

Brussels, 17 October 1997

NOTE FROM THE SECRETARIAT

Subject: **Agenda item 4 - Working Group II (Draft Trade Amendment)**

1. During its July 1997 meeting the Charter Conference requested the Working Group Chairman's compromise text, as amended in the light of technical work and, if appropriate, legal consideration should be submitted to the Conference.

The attachments to this Note recall points made during the meetings of Working Group II and its technical sub-group and provide drafting suggestions to implement the recommendations.

It is furthermore planned that the Conference will receive a report, as a Room Document, from the Working Group II meeting on 3 November 1997.

2. It was noted that many non-WTO countries had started negotiations with WTO. It was reiterated that the present work to amend the interim provisions of Article 29 would be particularly valuable in the period prior to the time when all the Contracting Parties are members of the WTO. During the Working Group meeting it was recalled that facilitating the accession of all our Contracting Parties to the WTO, has been and will remain the main purpose of the trade provisions of the Energy Charter Treaty and of the ongoing negotiations in Working Group II. Signing up to the WTO rules applied to a limited set of products has been expressed by the WTO members as a step in the right direction. In order to have full liberty in the WTO negotiations, several non-WTO signatories (footnote 8) wanted to be on Annex BR. A possible text to cover that concern is included in that footnote. The Charter Conference has stated its intention to consider the content of Annex BR as a key political issue to be resolved with a view to achieving agreement on a tariff standstill amendment prior to 1 January 1998, as stipulated in the Treaty.
3. Attachments 1, 2 and 3 contain redrafts of the relevant trade provisions. Footnotes to them are based on points made and initial positions taken at the meetings of Working Group II and its technical sub-group. The footnotes are numbered in sequence. They are to be found at the end of the parts of the draft to which they belong; notes relevant to more than one part have been placed where the issue first arises. Footnotes of a purely explanatory character which are marked with * are not

intended to prejudge or influence in any way the outcome of negotiations in Working Group III regarding energy-related equipment.

The proposed changes include:

- a) drafting changes to implement conclusions of Working Group II and its technical sub-group;
- b) amendments to update references to the WTO and instruments related to it from GATT 1947;
- c) amendments to include the WTO terminology regarding customs duties and charges.

Attachment 4 lists changes in other provisions of the Energy Charter Treaty consequent upon changing the reference to the WTO.

ARTICLE 29⁽¹⁾

INTERIM PROVISIONS ON TRADE-RELATED MATTERS

- (1) The provisions of this Article shall apply to trade in Energy Materials and Products⁽²⁾ while any Contracting Party is not a member of the WTO and party to Related Instruments⁽³⁾.
- (2)
 - (a) Trade in Energy Materials and Products⁽²⁾ between Contracting Parties at least one of which is not a member of the WTO⁽³⁾ or party to a relevant Related Instrument shall be governed, subject to subparagraph (b) and to the exceptions and rules provided for in Annex GII*, by the provisions of the WTO Agreement⁽³⁾ and Related Instruments⁽³⁾, as applied⁽⁴⁾ and practised with regard to Energy Materials and Products⁽²⁾ by members of the WTO⁽³⁾ among themselves, as if all Contracting Parties were members of the WTO⁽³⁾ and parties to 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 WTO⁽³⁾, whichever is the earlier.
- (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 customs duties and charges of any kind imposed on or in connection with importation or exportation of⁽⁵⁾ Energy Materials and Products⁽²⁾, notifying the level of such customs duties⁽⁵⁾ and charges applied on such date of signature or deposit⁽⁶⁾. Any changes to such customs duties⁽⁵⁾ 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) In respect of trade between Contracting Parties at least one of which is not a member of the WTO⁽³⁾, no Contracting Party shall increase any customs duty or charge of any kind imposed on or in connection with⁽⁵⁾ importation or exportation of Energy Materials and Products⁽²⁾ above the lowest of the levels applied []⁽⁷⁾.

A Contracting Party may increase such customs duty⁽⁵⁾ or other charge above the level referred to above only if:

- (a) in case of a customs duty or other charge imposed on or in connection with⁽⁵⁾ importation, such action is not inconsistent with the applicable provisions of the WTO Agreement⁽³⁾ and Related Instruments, other than

those provisions of the WTO Agreement⁽³⁾ and Related Instruments listed in Annex GII; 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⁽⁵⁾, subject to any conditions the Charter Conference may impose.
- (5) Notwithstanding paragraph (4), in the case of trade referred to in that paragraph, Contracting Parties listed in Annex BR⁽⁸⁾ shall not increase any customs duty⁽⁵⁾ or other charge above the level resulting from their commitments and any provisions applicable to them under the WTO Agreement and Related Instruments⁽³⁾.
- (6) Other duties and charges levied on or in connection with⁽⁵⁾ importation or exportation of Energy Materials or Products⁽²⁾ 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 :
 - (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⁽³⁾.

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.

Notes:

- * *The “new Annex G” has been named GII for the ease of reference, it would be open to revert at a later stage to “Annex G” if misunderstandings can be excluded.*

Footnotes:

- (1) J scrutiny reserve on all changes and other footnotes because it considers the content of the present draft (document T 36) acceptable.

Russian Federation general reserve.

- (2)* In any instrument dealing with energy-related equipment this term would need to be expanded appropriately in any of the relevant Treaty provisions.
- (3) Given that all parties to the GATT are now members of the World Trade Organization (WTO) and no Related Instruments are currently proposed to be applied by Article 29, it was agreed that the legal advice may need to be sought on
- a) how to substitute appropriate references to the membership in the WTO for references to “parties to the GATT and Related Instruments” and similar references throughout the Treaty. It should be noted that the WTO might adopt a plurilateral trade agreement which the Energy Charter Conference might wish to apply under Article 29;
 - b) what consequential amendments would be needed to the provisions of the ECT in order to ensure an appropriate reference the “WTO Agreement and Related Instruments”, or particular provisions thereof, rather than to “GATT and Related Instruments”.

Drafting suggestions have been incorporated in Article 29 and Annexes GII and D; further consequential changes are contained in Attachment 4 to this Note.

H suggests to delete the references to “Related Instruments” when updating the reference because the four plurilateral agreements presently existing under the WTO are all listed in Annex GII.

- (4) It was agreed to delete the date and to ensure in the redraft of the interim provisions on trade-related matters the following:
- a) new or revised instruments which relate solely to provisions of the WTO Agreement and Related Instruments which are applied by Article 29 should automatically be applied (and the case law under the WTO would likewise apply);
 - b) new or revised instruments which relate solely to provisions of the WTO Agreement or Related Instruments not applied by Article 29 should not be applied;
 - c) the Energy Charter Conference should have the capacity to consider and approve modifications of and technical changes to Annex G II relating to new or revised instruments under the WTO Agreement or Related Instruments which do not fall clearly within (a) or (b) above.

Legal advice may need to be sought in this context.

First drafting suggestions are contained in Attachment 2 (Annex GII, Part B, paragraph (10)) to this Note.

CH, EU: consideration might be given to an alternative positive list approach should an appropriate limitation of applicable instruments not be achievable under the present negative list approach.

H: consideration might be given to whether it was feasible to transform Annex GII into a shorter positive list.

- (5)*The phrase currently used in the Energy Charter Treaty, Article 29 is “tariff rates and other charges levied at the time of importation or exportation”. GATT, in articles I and II uses the expressions “customs duties and charges of any kind imposed on or in connection with importation or exportation”, “ordinary customs duties” and “other duties or charges”. 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 from those covered by GATT articles 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. Attachment III to document T 29 of 10 June 1996 noted that in the technical sub-group of WG II “Agreement was reached to change over to GATT/WTO terminology”. Drafting suggestions are provided here, which may need to be checked with the WTO Secretariat.
- (6)*In any instrument dealing with energy-related equipment, the transparency provisions of Article 29(3) would need to be adapted appropriately.
- (7) Applicable date(s) for the standstill were deferred for consideration by Working Group II at its next meeting. Delegations were invited to express their preferences as soon as possible.

The following options were mentioned during previous discussions in Working Group II and its technical sub-group:

- 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” (EU)
- 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 levels of customs duties and charges and possible downward adjustment
- 1 January 1996 (as the date at which countries had been asked to update the information - circulated in February 1996)
- 1 July 1996 as suggested in T 10.

- (8) The question of WTO members to be listed on Annex BR was deferred for consideration by the Conference.

It was reiterated that some delegations of WTO members could accept the approach of the Chairman of Working Group II only if they were listed on Annex BR.

Azerbaijan, Belarus, Kazakhstan, Russian Federation and Ukraine seek a mechanism under which they would be eligible to be listed on Annex BR once they complete their accession to the WTO. A possible way to meet this concern might be to add to Article 29(5) after “Related Instruments.” the sentence “Contracting Parties listed on Annex BR II will, upon their accession to the WTO, be considered to be listed on Annex BR.”

EU, Norway and Switzerland referred to a question of balance.

Working Group II will discuss possibilities to address these concerns at the next meeting, on 3 November. A Room Document reflecting the outcome of the discussion will be provided for the Conference.

Note by the Secretariat:

Text of the draft Article 29(6) ECT may be redundant in view of the new Annex GII.

ANNEX G II⁽¹⁾

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

(A) Exceptions to the Application of the Provisions of the WTO Agreement and Related Instruments.

The following provisions of the WTO Agreement and Related Instruments shall not be applicable under Article 29(2)(a)⁽⁹⁾:

- (1) Agreement Establishing the World Trade Organization
All except article [IX, paragraphs 2, 3 and 4 and]⁽¹⁰⁾ XVI, paragraphs 1, 3 and 4
- (a) Annex 1A to the WTO Agreement:
Multilateral Agreements on Trade in Goods:
- (i) General Agreement on Tariffs and Trade 1994
- | | |
|------------|---|
| II | Schedules of Concessions, 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 |
| XXIV | Customs Unions and Free-Trade Areas, paragraph 6 |
| XXV | Joint Action by the Contracting Parties |
| XXVI | Acceptance, Entry into Force and Registration |
| XXVII | Withholding or Withdrawal of Concessions |
| XXVIII | Modification of Schedules |
| XXVIII bis | 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 provisions)

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 Challenges, (1st sentence only)
- 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 paragraph 13

Understanding in Respect of Waivers of Obligations under the GATT
1994

- [3 Nullification and Impairment]⁽¹⁰⁾

Understanding on the Interpretation of Article XXVIII of the GATT
1994

Marrakesh Protocol to the GATT 1994

- (ii) Agreement on Agriculture

(iii) Agreement on the Application of Sanitary and Phytosanitary Measures

(iv) Agreement on Textiles and Clothing

(v) 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.”

10.9 Information about technical regulations, standards and certification systems (languages)

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 15.2 and 15.5)

Annex 2 Technical Expert Groups

(vi) Agreement on Trade-Related Investment Measures

(vii) 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 and 6

(viii) 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 except as far as it refers to Annex III paragraphs 6 and 7)

18 Institutions (Committee on Customs Valuation)

19 Consultation and Dispute Settlement

20 Special and differential treatment of developing countries

21 Reservations

23 Review

24 Secretariat

Annex II Technical Committee on Customs Valuation

Annex III Extra Provisions (except paragraphs 6 and 7)

(ix) Agreement on Preshipment Inspection

Preamble, paragraphs 2 and 3

3.3 Technical Assistance

6 Review

7 Consultation

8 Dispute Settlement

(x) Agreement on Rules of Origin

Preamble, 8th indent

4 Institutions

6 Review

7 Consultation

8 Dispute Settlement

9 Harmonization of Rules of Origin

Annex I Technical Committee on Rules of Origin

(xi) Agreement on Import Licensing Procedures

1.4(a) General Provisions (last sentence)

2.2 Automatic Import Licensing (footnote 5)

3.5 (iv) Non-Automatic Import Licensing (last sentence)

4 Institutions

6 Consultations and Dispute Settlement

7 Review (except paragraph 3)

8 Final provisions (except paragraph 2)

(xii) 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, 32.7 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

(xiii) Agreement on Safeguards

- 9 Developing Country Members
- 12 Notification and Consultation [paragraph 10]
- 13 Surveillance
- 14 Dispute Settlement
Annex Exception

(b) Annex 1B to the WTO Agreement:

General Agreement on Trade in Services

(c) Annex 1C to the WTO Agreement:

[Agreement on Trade-Related Aspects of Intellectual
Property Rights]⁽¹¹⁾

(d) Annex 2 to the WTO Agreement:

Understanding on Rules and Procedures Governing the
Settlement of Disputes

(e) Annex 3 to the WTO Agreement:

Trade Policy Review Mechanism

(2) Related Instruments:

(a) Annex 4 to the WTO Agreement:

Plurilateral Trade Agreements

(i) Agreement on Trade in Civil Aircraft

(ii) Agreement on Government Procurement

(iii) International Dairy Arrangement

(iv) International Bovine Meat Agreement

(b) Ministerial Decisions, Declarations and Understanding:

(i) Decision on Measures in favour of Least-Developed Countries

- (ii) Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking
- (iii) Decision on Notification Procedures
- (iv) Declaration on the Relationship of the WTO with the IMF
- (v) Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries
- (vi) Decision on Notification of First Integration under Article 2.6 of the Agreement on Textiles and Clothing
- (vii) Decision on Review of the ISO/IEC Information Centre Publication
- (viii) Decision on Proposed Understanding on WTO-ISO Standards Information System
- (ix) Decision on Anti-Circumvention
- (x) Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the GATT 1994
- (xi) 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
- (xii) Decision Regarding Cases Where Customs Administrations Have Reason to Doubt the Truth or Accuracy of the Declared Value
- (xiii) Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires
- (xiv) Decision on Institutional Arrangements for the GATS
- (xv) Decision on certain Dispute Settlement Procedures for the GATS
- (xvi) Decision on Trade in Services and the Environment
- (xvii) Decision on Negotiations on Movement of Natural Persons
- (xviii) Decision on Financial Services
- (xix) Decision on Negotiations on Maritime Transport Services

- (xx) Decision on Negotiations on Basic Telecommunications
 - (xxi) Decision on Professional Services
 - (xxii) Decision on Accession to the Agreement on Government Procurement
 - (xxiv) Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes
 - (xxv) Understanding on Commitments in Financial Services
 - (xxvi) Decision on the Acceptance of and Accession to the Agreement Establishing the WTO
 - (xxvii) Decision on Trade and Environment
 - (xxviii) Decision on Organisational and Financial Consequences Following from Implementation of the Agreement Establishing the WTO
 - (xxix) Decision on the Establishment of the Preparatory Committee for the WTO
- (3) All other provisions in the WTO Agreement⁽³⁾ or Related Instruments which relate to:
- (a) 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;
 - (b) the establishment or operation of specialist committees and other subsidiary institutions;
 - (c) signature, accession, entry into force, withdrawal, deposit and registration.
- (4) All agreements, arrangements, decisions, understandings or other joint action pursuant to the provisions listed as not applicable in subparagraphs (1) to (3).
- (5) 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⁽¹²⁾.
- (B) Rules Governing the Application of Provisions of the WTO Agreement and Related Instruments.**

- (1) Interpretations of the WTO Agreement including the multilateral trade agreements, taken by the Ministerial Conference or the General Council of the WTO under paragraph 2 of article IX of the WTO Agreement shall be applicable insofar as they concern provisions applicable under Article 29(2)(a)⁽⁹⁾.
- [(2) Requests for waivers under Article 29[(2) and] (4)(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 .]⁽¹⁰⁾⁽¹³⁾
- (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(5), be modified as follows :
 - "(i) All Energy Materials and Products⁽²⁾ 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(4), first sentence, or under Article 29(5), 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(4), 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 manufactures 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(4) or (5).
 - (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 described in Annex EM ⁽²⁾, 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(4) or (5). 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(4) or (5), 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 Amendment, 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 recognized by the Fund at the date of the standstill referred to in Article 29(4), first sentence, or under Article 29(5). 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(4) or (5) or elsewhere in this Amendment, 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) On or before [the date of signature] [the entry into force] of this Amendment, each Contracting Party shall notify the Secretariat of the customs duties [and charges if any kind]⁽⁵⁾ applicable on the date of the standstill referred to in Article 29(4), first sentence. The Secretariat shall keep a Tariff Record of the customs duties [and charges if any kind]⁽⁵⁾ relevant for the purpose of the standstill on customs duties and charges of any kind⁽⁵⁾ under Article 29(4) or (5).
- (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(5), apply with the following modifications:

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

Contracting Parties hereby agree as follows :

- (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⁽²⁾ 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(4), first sentence, or under Article 29(5) 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⁽²⁾.
 - (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(4), first sentence, or the relevant date under Article 29(5), 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(4) or (5), for a period of one year after the entry into force of this Amendment or one year after the notification to the Secretariat of the level of customs duties and charges of any kind⁽⁵⁾ referred to in Article 29(4), first sentence, or Article 29(5), 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⁽³⁾ or a Related Instrument refers to “duties inscribed in the Schedule” or to “bound duties”, there shall be substituted “the level of customs duties⁽⁵⁾ and charges of any kind permitted under Article 29(4) or (5)”.
 - (7) Where the WTO Agreement⁽³⁾ 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.

- (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⁽³⁾ or parties to 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 members of the WTO and parties to Related Instruments⁽³⁾, which contain their own notification requirements.
- (9) Where Article 29(2)(a) or (4)(b) applies, the Charter Conference shall carry out any applicable duties that the WTO Agreement⁽³⁾ or a Related Instrument assigned to the relevant bodies under the WTO Agreement or a Related Instrument⁽⁹⁾⁽¹⁰⁾.

[(10) New or revised instruments introduced under the WTO Agreement or a Related Instrument shall be applied as follows :

- (a) Those which relate [exclusively] [predominantly] [only] to provisions of the WTO Agreement or Related Instruments which are applicable under Article 29(2)(a), shall apply [from the date of their applicability under the WTO Agreement or Related Instruments] [unless the Charter Conference decides otherwise [by unanimous decision]].
- (b) Those which do not relate to any provisions of the WTO Agreement or Related Instruments which are applied under Article 29(2)(a) shall not be applied under Article 29(2)(a) [unless the Charter Conference decides otherwise [by unanimous decision]];
- (c) Those which do not fall under sub-paragraph (a) or (b) shall.....

[some options are indicated below for further consideration (see Notes by the Secretariat (c))]

- (d) Adopted panel reports and appellate body reports under the Understanding on Rules and Procedures Governing the Settlement of Disputes, contained in Annex 2 to the WTO Agreement, and other case law developed under the WTO Agreement or Related Instruments, related to applicable provisions of the WTO Agreement or Related Instruments, are automatically likewise applicable under Article 29(2)(a);]

Footnotes:

- (9) J considers the content of the present draft (document T 36) acceptable; scrutiny reserve to all changes and footnotes to it.
- (10) EU scrutiny reserve, EU wishes to consider further
- a) the procedures applied to applications for waivers: in particular there is a case for the automatic application under Article 29 of waivers agreed in the WTO;
 - b) whether there is a potential need for waivers for WTO provisions or only for the provisions in Article 29, paragraph (4)(b).

J supports the present draft (document T 36).

- (11) EU and CH contemplate deletion, thus incorporating at least parts of the TRIPS agreement. EU proposes incorporating the substantive provisions and listing the institutional provisions in Annex GII part A as not applicable. EU may submit a draft proposal in this regard.
- (12) RUF proposes that trade in nuclear materials should become subject to the general interim provisions on trade-related matters. This would require the deletion of paragraph 12 of Annex GII (i.e. the new paragraph (5) of Annex GII part A).
- (13) J proposes to delete the brackets around the draft text.

Notes by the Secretariat

- (a) Once the applicable date under Article 29(4) first sentence has been decided the drafting of paragraphs B(4) and (5) of Annex GII may be simplified.
- (b) If it were preferred not to incorporate the Understanding on the Balance of Payments Provisions of the GATT 1994 by reference, the text of paragraph 2 of the present Annex G to the ECT could become a new paragraph B(8) of Annex GII, as indicated in document T 36.
- (c) Some options for instruments to be reflected in sub-paragraph (c) of the new paragraph (10):

The majority of cases of new or revised instruments introduced under the WTO Agreement or Related Instruments is likely to raise the question of modification and/or applicability which the Conference would need to deal with. A Conference decision on an interim suspension of applicability might be taken separately, prior to the Conference decision on applicability of an instrument and any appropriate modifications to Annex GII.

Options for dealing with cases which do not fall under (a) or (b) in the draft paragraph (10) in Annex GII (B) include modification procedures:

- 1) The present text of the ECT provides for the possibility of “modifications” to Annexes of the ECT (Article 34(3)(m)) which would in the case of

Annex G be subject to a unanimity requirement (because of the listing of Annex G in Article 36(1)(d)). Such “modifications” could theoretically have immediate effect for all Contracting Parties. However, this could occur only with the unanimous agreement of the Contracting Parties that the change was a modification (not requiring ratification) and that the modification should have effect from the date of the decision of the Conference.

- 2) If there was the wish to provide for Conference decisions with less than unanimity being required for the adoption of modifications to Annex GII, a simple solution might be to delete the reference to Annex G from Article 36(1)(d). In that case a “three-fourths majority of the Contracting Parties Present and Voting” would be needed for such decisions (Article 36(4)) unless different voting requirements were introduced in the Trade Amendment.

Alternative options regarding (1) a trigger mechanism for Conference action and (2) the consequence of a request for Conference action are indicated below. These options may be combined with each other as appropriate.

- 1)
 - A right for any one Contracting Party or only for a minimum of x (=more than one) Contracting Parties to request consideration of an instrument by the Conference (with a view to deciding on applicability or non-applicability of the instrument or specific provisions of it and on any appropriate modifications to the applicability of the instrument).
 - A possibility for such a request (for consideration of an instrument by the Conference) to be made without any time-limit or within a time-limit for such requests (e.g. y months after the applicability of the instrument under the WTO Agreement or a Related Instrument).
- 2)
 - Following such a request for consideration of an instrument the application of this instrument may be automatically suspended or it may be suspended only if the request for consideration also contains a request for suspension of application.
 - The request for suspension might be subject to a separate Conference decision.
 - A time frame for Conference decisions on suspension of applicability could be developed (e.g. the Conference must decide on suspension or the instrument applies/does not apply).
 - Interim applicability along the following lines might be envisaged:
The question concerning the applicability (or non-applicability) of new or revised instruments pending a decision on modification of Annex GII might be addressed by an Understanding that Contracting Parties will seek to [agree and] decide on the applicability of such instruments and any appropriate modifications to Annex GII within x months of their applicability under the WTO Agreement or Related

Instrument. Pending this decision Contracting Parties will apply any such instrument provisionally, to the extent that such application is not inconsistent with their constitutions, laws or regulations. In the case where the Contracting Parties do not take a decision on the applicability and any modifications to Annex GII within x months, the instrument shall be applicable, unless the Contracting Parties decide otherwise.

- Alternatively, should automatic and unlimited suspension of applicability of an instrument be preferred, options include triggering unlimited suspension by one Contracting Party or introducing an additional requirement of support for the request for suspension by more than one Contracting Party.

After guidance on preferred policy choices appropriate legal drafting could be included in sub-paragraph (c) of the above draft.

ANNEX D AMENDMENTS⁽¹⁾

“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.”

and in the second sentence, replace “GATT” with “WTO Agreement”.

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 2(a), second sentence, replace “GATT” with “WTO Agreement”.

In paragraph 3(a), second sentence, replace “GATT” with “WTO Agreement” and replace the penultimate sentence with :

“Panels shall be guided by the interpretations given to the WTO Agreement and Related Instruments within the framework of the WTO Agreement or Related Instruments and shall not question the compatibility with Article 5 or 29 of practices applied by any Contracting Party which is a member of 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 or Related Instruments.”

In paragraph 4(b), first sentence, replace “GATT” with “WTO Agreement”.

In paragraph 5(c), replace “GATT” with “WTO Agreement”.

In paragraph 7, first sentence, replace “party to the GATT” with

“member of the WTO or party to a Related Instrument”

and replace “panellists currently nominated for the purpose of GATT dispute panels” with:

“persons whose names appear on the indicative list of governmental and non-government 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 panelists on a GATT or WTO dispute settlement panel.”

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”.

Note by the Secretariat:

In view of the change over from references to “GATT and Related Instruments” to references to the “WTO Agreement and Related Instruments”, introduced in Article 29, consequential changes became necessary in Annex D (as well as in other provisions of the ECT which are outside the Interim Provisions on Trade-Related Matters).

OTHER AMENDMENTS TO THE ECT
IN CONSEQUENCE OF THE CHANGE OF REFERENCE :⁽¹⁾

In the Preamble, paragraph (7), replace “General Agreement on Tariffs and Trade” with “Agreement Establishing the World Trade Organization”

and in paragraph (9), replace “General Agreement on Tariffs and Trade” and “parties thereto” with “World Trade Organization” and “members thereof”

and in paragraph (10), replace “parties to the General Agreement on Tariffs and Trade and” with “members of the World Trade Organization and parties to”.

In Article 1, replace the text of paragraph (11) with :

“(a) “WTO” means the World Trade Organization established by the Agreement Establishing the World Trade Organization.

(b) “WTO Agreement”⁽¹⁴⁾ means the Agreement Establishing the World Trade Organization including the multilateral trade agreements contained in its Annexes 1, 2 and 3, which are binding on all members of the WTO, and the decisions, declarations and understandings related thereto, as subsequently rectified, amended and modified.

(c) “Related Instruments”⁽¹⁴⁾ means the plurilateral trade agreements contained in Annex 4 to the Agreement Establishing the World Trade Organization and agreements, arrangements or other legal instruments including decisions, declarations and understandings, concluded under the auspices of the WTO, which are binding on those members of the WTO that have accepted them, as subsequently rectified, amended or modified.

(d) “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.”

In Article 4, title, replace “GATT” with “WTO Agreement”

and in the text of Article 4, replace “parties to the GATT” with “members of the WTO”

and replace “GATT” before “and Related Instruments” with “WTO Agreement”.

In Article 5, paragraph (1), insert “1994” following “article III and XI of the GATT”

and replace “GATT” before “and Related Instruments” with “WTO Agreement”.

In Article 14, paragraph (6), replace “GATT” with “WTO Agreement”.

In Article 20, paragraph (1), replace “GATT” with “WTO Agreement”.

In Article 25, paragraph (3), replace “GATT” with “WTO Agreement”.

In the ‘Table of Contents’ of Annexes to the Energy Charter Treaty, 9. Annex G, replace “GATT” with “WTO Agreement”.

In Annex TRM, paragraph (1)(a) and (b) and in paragraphs (3)(a) and (b), replace “party to the GATT” with “member of the WTO”.

In Annex TFU, paragraphs (2)(c), (4), first sentence, and (6), first sentence, replace “GATT” with “WTO Agreement”.

Footnote:

(14) The definitions of “WTO Agreement” and “Related Instruments” may require further reflection.

Note by the Secretariat:

The definition of “GATT 1994” remains unchanged as compared with the present text of Article 1 (11) (c) of the ECT.