
- 7 Review by the Committee [, the phrase "or under paragraph 12(b) of Article XVIII"]
- 8 Simplified consultation procedures
- 13 Conclusions of Balance-of-Payments consultations, first sentence, third sentence the phrase "and XVIII: B, the 1979 Declaration" and last sentence.

Understanding on the Interpretation of Article XXIV of the GATT 1994

All except paragraphs 13 and 15

Understanding in Respect of Waivers of Obligations under the GATT 1994

- 3 Nullification and Impairment

Understanding on the Interpretation of Article XXVIII of the GATT 1994

Marrakesh Protocol to the GATT 1994

(c) Related Instruments

in Annex 1A to the WTO Agreement:

- (i) Agreement on Agriculture
- (ii) Agreement on the Application of Sanitary and Phytosanitary Measures
- (iii) Agreement on Textiles and Clothing

(iv) Agreement on Technical Barriers to Trade

Preamble (paragraphs 1, 8, 9 )

1.3 General Provisions

10.5 The words “Developed country” and the words “French or Spanish” which shall be replaced by “Russian”

10.6 The phrase “and draw attention of developing country Members ... interest to them.”

10.7 Information about technical regulations, standards and certification systems

11 Technical assistance to other Parties

12 Special and differential treatment of developing countries

13 The Committee on Technical Barriers to Trade

14 Consultation and Dispute Settlement

15 Final Provisions ( other than 15.5 )

Annex 2 Technical Expert Groups

(v) Agreement on Trade-Related Investment Measures

(vi) Agreement on Implementation of Article VI of the GATT 1994  
(Anti-dumping)

15 Developing Country Members

16 Committee on Anti-Dumping Practices

17 Consultation and Dispute Settlement

18 Final Provisions, paragraphs 2, 4, 5 and 6

(vii) Agreement on Implementation of Article VII of the GATT 1994  
(Customs Valuation)

Preamble, paragraph 2, the phrase “and to secure additional benefits for the international trade of developing countries”.

14 Application of Annexes ( second sentence )

18 Institutions ( Committee on Customs Valuation )

19 Consultation and Dispute Settlement

20 Special and differential treatment of developing countries

21 Reservations

22.1 National Legislation

23 Review

24 Secretariat

Annex II Technical Committee on Customs Valuation

Annex III Extra Provisions (except paragraphs 6 and 7 )

(viii) Agreement on Preshipment Inspection

[Preamble, paragraph 2 and 3

3.3 Technical Assistance

6 Review]

- [7 Consultation
- 8 Dispute Settlement]

(ix) Agreement on Rules of Origin

- Preamble, 8th indent
- 3 Disciplines after the Transition Period
- 4 Institutions
- 6 Review
- 7 Consultation
- 8 Dispute Settlement
- 9 Harmonization of Rules of Origin
- Annex 1 Technical Committee on Rules of Origin

(x) Agreement on Import Licensing Procedures

- 1.4 General Provisions (last sentence)
- 2.2 Automatic Import Licensing (footnote 5)
- 4 Institutions
- 6 Consultations and Dispute Settlement
- 7 Review (except paragraph 3)
- 8 Final provisions (except paragraph 2)

(xi) Agreement on Subsidies and Countervailing Measures

- 4 Remedies [(except paragraphs 4.1, 4.2 and 4.3)]
- 5 Adverse Effects, last sentence
- 6 Serious Prejudice (paragraphs 6.6, [the phrases “subject to the provisions of paragraph 3 of Annex V” and “arising under Article 7, and to the panel established pursuant to paragraph 4 of Article 7”], 6.8 [ the phrase “, including information submitted in accordance with the provisions of Annex V] and 6.9)
- 7 Remedies [(except paragraphs 7.1, 7.2 and 7.3)]
- 8 Identification of Non-Actionable Subsidies, paragraph 8.5 and Footnote 25
- [9 Consultations and Authorised Remedies]
- 24 Committee on Subsidies and Countervailing Measures and Subsidiary Bodies
- 26 Surveillance
- 27 Special and Differential Treatment of Developing Country Members
- 29 Transformation into Market Economy, paragraph 29.2 (except first sentence)
- 30 Dispute Settlement
- 31 Provisional Application
- 32.2, 32.5, 32.7 and 32.8( only insofar as it refers to Annexes V and VII) Final Provisions

Annex V Procedures for Developing Information concerning Serious

Prejudice  
Annex VII Developing Countries

- (xii) Agreement on Safeguards
  - 9 Developing Country Members
  - 12 Notification and Consultation [paragraph 10]
  - 13 Surveillance
  - 14 Dispute Settlement
    - Annex Exception
  
- (xiii) Annex 1B to the WTO Agreement:  
General Agreement on Trade in Services
  
- (xiv) Annex 1C to the WTO Agreement:  
Agreement on Trade-Related Aspects of Intellectual  
Property Rights
  
- (xv) Annex 2 to the WTO Agreement:  
Understanding on Rules and Procedures Governing the  
Settlement of Disputes
  
- (xvi) Annex 3 to the WTO Agreement:  
Trade Policy Review Mechanism
  
- (xvii) Annex 4 to the WTO Agreement: Plurilateral Trade Agreements  
Agreement on Trade in Civil Aircraft
  
- (xviii) Agreement on Government Procurement
  
- (xvix) International Dairy Arrangement
  
- (xx) International Bovine Meat Agreement
  
- (xxi) Ministerial Decisions, Declarations and Understanding:  
Decision on Measures in favour of Least-Developed Countries
  
- (xxii) Declaration on the Contribution of the WTO to Achieving Greater  
Coherence in Global Economic Policymaking
  
- (xxiii) Decision on Notification Procedures
  
- (xxiv) Declaration on the Relationship of the WTO with the IMF

- (xxv) Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries
- (xxvi) Decision on Notification of First Integration under Article 2.6 of the Agreement on Textiles and Clothing
- (xxvii) Decision on Review of the ISO/IEC Information Centre Publication
- (xxviii) Decision on Anti-Circumvention
- (xxix) Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994
- (xxx) Declaration on Dispute Settlement pursuant to the Agreement on Implementation of Article VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures
- (xxxi) Decisions on Texts relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires
- (xxxii) Decision on Institutional Arrangements for the GATS
- (xxxiii) Decision on certain Dispute Settlement Procedures for the GATS
- (xxxiv) Decision on Trade in Services and the Environment
- (xxxv) Decision on Negotiations on Movement of Natural Persons
- (xxxvi) Decision on Financial Services
- (xxxvii) Decision on Negotiations on Maritime Transport Services
- (xxxviii) Decision on Negotiations on Basic Telecommunications
- (xxxix) Decision on Professional Services
- (xl) Decision on Accession to the Agreement on Government Procurement
- (xli) Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes
- (xlii) Understanding on Commitments in Financial Services
- (xliii) Decision on the Acceptance of and Accession to the Agreement Establishing the WTO

- (xliv) Decision on Trade and Environment
  - (xliv) Decision on Organisational and Financial Consequences Following from Implementation of the Agreement Establishing the WTO
  - (xlvi) Decision on the Establishment of the Preparatory Committee for the WTO
- (d) All other provisions in the GATT or Related Instruments which relate to:
- (i) governmental assistance to economic development and the treatment of developing countries, except for paragraphs (1) to(4) of the Decision of 28 November 1979 (L/4903) on Differential and more Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries;
  - (ii) the establishment or operation of specialist committees and other subsidiary institutions;
  - (iii) signature, accession, entry into force, withdrawal, deposit and registration.
- (e) All agreements, arrangements, decisions, understandings or other joint action pursuant to the provisions listed in subparagraphs (a) to (c).
- (2) Interpretations of the Agreement establishing the World Trade Organization and of the Multilateral Trade Agreements, taken by the Ministerial Conference or the General Council of the World Trade Organization under article IX:2 of the Agreement establishing the World Trade Organization shall be applicable insofar as they concern provisions applicable under Article 29(2)(a).
- [(3) Requests for waivers under Article 29[(2) and] (4)(b) shall be submitted to the Charter Conference which shall follow the procedures of article IX, paragraphs 3 and 4 of the Agreement establishing the World Trade Organization in carrying out these duties.]
- [(4) Waivers of obligations in force in the World Trade Organization at the date of the coming into force of this amendment shall remain in force for the purposes of Article 29 so long as they remain in force in the World Trade Organization.]

(5)\* The provisions of Article II of the GATT 1994 which have not been disapplied shall, without prejudice to Article 29(5), be modified as follows:

- (i) in paragraph (1)(b), second sentence, “such products” shall refer to “all Energy Materials and Products imported from or exported to any other Contracting Party”, after “in connection with importation” the words “or exportation” are added and “the date of this Agreement” shall be substituted by “the date of the standstill referred to in Article 29(4), first sentence”;
- (ii) paragraphs (3), (4), (5) and (6) shall be applied as if all Energy Materials and Products were bound in the appropriate Schedule and as if the concessions provided for in the appropriate Schedule were the tariff rates permitted under Article 29 (4);
- (iii) on or before [the entry into force] [the date of signature] of this amendment, each Contracting Party shall notify the Secretariat of the tariffs applicable on the date of the standstill referred to in Article 29(4), first sentence. The Secretariat shall keep a Tariff Record of the tariffs relevant for the purpose of the tariff standstill under Article 29(4) and (5).

[(6)\* The Decision of 26 March 1980 on “Introduction of a Loose-Leaf System for the Schedules of Tariff Concessions” shall not be applicable under Article 29(2)(a) (BISD 27S/24 ). In place of it the applicable provisions of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 shall, without prejudice to Article 29(5), apply with the following modifications:

- (a) all Energy Materials and Products shall with respect to their importation and exportation be regarded as “bound tariff items”. “Other duties or charges” shall be recorded in the “Tariff Record” at the levels applying at the date of the standstill referred to in Article 29(4), last sentence or under Article 29(5) respectively. “Tariff Record” shall be substituted for “Schedule”;
- (b) paragraph (4), second sentence, “time of the original binding” shall be substituted by “date of the standstill referred to in Article 29(4), first sentence or the relevant date under Article 29(5)” and “period of three years” by “period of one year”; “this amendment” shall be substituted for “the WTO Agreement”, “one year” for “three years” and “the notification to the Secretariat of the tariff level, referred to in Article 29(4), first sentence or 29(5)” for “the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994”;
- (c) paragraph (7), “notification to the Secretariat” shall be substituted for the words “Schedule at the time of deposit...Director-General of the WTO” and for “the date of deposit of the instrument”].

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\* Once the applicable date under Article 29(4) first sentence has been decided the drafting may be simplified (e.g. by the LAC)

- (7) Where the GATT 1994 or a Related Instrument refers to “duties inscribed in the Schedule” or to “bound duties”, there shall be substituted “the level of tariffs and other charges of any kind permitted under Article 29(4) and (5)”.
- (8) Where the GATT 1994 or a Related Instrument 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 entry into force of this Amendment
- (9) [as in current paragraph 2 if it is preferred not to spell out the treatment of the balance-of payments Declaration].
- (10) With respect to notifications required by the provisions made applicable by Article 29(2)(a):
  - (a) Contracting Parties which are not parties to the GATT or a Related Instrument 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 parties to the GATT and Related Instruments, which contain their own notification requirements.
- (11) Where Article 29(2)(a) or (4)(b) applies, the Charter Conference shall carry out any applicable duties that the GATT or a Related Instrument assigned to the contracting parties to the GATT acting jointly or to other bodies.
- (12) Trade in nuclear materials may be governed by agreements referred to in the Declarations related to this paragraph contained in the Final Act of the European Energy Charter Conference.

ANNEX D AMENDMENTS

“Annex D is amended as follows:

At the end of paragraph 1(a), delete the period and add thereafter following “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.

In paragraph 1(b), at the end of the first sentence, delete the period and insert thereafter following “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.

In paragraph 1(d), insert after the comma before “the Contracting Parties”:

or to nullify or impair any benefit accruing to it directly or indirectly under the provisions applicable to trade under Article 29,

In paragraph 3(a), penultimate sentence, insert after “GATT” before the comma:

or Related Instruments

and after “GATT” before the period:

or Related Instruments

In paragraph 7, first sentence, insert after “GATT” before the comma:

and Related Instruments

and after “GATT” before “dispute panels” insert:

- related

Add after paragraph 9:

(10) Where a Contracting Party invokes Article 29(7)(b), this Annex shall apply, subject to the following modifications:

(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 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”.

**THE ENERGY CHARTER  
SECRETARIAT**

**Room Document 3  
Working Group II (Trade)  
17-18 September 1996**

Brussels, 18 September 1996

**REVISED**

Draft note from the Chairman

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1. At its fifth meeting 5 June 1996 the provisional Charter Conference concluded that at its next meeting there should be a complete overview of the Working Groups for discussion and a possible decision on the procedure for negotiations in 1997. The November meeting of Working Group II is its last meeting before that Conference meeting.
2. Accordingly for the November meeting, I shall be proposing for discussion a compromise text which would commit each Contracting Party not to increase tariffs or other charges levied at the time of importation or exportation beyond the level described under that text.
3. My compromise proposal will reflect a ceiling of tariffs based on those actually applied. It will include any amendments to Annexes G and D appropriate to the introduction of a mandatory tariff ceiling. As I have noted it will cover tariffs and other charges levied at or in connection with both importation and exportation. It will thus be a complete response to the remit given to the Working Group under Article 29(6).
4. I shall include a provision under which a WTO Member may take as the tariff ceiling that permitted under the rules of the WTO as applied in practice from time to time. The discussion on the conditions under which this opportunity might be available for an energy trade will be left for the negotiating Conference.
5. I hope that in due course the proposed draft could be supplemented with a background note as briefing for the delegates to the December Charter Conference.
6. Both the Australian and the EC proposals will be annexed to my compromise proposal so that they will remain as official documents for the negotiations directed by the Charter Conference.
7. I shall be seeking the advice of the Legal Advisory Committee as appropriate to ensure the consistency and the integrity of my proposal.

**THE ENERGY CHARTER  
SECRETARIAT**

*Attachment 5*

**Room Document 1**  
**Working Group II (Trade)**  
**19-20 March 1996**

Brussels, 20 March 1996

Tariff Standstill

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Australian proposal revised in the light of technical suggestions made to doc. T-3.  
For the ease of comparison changes have been underlined.

## Revised Australian proposal for Article 29(4),(5),(7) - Tariff Standstill

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Article 29(4) along the following lines:

"Each Contracting Party shall not increase any tariff rate or other charge of any kind, including other duties or charges, as described in the Understanding on the interpretation of article II:1(b) of the General Agreement on Tariffs and Trade 1994, imposed on or in connection with importation or exportation of Energy Materials and Products originating in or destined for another Contracting Party:

- (a) In the case of the importation of Energy Materials and Products described in part I of the schedule relating to the Contracting Party referred to in article II of the GATT, above the level set forth in that schedule at any given time, if the Contracting Party is a party to the GATT;
- (b) In the case of the exportation of Energy Materials and Products, and that of their importation if the Contracting Party is not a party to the GATT, above the level applied on the date of its signature or deposit of its instrument of accession.

Article 29(5) might read:

"A Contracting Party may increase such tariff rate or other charge levied at the time of importation or exportation above the level referred to in paragraph (4) only if:

- (a) In the case of a tariff rate or other charge levied at the time of importation, such action is not inconsistent with:
  - (i) any provision of the GATT or a Related Instrument applicable to a Contracting Party party to the GATT;
  - (ii) any provision of the GATT or a Related Instrument, other than those listed in Annex G, made applicable by sub-paragraph (2)(a), to a Contracting Party not party to the GATT; or
- (b) The Charter Conference has voted to waive the obligation imposed by sub-paragraph (4)(b) not to increase the tariff rate or other charge in question, provided that such an increase is consistent with any terms and conditions specified by the Charter Conference in granting such a waiver."

Article 29(7)(chapeau)

To cover the problem of "non-violation nullification and impairment of benefits" (analogous to GATT XXIII:1(B)), an amendment to the chapeau of Article 29(7) along the lines of the following might be considered:

"Annex D shall apply to disputes regarding compliance with provisions applicable to Trade under this Article or to 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, unless both Contracting Parties agree otherwise..."

Consequential changes to Annex D would be needed to make it applicable to non-violation complaints.

**THE ENERGY CHARTER  
SECRETARIAT**

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Brussels, 14 May 1996

**NOTE FROM THE SECRETARIAT**

**Subject:      Tariff standstill - Working Group II**

Please find attached a draft text by the European Communities for provisions for a tariff standstill based on applied tariffs and some explanatory notes thereto.

**DRAFT PROVISIONS FOR A TARIFF STANDSTILL BASED  
ON APPLIED TARIFFS IN THE ENERGY CHARTER TREATY**

**Proposal by the European Community**

Delete Article 29, paragraphs (4) to (7) and substitute the following:

- (4) In respect of trade between Contracting Parties at least one of which is not a party to the GATT or a relevant Related Instrument, no Contracting Party shall increase any tariff rate or other charge levied at the time of importation or exportation<sup>(1)</sup> of Energy Materials and Products above the lowest of the levels applied in the period between the date of signature of the ECT and the date of the conclusion of the negotiations of the tariff standstill<sup>(2)(3)</sup>.

A Contracting Party may increase such tariff rate or other charge above the level referred to above only if:

- (a) in case of a rate or other charge levied at the time of importation, such action is not inconsistent with the applicable provisions of the GATT, other than those provisions of GATT 1947 and Related Instruments listed in Annex G<sup>(4)</sup> and the corresponding provisions of GATT 1994 and Related Instruments;
- (b) in exceptional circumstances not elsewhere provided for in this Treaty, the Charter Conference consents to a different rate, subject to any conditions it may impose<sup>(5)</sup>;  
<sup>(6)(7)</sup>
- (5) If a Contracting Party lowers a tariff rate below the levels indicated in paragraph 4, the reduced tariff becomes the new ceiling and the rate cannot be raised again<sup>(8)</sup>.
- (6) Other charges levied at the time of importation or exportation<sup>(1)</sup> of Energy Materials or Products shall be subject to the provisions of the Understanding on the interpretation of Article II; I(b) of the GATT 1994 as modified according to Annex OC.
- (7) Annex D shall apply to disputes regarding:
- (a) compliance with provisions applicable to Trade under this Article; or
- (b) to 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<sup>(9)</sup> and, unless both Contracting Parties agree otherwise, to disputes regarding compliance with Article 5 between Contracting Parties at least one of which is not a party to the GATT, 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.

### Notes

- (1) *This is the phrase currently used in the Energy Charter Treaty, Article 29. GATT, in articles I and II uses the expression “customs duties and charges of any kind imposed on or in connection with importation or exportation”. The Secretariat is not aware that there was any intention in the negotiations to cover in paragraphs (3) to (6) of Article 29 any different duties and charges than those covered by GATT article I and II. The Understanding on the Interpretation of Article II; 1(b) of the GATT 1994 refers to “other duties or charges”. Given that the incorporation of a mandatory standstill will substantially increase the discipline on tariffs, it may be desirable to change to the GATT terminology to avoid any possible misinterpretation.*
- (2) *This construction seems to be the most effective. However, the Working Group discussed the issue of an applicable date during its 5<sup>th</sup> meeting and identified other solutions:*
  - *the lower of the level at signature of the ECT and entry into force of the agreement*
  - *the date of adoption of the tariff standstill amendment*
  - *the date of signature of (or accession to) the ECT*
  - *some future date to allow for discussions of the current tariff levels and possible downward adjustment*
  - *1 January 1996 (as the date at which countries had been asked to update the information - circulated in February)*
  - *1 July 1996 as suggested in T 10*
- (3) *It is assumed that no date needs to be set in the text for those countries which later accede to the ECT, that can be left to the terms to be approved by the Charter Conference (Article 41).*
- (4) *Several of the GATT articles included in Annex G as exceptions were placed there because of their relevance to tariff concessions. Whether they may need to*

*be invoked by the Treaty as part of a tariff standstill even if that standstill is based on applied rather than bound tariffs remains to be explored.*

- (5) *The Working Group considered that further analysis was required as to whether provisions such as those in article XXV of the GATT would be necessary in the ECT in the event of a standstill to enable the Charter Conference to permit an increase in exceptional circumstances.*
- (6) *The Working Group considered that the provisions on standstill should not make accession to the WTO more difficult nor prejudice those negotiations. Accordingly one could argue a provision allowing adjustment to tariffs following accession to the WTO. On the other hand, the EC considers that from the point of view of promoting investment and trade it would be extremely desirable not to have increases in tariffs on accession to WTO. Therefore no provision on flexibility with regard to WTO accession is included.*
- (7) *Some delegations spoke out for a specific Annex which would contain exceptions for particular Contracting Parties. The EC sees no need for such an Annex, which would upset the general balance of commitments.*
- (8) *The text assumes that, a ratchet effect applies (if a tariff were reduced below the original ceiling the reduced level would become the new ceiling).*

*It is acknowledged that no consensus on a ratchet mechanism was reached in the Working Group. The following other options were considered:*

- *periodic renegotiations of tariff levels*
  - *staging tariff decreases*
  - *a reduction below the levels at signature corresponding to the tariff cuts made by WTO members in the Uruguay Round.*
- (9) *The Working Group concluded that if there were a mandatory standstill there could be a case for providing for dispute settlement with respect to nullification and impairment. In this case consequential changes to Annex D would be deemed to make it applicable to non-violation complaints.*